7 March 2000

ENGLISH ONLY

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

SUBSIDIARY BODY FOR SCIENTIFIC AND TECHNOLOGICAL ADVICE
Twelfth session
Bonn, 12 - 16 June 2000
Item 5 of the provisional agenda

SUBSIDIARY BODY FOR IMPLEMENTATION
Twelfth session
Bonn, 12 - 16 June 2000
Item 5 of the provisional agenda

PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL

Submissions from Parties

Note by the secretariat

1. At the eleventh sessions of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation, the Joint Working Group on Compliance, in response to questions related to a compliance system under the Kyoto Protocol, invited Parties to submit views to the secretariat by 31 January 2000 (FCCC/SBI/1999/14, annex II, para. 12 (b)).

2. Submissions* have been received from 15 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.

* 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.

3. The secretariat has also received submissions on procedures and mechanisms relating to compliance under the Kyoto Protocol from the Center for International Environmental Law and from the Center for Clean Air Policy. It is the practice of the secretariat not to reproduce documents from non-governmental organizations. Parties may, however, wish to request copies of this submission directly from the Center for International Environmental Law, 1367 Connecticut Avenue., NW, suite 300, Washington DC 20036 USA, http://ciel.org/ComplianceComments or from the Center for Clean Air Policy, Mr. Ned Helme, Executive Director, 750 First Street NE, Suite 1140, Washington, DC 20002 USA, Tel: 1-202-408-9260, email: nhelme@ccap.org.

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PAPER NO. 1: ARGENTINA

Co- Chairs initial thoughts on procedures and mechanisms relating to a compliance system under the Kyoto Protocol

Buenos Aires, 28 January 2000

Objectives

Although the main objective of the Kyoto Protocol's compliance system shall be the monitoring of the compliance of the Protocol's commitments, an emphasis on preventive elements should also be recognised.

The Kyoto Protocol's commitments can be divided into two separate sets: i) the ones to be addressed by Annex I Parties and ii) the ones to be addressed by non Annex I Parties. Article 10 imposes obligations to all Parties based on the common but differentiated responsibilities principle. On the other hand, only Annex I Parties are bound to comply with Article 3 provisions and they shall meet its objectives by the end of the commitment period. Anyway, there exist other compromises to be complied long before the year 2012 (in Argentina's view they may be called *"intermediate commitments"*) such as the national system for the estimation of anthropogenic emissions by sources and removals by sinks that Parties shall have in place no later than one year prior to the start of the first commitment period (Article 5.1) and the supplementary information for the purpose of ensuring compliance with Article 3 that Parties shall incorporate in its annual inventory of such emissions (Article 7.1). According to Article 7.2 *"Each Party included in Annex I shall, by 2005, have made demonstrable progress in achieving its commitments under this Protocol".*

One can assume that among the Protocol's concerns, the achievement of these *"intermediate compromises"* is a major issue. Therefore, the compliance regime should tend to provide Parties with some kind of assistance measures when they are facing difficulties in addressing these commitments.

In Argentina's point of view, the Kyoto's Protocol objectives shall be:

1. To promote compliance of the Kyoto Protocolo commitments;

2. To facilitate assistance to Parties in achivieng its commitments.

In relation to the latter, two concepts need to be discussed: facilitative and enforcement measures. Facilitative measures should be focused on those Parties with reasonable and proved difficulties to fullfil their compromises. Although these measures may apply to all Parties it is understood that they will mainly be designed to help non Annex I Parties to address their commitments under Article 10. On the other hand, enforcement measures, which will be focused on Annex I Parties, should be dealt with a certain degree of flexibility so as to allow Parties overcoming difficulties, vgr: providing a grace period (this is the criteria used in Article 3.6).

Nature and Principles

With regards to the issue of the compliance system nature it seems to be a substantial divergence in the interpretation of the term "nature". In Argentina's view the nature of an international instrument is closely related to the quality of its provisions (if they are binding or not binding) whereas the list provided by the Co-Chairs of the JWG is a mere set of features that the compliance system may posses. From a legal point of view it is not usual to include in an international instrument the attributes that Parties would like it to have once in force.

Since the Kyoto Protocol provisions are compulsory there is no doubt that the compliance system will be binding too.

Argentina fully agrees with the "Principles" that have been proposed by the JWG. We would like to remark that "Proporcionality" means not only the relationship between the sanction and the commitment which has not been met but also the damage due to that lack of compliance (if the damage can be measured).

Scope of Application

We have preferred to talk about of *"Scope of Application"* instead of "Coverage" since the former seems to be more appropriate in legal writing.

The Kyoto Protocol (as mentioned above) involves general and specific commitments (Article 3 and Article 10 respectively). There is a wide variety of alternatives for Annex I Parties in order to meet Article 3 requirements. Notwithstanding domestic measures Parties may:

a) transfer to or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy (Article 6);

b) involve in a clean development mechanism (Article 12);

c) participate in emissions trading (Article 17)

If Parties have chosen alternative (a) they will be requested to fullfil its obligations under Articles 5 and 7:

Article 6.1c) "It does not acquire any emission reduction units <u>if it is not in compliance with its obligations under Artices 5 and 7</u> ...".

When it comes to clean development mechanisms under Article 12, Annex I Parties shall meet the modalities and procedures to be elaborated by the COP/MOP at its first session:

Article 12.7: "The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, elaborate modalities and procedures with the

objective of ensuring transparency, efficiency and accountability through independent auditing and verification of project activities"

Regarding emissions trading, Annex I Parties shall follow the relevant principles, modalities, rules and guidelines to be adopted by the COP/MOP:

Article 17: "The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability of emissions trading..."

Notwithstanding the alternatives above mentioned, Annex I Parties are compelled to :

- have in place, no later than one year prior to the start of the first commitment period, a national system for the estimation of emissions (Article 5.1);

- incorporate in its annual inventory of emissions the necessary supplementary information for the purposes of ensuring compliance with Article 3 (Article 7.1);

- incorporate in its national communication submitted under Article 12 of the Convention the supplementary information necessary to demonstrate compliance with its commitments under this Protocol (Article 7.2)

On the other hand, non Annex I Parties should demonstrate their compliance with Article 10 provided they have received new and additional financial resources and the transfer of technology set up in Article 11.

Compliance body(ies)

Since the Parties have to address several compromises throughout the commitment period (Article 3.1 target at the end of the period; Article 5.1 national system no later than one year prior to the start of the first commitment period; Article 7.1 supplementary information to the national inventory, etc) a standing compliance body should be established.

This institutional arrangement may be called "Implementation and Compliance Committee" (ICC). Although the ICC should work as a whole to decide upon the sanctions to impose when a non-compliance case is duly proved, the task to be undertaken by the ICC shall be basically based on the facilitative and enforcement measures distinction. Therefore, the Committee should be divided into two separate groups (Sub-Committees) :

i) Implementation Sub-Committee: its main purpose should be to encourage Parties to achieve the Protocol's commitments (facilitation approach);

ii) Compliance Sub-Committee: it should deal with non compliance cases and its consequences (enforcement approach).

In Argentina's view it is highly recommended that both Sub-Committees will be composed of members coming either from Annex I Parties and non Annex I Parties.

With regards to the size of the ICC it would be useful to work on the Chilean proposal held during the 5th COP, Bonn, 25 October - 5 November 1999 (between 20 and 4 members). In Argentina's view the ICC may be composed of 10 members so as to provide equitable geographical distribution (2 members from each region).

Those members shall be elected by the COP/MOP according to the procedure to be elaborated during its first session. Although candidates should be nominated by Parties they shall be elected to act on a personal basis. Potential members should be requested to have expertise on scientific and legal fields.

The Kyoto Protocol's compliance system should take advantage from the non-compliance procedures regime under the Montreal Protocol on Substances that Deplete the Ozone Layer (1987). In this regard, memebers may be elected by the COP/MOP for 2 years. The compliance system may enable them to be elected for one more two-year term. The Committee itself may choose its own President and Vice-President who will alternate annually between developing and developed countries. In addition, ICC meetings may take place in conjuction with the subsidiary bodies of the COP/MOP (twice a year).

Initiation of the process

Compliance process should be triggered by:

- a Party when there are serious concerns about other Party's compliance (a third Party may join the procedure once initiated as provided in the settlement dispute system under the WTO);

- any other Party longing to demonstrate the cause of its non-compliance;

- COP/MOP should also trigger the procedure (as described below in "Role of the COP/MOP).

It is our understanding that the expert review teams set up in Article 8 has to be ruled out from this list. This exclusion is close related to its nature and functions since its unique job is to prepare and submit a report to COP/MOP and Parties. Expert review teams are only expected to assess the information available due to Article 7 in an objective way.

Functions

ICC's functions should be as follows:

- To assist Parties facing difficulties to fullfil its commitments (the ICC should be able to suggest measures aiming to avoid potencial non-compliance)

- To evaluate any non-compliance case put forward either by a Party or COP/MOP;

- To apply and enforce Protocol's commitments (including sanctions against concrete non-compliance cases)

Sources of information

The ICC should not be constrained to seek any source of information other than the ones included in this list (it would be desirable to incorporate this assertion to the compliance system provisions).

Special care should be taken when drafting provisions related to "Information gathered in the territory of the Party in question" and "Assessment from outside experts asked to clarify facts" sources of information. The former should be carried out taking into account the sovereign rights of the Party concerned whereas the latter should only be conducted under special circumstances since it will imply additional financial resources.

Secretariat

The Secretariat of the Protocol shall undertake not only the tasks set up in Article 8. 3 but also:

i) To assist the ICC in the logistics of meetings, preparation and distribution of reports, etc;

ii) To channel ICC information requests

Procedure[1]

1. Election of officers of compliance body(ies): as stated before the ICC should be composed of 10 members, elected among the candidates nominated by Parties. This election should take place throughout the first session of the COP/MOP.

2. Time limit for filing cases: the ICC should only evaluate those cases put forward throughout the commitment period and within the year after the end of the period (vgr. with regards to the first commitment period the ICC should work on procedures triggered from the entry into force of the Protocol until 2013).

3. Voting and quorum rules: 4/5 majority criteria may apply in both cases although it may be suggested to choose different rules depending on the decision to be adopted by the ICC (vgr. 3/5 majority to accept or reject the initiation of the compliance procedure and 4/5 majority to adopt a sanction).

4. Procedure for appeal: this issue has not received deep consideration whithin the JWG. Anyway if there is consensus about having an appeal stage, this possibility should be limited to final decisions on procedures triggered by a Party or COP/MOP. Appeals should be made within a six-month period since the adoption of the final decision. Appeals should be solved as soon as possible (six months too). The "Appeal Body" should be composed of five members elected among the ICC members taking into fully account the need of geographical distribution.

[1] It is our understanding that dots Nº 2 "Types of information that would be available to the relevant body(ies)" and Nº 3 "Criteria for using information" have been previously discussed.

5. Confidentiality: in Argentina's view the compliance system should not be a confidential regime but rather a publicized one. Although there will be need of confidentiality to manage some information (basically when information comes from a source other than the Party in question) Parties based on the due process principle are entitled to ask for information connected to the procedure, ICC measures, ICC recommendations, etc.

Role of the COP/MOP

The COP/MOP shall play an important role throughout the compliance system procedure.

First, the COP/MOP shall be the one to decide upon the guidelines for the preparation of the national system of emissions set up in Article 5.1 and the supplementary information required in Article 7. This information shall not only be assessed by the review expert teams (in accordance with guidelines provided by the COP/MOP, Article 8.2) but also by the COP/MOP in a later stage (Article 8.5.a). At the same time, the COP/MOP shall give further consideration to the review expert teams report and the comments and remarks made by the Secretariat as well as any question raised by Parties.

Secondly, the COP/MOP may initiate the procedure under the compliance system based on Article 8.6 provision:

Article 8.6: "Pursuant to its consideration of the information referred to in paragraph 5 above, the Conference of the Parties serving as the meeting of the Parties shall take decisions on any matter required for implementation of this Protocol".

The ICC shall likely request assistance from the COP/MOP during the compliance assessment, especially when it comes to interpret the review expert teams.

Lastly, the ICC shall submit its final report to the COP/MOP. A 2/3 majority may be required for the adoption of the report. This report should only be revised if the COP/MOP has strong feelings against it. In that case, COP/MOP should request the ICC to undertake a new assessment taking into account the COP/MOP concerns. This should be the last step of the procedure unless some objections remain in which case the COP/MOP itself should establish an Ad-Hoc Committee to reach a final decision.

Possible outcomes or consequences of non-compliance or potential non-compliance[2]

One of the main features of compliance systems is the imposition of sanctions when concrete non-compliance is verified. Sanctions ought to be known with certainty by those who have to fullfil certain commitments within the framework of a compulsory instrument.

[2] From a legal point of view and bearing in mind the very nature of the Protocol's compliance system it seems more appropriate to talk of "sanctions" instead of "outcomes/consequences".

An issue that has currently been raised during the JWG meetings is the one related to "automaticity". It is important to have in mind that ICC should have a certain degree of flexibility in order to decide upon the sanctions to impose (through reflection on the special circumstances that leaded to non-compliance).

Therefore, sanctions should be associated with verified non-compliance cases.

One of the alternative sanctions to be discussed is the "suspension of rights or privileges"[3].

In this regard we are considering the following scenarios:

- Non Annex I Parties

They should be ruled out from the clean development mechanism (Article 12) benefits when they have not met its compromises under Article 10 provided they have received new and additional financial resources and the transfer of technology set up in Article 11.

- Annex I Parties

1. *Annex I Parties that have transferred or acquired emission reduction units under article 6 or have been involved in emissions trading*: Parties that have not met Article 3 target should diminish the transfer/trade of emission reduction units/emissions and enhance the domestic measures for the purpose of fullfiling commitments under Article 3.

2. *Annex I Parties that have chosen the clean development mechanism (cdm) as a means to meet Article 3 target:* the ICC should order a decrease of the cdm's in proportion to the domestic measures adopted to fullfil Article 3 commitments.

Since Article 12 does not have a provision like the one contained in Articles 6 and 17[4], some Parties may assume that compliance with Article 3 requirements can be met only through cdm's in which case they would not feel compelled to take domestic measures. Therefore, Parties should be compelled to reduce the proportion of the cdm's to 50% of its quantified emissions.

With regards to non-compliance with the so called "intermediate commitments" there should be any kind of sanction although it should be a long-term one. In other words, non-compliance should be regarded as a negative record to the Party in question when it comes to assess about its compliance with Article 3 target.

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[3] We are not discussing "financial Penalties" since we think this issue needs further consideration.

[4] Article 6.1d): *"The acquisition of emission reduction units shall be supplemental to domestic actions for the purposes of meeting commitments under Article 3"*
Article 17: *"...Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under Article 3".*

PAPER NO. 2: AUSTRALIA

Proposal on Procedures and Mechanisms relating to Compliance under the Kyoto Protocol

31 January 2000

1. This proposal is submitted in response to the invitation contained in the COP-5 conclusions of the Joint Working Group on Compliance and is based on the "Co-Chair's initial thoughts on procedures and mechanisms relating to a compliance system under the Kyoto Protocol", dated 3 November 1999. Australia considers that this "Co-Chair's initial thoughts" paper provides a useful framework for the development of a negotiating text on procedures and mechanisms relating to compliance under the Kyoto Protocol. Reference should be made throughout this proposal to the diagram at appendix A, which sets out Australia's thoughts on how the compliance procedure might operate and how it might fit together with existing provisions of the Protocol, particularly Article 8, to form a coherent compliance system.

General

Objectives

1. To promote implementation of the Kyoto Protocol

2. The promotion of the implementation of the Kyoto Protocol in an efficient and effective manner should be the primary objective of the Protocol's compliance system.

2. To provide advice and facilitate assistance in overcoming difficulties

3. The compliance system should provide advice and facilitate assistance for Parties that have difficulties in meeting their individual commitments in the Protocol. Parties facing difficulty in meeting their obligations on any Article 3.1 target-related issue should have access to a facilitative stage before coming to a compliance stage (for the relationship between these two stages, see appendix A). This assistance and advice should be provided throughout the commitment period as well as after its conclusion, with the aim of ensuring that Parties stay in compliance and avoid compliance problems at the end of the commitment period. Assisting Parties to overcome their difficulties is the most effective means of ensuring the implementation of the Protocol and the achievement of its emission limitation and reduction objective.

3. To prevent non-compliance or disputes from arising and bring Parties not in compliance back into compliance

4. The Protocol's compliance system should have a preventative role. Effective and transparent monitoring and reporting will be important in preventing potential instances of non-compliance becoming actual instances and in correcting actual non-compliance before it becomes more serious. The Protocol's monitoring and

reporting provisions under Articles 5 and 7 will play an "early warning" role in the Protocol's compliance system.

5. The provision of advice and assistance will often help bring Parties not in compliance back into compliance. Ideally, this will happen at the facilitative stage before a formal assessment of non-compliance is made. As far as possible, compliance consequences should be aimed at bringing Parties into compliance with their obligations.

6. However, in Australia's view, the compliance system does not have a role in preventing or resolving disputes between Parties. Compliance and dispute settlement are two different concepts. Compliance is about Parties' implementation of their individual obligations under a multilateral agreement. No one Party is injured if another Party fails to abide by its obligations; instead it is the overall operation of the agreement that is undermined. Therefore non-compliance affects all Parties collectively. In contrast, dispute settlement is more confrontational as it is about resolving a dispute between two or more Parties concerning the interpretation or application of an agreement. Indeed, as has been noted elsewhere, compliance procedures were developed in multilateral environmental agreements to attempt to get away from the confrontational nature of dispute settlement provisions, which had resulted in Parties' reluctance to use them.

4. To deter non-compliance by imposing consequences if a Party fails to fulfil its obligations under the Protocol

7. An objective of the Protocol's compliance system should be to deter non-compliance. However, the imposition of consequences is not the only means of deterring non-compliance. There is an incentive for Parties to refrain from violating their obligations because of the embarrassment that will result from the public exposure of their breach and the domestic and international public and political pressure that will be brought to bear on them to change their ways. The development of the Protocol's compliance system should be approached from the perspective that most Parties will be actively seeking to comply with their Protocol obligations. This objective would be better expressed more generally as "to deter non-compliance". Appropriate responses in the event that a Party fails to fulfil its obligations under the Protocol are considered at paragraphs 33 to 36.

5. To ensure the implementation of some or all of commitments under the Protocol by Annex I Parties

8. This objective seems repetitive of objective 1.

6. To provide both facilitative and enforcement tools to promote compliance with the Protocol

9. This objective is also repetitive to some extent of those above, but is important as it brings in the concepts of facilitation and enforcement. Australia considers that both concepts have a role in the operation of the Protocol's compliance system, as illustrated by Australia's proposal for facilitative and compliance stages.

10. Australia would like to suggest that an additional objective of the compliance system (which we consider is not reflected in the existing objectives) should be: "to determine and address instances of non-compliance".

Nature and Principles

Nature

Credible, coherent, unified, effective, predictable, transparent, etc..
11. Each of these matters should be reflected in the design of the Protocol's compliance system.

Principles

1. Due process
2. Proportionality
3. Common but differentiated responsibilities
4. Parties that undertake the same commitments under the Protocol to be treated equally
5. Other

12. Each of these principles should also be reflected in the design of the Protocol's compliance system, except that it is not obvious to us what role a principle such as common but differentiated responsibilities could play in a compliance system for the Kyoto Protocol. Parties' responsibilities have already been differentiated under the Kyoto Protocol. Parties that have undertaken the same type of obligations should receive the same treatment under the Protocol's compliance system.

Or do not include Objectives, Nature and Principles.
(*Notes. Reflection of Objectives, Nature and Principles will be apparent from the design of the compliance system)*

13. We do not consider that the decision setting out the procedures and mechanisms for the Protocol's compliance system should include a section on "objectives, nature and principles". It would be preferable for the Joint Working Group on Compliance to agree on basic "objectives, nature and principles" that should guide its work and then reflect these aspects in the design of the Protocol's compliance system.

Coverage

- Apply to all commitments in or under the Protocol
- Specify the commitments of the Protocol to be covered by the compliance system of the Protocol

14. The compliance system should be concerned with the legally binding obligations undertaken individually by Parties to the Kyoto Protocol. Central to these obligations will be Annex B Parties' Article 3.1 target commitments and the Articles important to the substance of these commitments (e.g. Articles 3.3, 3.4, 3.7, 4, 5, 6, 7, 12 & 17). As the core feature of the Kyoto Protocol, these obligations should be the focus of the Protocol's compliance system.

15. The Protocol contains a number of collective and hortatory provisions which should not be covered by the Protocol's compliance system. Consideration will need to be given to the establishment of a separate review procedure, such as the multilateral consultative process, in relation to the implementation of all non-target related provisions.

Compliance body(ies)

1. Status
   - standing
   - depending on the functions of and outcomes from the compliance body(ies), its status would be ad hoc.

16. At least one standing compliance body seems necessary to oversee and implement the operation of the Protocol's compliance system. A standing body seems the best approach for efficiency and consistency reasons and to provide continuity in the body's work. In Australia's view, the compliance system should include a "facilitative stage" followed by a "compliance stage" (see appendix A). We are open at this stage as to whether these two stages would be best undertaken by one standing body or two standing bodies. Consideration will also need to be given to the inclusion of an appellate body in the system's institutional structure.

2. Size

   limited (separate membership of facilitative and enforcement branches)

17. Any compliance body should be limited in size in order to be effective and functional. The different requirements of the facilitative and compliance stages suggest that two different teams of experts will need to be made responsible for these stages. However, as noted above, we are open as to whether these stages are handled by two separate bodies or by two different branches within the one body.

3. Capacity in which members act

   - experts (nominated by governments) elected to act on a personal basis
   - representatives of governments

18. The members of any compliance body should be experts nominated by governments and elected to act in a personal capacity.

4. Composition

   based on the principle of rotation
   - based on equitable geographical distribution
   - one half to be designated by Annex 1 Parties and one half to be designated by non-Annex 1 Parties
   - other

19. With respect to the composition of any compliance body established, its membership should be related to the provisions of the Kyoto Protocol being assessed. We do not consider that membership based on equitable geographical distribution would be the appropriate means for selection of compliance body members responsible for looking at compliance with Annex B Parties' Article 3.1 target commitments. A more equitable approach for a body examining such obligations would be to have at least one half of its members nominated by Annex B Parties.

5. Expertise

scientific, social, legal, etc..

20. A decision on the expertise required of compliance body members cannot be taken until the functions of each body or branch/stage are determined. The different nature of the facilitative and compliance stages suggests that different types of expertise might be required.

21. We suggest that "technical" expertise be added to this preliminary list of appropriate expertise as situations may be foreseen where Parties' actual or potential compliance problems are of a technical nature (e.g. relating to inventory matters) which requires expert technical assistance. Members with technical expertise might be particularly useful at the facilitative stage. Similarly, at least some of the experts at the compliance stage will need legal skills and experience.

6. Length of membership

3 or 4 years
possibility of re-election
provision for ensuring continuity in the compliance body(ies)
other

22. It would seem reasonable for experts to serve three or four year terms with some provision for re-election for at least one further term to ensure continuity in the compliance body/bodies. Provision should be made for vacancies on the body/bodies to fall due at different times so as to ensure continuity in expertise and experience.

7. Frequency of meetings

meeting in conjunction with the subsidiary bodies and COP/moP, at least once or twice a year.

23. The compliance body/bodies should be enabled to meet as often as is considered appropriate by its members, with a meeting to be held at least twice a year as a minimum (to coincide with Subsidiary Body and COP/moP meetings).

Initiation of the process (references)

1. By expert review teams under Article 8 of the Protocol

2. By a Party or a group of Parties with respect to their own implementation
3. By a Party or a group of Parties with respect to the implementation by another Party or group of Parties (under certain circumstances)
4. Other

24. As set out in Australia's proposal on the operation of the compliance procedure at appendix A, we consider that the compliance process should be initiated through the Article 8 expert review process. Questions of Annex B Parties' implementation of their legally binding Protocol obligations identified by Article 8 expert review teams on the basis of their technical reviews would be directed to the compliance system. The guidelines to be put into place under Article 8.4 for the review of implementation of the Protocol by these expert review teams could include criteria for the movement of questions from the technical review stage to the compliance system.

25. Once an Article 8 expert review team has completed a comprehensive and thorough review of an Annex B Party's performance, it is not clear to us what value could be added by another means of initiating the process. There is a need to confirm our confidence in the role and performance of the Article 8 expert review process in the design of the system.

Functions

1. To decide which references to pursue
2. To provide advice and facilitate assistance to individual Parties
3. To assess a Party's consistency with the eligibility requirements of the Kyoto mechanisms
4. To determine non-compliance
5. Other

(*Notes: Some of these compliance functions might justify distinct treatment, but must operate within a coherent and unified institutional/procedural arrangement.)*

26. Australia is of the view that certain functions should be dealt with by different stages in the compliance system. As discussed above, Australia is open as to whether these stages should be undertaken by different branches within the one body or by two separate bodies, but regardless of the specific structure the two stages must operate within a coherent institutional and procedural arrangement. In particular, we consider that advice and assistance should be provided/facilitated at the facilitative stage in response to a question of implementation raised in an Article 8 expert review team report (where the Party is not able to cure the problem of its own accord). By contrast, determining and addressing Parties' compliance with their individual legally binding commitments, including whether Parties are found not in compliance with the eligibility requirements of the Kyoto mechanisms, should be the responsibility of the compliance stage.

27. Questions of implementation raised in an Article 8 expert review team report would be directed to the compliance system in accordance with criteria set out in the Article 8.4 guidelines for these teams. There may be a need for the facilitative stage in the compliance system to have a discretion as to which references it pursues, e.g. for it to decide that a particular question is not compliance-related and therefore not capable of being dealt with in a compliance system.

Sources of information

1. Information provided by Parties concerned
2. Report by expert review teams under Article 8 of the Protocol
3. Information gathered in the territory of the Party in question
4. Outside experts, asked to clarify facts
5. Any other sources that compliance body(ies) deems appropriate
6. Other

(*Notes: Depending on stage of procedure, the sources of information may be different.)*

28. As a general principle, the compliance body/bodies should have wide access to information sources. The Article 8 expert review team reports and the information submitted by Parties will be an important information source for a compliance body/bodies. Due process also demands that the Party concerned should be able to put information before any compliance body. In addition, consideration should be given to the types of information sources which might be relevant to an assessment of the "cause, type, degree and frequency of non-compliance". For example, expert advice on cause might be needed to enable a compliance body to recommend appropriate facilitative measures to correct the problem.

29. Although different sources of information may be utilised at different stages of the compliance procedure, we see no reason to limit an information source to one stage over another.

Secretariat.

1 To channel information to the compliance body(ies)
2. To service the meetings of the compliance body(ies)
3. Other

30. The Secretariat's involvement in the compliance system should be limited to the roles set out in Article 8.3 and to the provision of secretariat services for the compliance body/bodies.

Procedure

1. Election of officers of compliance body(ies)
2. Types of information that would be available to the relevant body(ies)
3. Criteria for using information
4. Time limit for filing cases
5. Voting and quorum rules
6. Procedure for appeal
7. Confidentiality

31. Australia is of the view that a number of the above issues on the compliance body/bodies need to be determined before these matters of procedures can be considered. However, it will be important to decide these issues as part of the procedures and mechanisms to be adopted on compliance, in particular any procedure for appeal and the voting and quorum rules.

Role of the COP/moP

1 To provide general policy guidance to the compliance body(ies)
2. To receive reports from compliance body(ies)
3. To review the reports of the compliance body(ies)
4. To adopt the conclusions in the reports of the compliance body(ies),

- unless the COP/moP decides otherwise by consensus
- by consensus
- other

32. As set out at appendix A, Australia considers that the COP/moP should take a decision under Article 8.6 to adopt the compliance procedure outcome, but should not have a role in reviewing the reports produced by the compliance body/bodies. We consider that a negative consensus rule should apply to the COP/moP's adoption of the compliance procedure outcome, i.e. unless there is a consensus in the COP/moP against the outcome of the compliance procedure, the outcome stands. This approach would preserve the integrity of the compliance procedure while providing an important safeguard role for the COP/moP.

Possible outcomes or consequences of non-compliance or potential non-compliance

1 Incentives
2. Providing advice and facilitating assistance
3. Voluntary measures
4. Publication of non-compliance/potential non-compliance
5. Issuing cautions
6. Suspension of rights or privileges
7. Subtraction of excess tonnes from a Party's assigned amount for the subsequent commitment period, with a penalty
8. Financial penalty
9. Use of compliance fund

(Notes. Provision may be made for automatic or discretionary application of some or all of the above outcomes or consequences.)

(Notes. Some of these compliance outcomes or consequences might justify distinct treatment, but must operate within a coherent and unified institutional/ procedural arrangement.)

33. Australia considers that it will be important to provide advice and assistance, including technical assistance, at the facilitative stage to every Party for whom a problem of implementation has been identified by an Article 8 expert review team. We believe that such a facilitative approach offers the best means of ensuring that the environmental goals of the Protocol are met because Parties are helped to meet their commitments rather than have measures taken against them directly upon identification of a problem. Whether a Party takes/acts on the advice proffered at the facilitative stage would be voluntary, although failure to fix the problem at this stage will mean that the problem is taken up by the compliance stage. Because lists of questions of implementation contained in Article 8 expert review team reports will be considered by the COP/moP (as per Article 8.3 and Article 8.5), this information will

essentially be public. Consideration should also be given to publication of the advice/assistance suggested at the facilitative stage, together with any response offered to this advice/assistance by the Party concerned.

34. A matter would only move to the compliance stage once all attempts at correcting the problem through advice and assistance have been exhausted (consideration will need to be given to whether there should be a time-limit or a limit on the number of times a Party can seek help on a problem at the facilitative stage). At the compliance stage, consideration should be given to the use of a menu of consequences from which Parties found in non-compliance with their Article 3.1 target obligations at the end of the commitment period (and after the grace period) could choose. A Party might be asked to choose from the menu of consequences only after a finding by a compliance body at the compliance stage that a Party is not in compliance and after the facilitative stage has been exhausted. This finding would be made public. Possible options in a menu might include several of those listed above. That said, Australia does not support the application of a financial penalty as such a consequence is not in keeping with the objectives of the compliance system identified above.

35. In addition, Australia considers that loss of access to the Kyoto mechanisms should not be a consequence applied to a Party that is found at the compliance stage to have exceeded its Article 3.1 target at the end of the commitment period (and after the grace period). To do otherwise would be to make a distinction between over-selling/ over-transferring under the mechanisms and over-emitting, when in fact the cause of the Party's tonnes overage is irrelevant. It is impossible to say whether it is the units that the issuing Party over-sold which put it out of compliance or the units that it over-emitted. However, loss of access to the mechanisms may be an appropriate response to some breaches during the commitment period of the rules/modalities/procedures/guidelines of the mechanisms themselves (but see the discussion in para 49 below on the need for there to be a nexus between the breach and the ensuing response).

36. With respect to the automaticity/discretionary issue, Parties' need for reasonable certainty with respect to the consequences of non-compliance needs to be balanced against the need to take into account "the cause, type, degree and frequency of non-compliance". There are a number of good policy and practical reasons for arguing that Parties should know in advance that certain consequences would attach automatically to specific acts of non-compliance, as this provides important deterrent value and certainty for Parties in approaching the Protocol's compliance system. However, we are concerned that the application of automatic consequences for specific acts of non-compliance would inhibit the flexibility to take into account "cause, type, degree and frequency", for example failure by a Party to meet its Article 3.1 target due to circumstances arising unexpectedly during the commitment period which could not have reasonably been foreseen (such as a natural disaster).

Other issues

1. Relationship with Article 19 of the Protocol

37. Australia considers it important that the development of the Protocol's compliance system and its Article 19 dispute settlement provision receive separate consideration because, as explained above at paragraph 6, these are different concepts.

38. However, the Protocol's dispute settlement provision may have the potential to act in a complementary fashion with its compliance system.

2. Evolution of the compliance system under the Protocol

39. It would seem sensible to include a provision for evolution of the Protocol's compliance system in the procedure and mechanisms to be developed for that system.

3. Grace or "true up" period

40. Australia considers that a true-up period should be built into the Protocol's compliance system. Such a period is necessary given the long lag time in collection of inventory data. It would also give Parties an opportunity to "do their sums" on their Article 3 targets and take action on the basis of these figures to ensure their compliance. A true-up period would thus encourage compliance while maintaining the integrity of the Protocol.

4. Parallel compliance action at the domestic level

41. The Protocol's compliance system should promote strong domestic compliance. Parties' domestic implementation of their Protocol commitments will be crucial to fulfilment of the Kyoto Protocol's objectives and an important complement to an international compliance system. While Parties should have the flexibility to design domestic implementation measures in accordance with their national circumstances, it may be useful for Parties to report on their domestic compliance actions, for example in the supplementary information to be reported under Article 7 or in relation to Article 5.1.

5. Other

42. Parties will also need to consider the relationship between the Protocol's compliance system and the Article 16 multilateral consultative process (MCP). The MCP might potentially play a role in the Protocol's compliance system. Alternatively, this process could just as well operate separately to and without prejudice to the compliance system developed for the Protocol.

Linkages

1. Articles 5, 7 & 8

43. The arrangements to be put in place for monitoring, reporting and review under Articles 5, 7 and 8 of the Protocol will be the backbone of the compliance system. These provisions provide the tools for assessing Parties' compliance with their Article 3 target obligations. They also help Parties identify problems early enough to take corrective action before the end of the commitment period.

44. The procedures and mechanisms to be agreed for the Protocol's compliance system and the guidelines and procedures to be put in place under Articles 5, 7 and 8 will thus need to work together and fit together. For example, the role of the Article 5.2 adjustment procedure in the compliance system will need to be considered. Careful consideration also needs to be given to the substance of the guidelines to be adopted under Article 7.1 and 7.2 that will set out the supplementary information that Parties will need to report so as to ensure their compliance with their Article 3 targets. As noted above, thought should be given as well to including criteria in the guidelines to be adopted under Article 8.4 for the review of implementation by expert review teams on the movement of questions from the technical review stage to the compliance system. These guidelines will also have to advise expert review teams on what constitutes a "question of implementation".

45. Australia's proposal for building the Protocol's compliance procedure onto the existing provisions in Article 8 (Appendix A) illustrates the linkage that could be developed between the Protocol's technical review provisions and its compliance system. A further examination of these linkages will be made in Australia's submissions on national systems, adjustments and guidelines under Articles 5, 7 & 8.

2. Kyoto mechanisms

46. As a means of assisting Annex B Parties to meet their Article 3 targets, the Kyoto mechanisms will have an important relationship with the Protocol's compliance system. As set out above, because the mechanisms are "a means to an end", we do not consider that loss of access to the mechanisms should be a consequence of non-compliance with a Party's Article 3.1 target.

47. However, as also noted above, a Party might lose access to the mechanisms due to a breach during the commitment period of the rules/modalities/procedures/ guidelines of the mechanisms themselves. In particular, a finding that an Annex I Party is not in compliance with certain aspects of Articles 5 and 7 might remove that Party's eligibility to participate in international emissions trading, use certified emission reductions accruing from Clean Development Mechanism project activities, or acquire emission reduction units resulting from projects under Article 6. There is also a need to address the issue of whether a Party operating under Article 4 may participate in the mechanisms if another Party operating under the same Article 4 agreement, or if a regional economic integration organisation to which the Party belongs and which is itself a Party to the Protocol, is found not to be in compliance with its obligations under Articles 5 and 7.

48. As set out in Appendix A, the same compliance body that deals with end of commitment period Article 3.1 target issues might also examine questions identified by an Article 8 expert review team in relation to whether a Party has met the

mechanism eligibility requirements, using an expedited procedure. Parties would regain the right to participate in the mechanism(s) once it has addressed the compliance problem that lost them a right. An expeditious procedure should also be available to Parties to demonstrate that it has corrected the problem and can return to usage of the mechanism(s).

49. Two issues arise from the above linkage. First, what should constitute non-compliance with Articles 5 and 7 with respect to losing mechanisms eligibility? Australia considers that only a finding that an Annex I Party is not in compliance with the inventory and registry related obligations in Articles 5 and 7 should affect mechanisms eligibility. Second, what should be the connection between the extent of the disqualification from use of the mechanisms and the nature of the breach of Articles 5 and 7? In Australia's view, there should be a nexus between the compliance problem under these Articles and the extent of the loss of eligibility to participate in the mechanisms. For example:

- a serious breach in respect of overall registry maintenance might result in loss of access to all three mechanisms;

- a breach in respect of several projects under a mechanism in relation to proper reporting might result in the Party being disqualified from participation in that particular mechanism only;

- a problem related to project specifics such as a baseline for a project might result in the disqualification of that project only.

50. A further important linkage between the Kyoto mechanisms and the compliance system is the Article 6.4 procedure under Joint Implementation. Careful consideration will need to be given to the relationship between this procedure and the Protocol's compliance system.

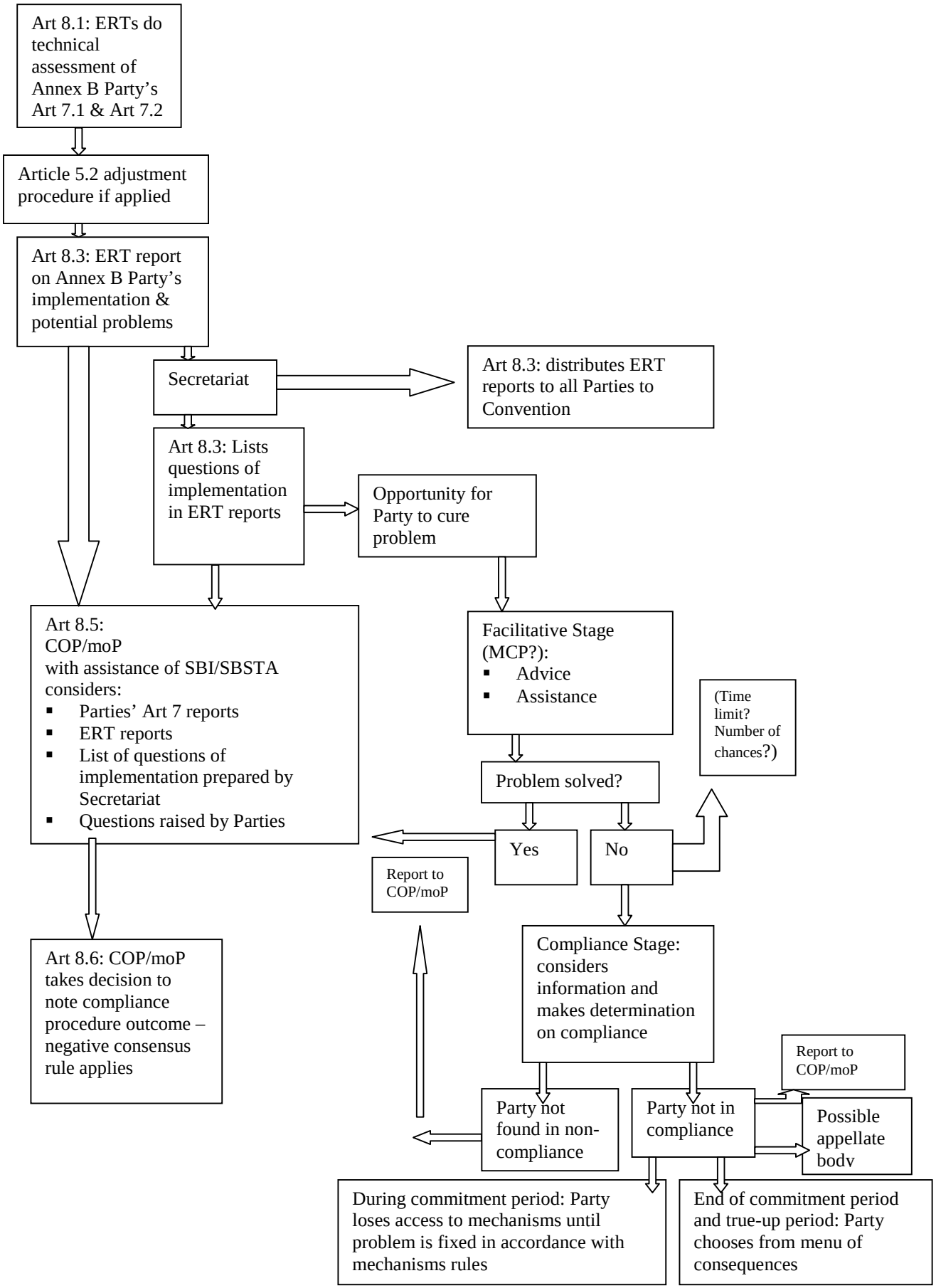
3. Other

Appendix A

Australia's proposal on the operation of the compliance procedure.

Kyoto Protocol: Compliance Procedure

Article 3.1 target issues only (includes Art 3.3, 3.4, 3.7, 4, 5, 6, 7, 12 & 17)



PAPER NO. 3: BRAZIL

PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL

General Provisions

The main objective of the compliance system should be to promote the implementation of the Kyoto Protocol by ensuring that Annex B Parties fulfill their commitments under Article 3. The system should encourage and facilitate Parties to comply, as well as deter non-compliance in an efficient manner by imposing appropriate consequences to Parties which fail to fulfill their commitments under the Protocol.

The compliance system should be guided by the same principles observed in the Convention and in the Protocol, in particular the principle of common but differentiated responsibilities between Annex I and non-Annex I Parties. As the cornerstone of the regime established by the Convention and the Protocol, this principle should be clearly reaffirmed in the future rules of the compliance system. The principles of due process, proportionality, predictability, transparency, efficiency and the general principles of Public International Law should also be taken into account in the design of the compliance system.

Coverage:

The compliance system should address any topic related to the non-compliance or potential non-compliance of a Party with its commitments under the Kyoto Protocol.

The text of the Protocol has already determined the differences in timing and character of commitments. Different range of commitments (considering the case, type, degree and timing) should be treated in a differentiated manner and in differentiated timeframes.

Linkages:

The expert review process established by Article 8 is expected to play a major role in the compliance system by providing a thorough and comprehensive technical assessment of all aspects of the implementation by Annex I Parties. The technical report prepared by the expert review teams should be the main source of information to assess whether a Party is fulfilling its obligations under the Protocol. As a technical entity, however, the expert review team should not be entitled to assess whether the Party is complying with its obligations under the Protocol, since this assessment has basically a legal and political nature. The authority of the expert review team should therefore be limited to the technical and factual fields, in accordance to the provisions of Article 8.

The COP/MOP is supposed to have a significant role in the compliance system, according to Article 8. Besides developing guidelines for the work to be carried out by the expert review team (articles 8.1 and 8.4), the COP/MOP shall consider the information submitted by Parties under Article 7 and the reports elaborated by the expert reviews, as well as questions of implementation listed by the Secretariat under paragraph 8.3 and any questions raised by Parties (article 8.5). Furthermore, Article 8.6 gives a mandate to the COP/MOP, in connection with the provisions of article 8.5, to take decisions on any matter

required for the implementation of this Protocol. Although this mandate would clearly include the faculty to trigger the compliance procedure, it should be taken into account that the size and frequency of meetings of the COP/MOP could jeopardize the efficiency of the compliance system. It might be necessary that the COP/MOP establishes another body composed of representatives of country Parties which would be in charge of assessing the expert review team's findings and decide on appropriate actions related to cases of non-compliance.

There should be a role for COP/MOP also in the end of the compliance procedure. As the supreme body of the Kyoto Protocol, the plenary of COP/MOP should approve the outcome of the compliance system. However, in order to ensure maximum credibility to the compliance body and avoid that its decisions be subject to a political review by COP/MOP, we believe that such decisions could only be reformed in the basis of a negative consensus, following the lines of the rules established by WTO for settlement of disputes.

The Secretariat of the UNFCCC will play an important role in supporting the compliance system in its different stages, as in the example provided by Article 8.3, but it is not expected to initiate the compliance procedure, which involves a political authority which is neither given nor suggested by Article 8 of the Convention.

The possible application of the Article 13 of the Convention, with regard to a Multilateral Consultative Process, under the Article 16 of the Protocol, could constitute a facilitative tool of the compliance system. It might play a role in assisting Parties to address questions of implementation and avoid the use of enforcement tools under the compliance regime.

The settlements of dispute procedures, including the arbitration and conciliation procedures mentioned in Article 14 of the Convention and Article 19 of the Protocol, should be treated as an issue independent from the design of the compliance system, since they differ both in procedures and purposes.

The possible linkages between the compliance procedure and the Kyoto mechanisms, the executive board of the CDM and the operational entity of the financial mechanism are to be further developed, as negotiations on both the compliance regime and the mechanisms established by Articles 6, 12 and 17 provide a clearer picture on these issues.

Compliance Procedure

The compliance procedure is expected to have at least two different sub-procedures to address its two distinct general functions (facilitation and enforcement), which would not necessarily imply the establishment of different bodies.

Although the expert review process is supposed to provide the elements for the initiation of the compliance procedure, ERTs, as mentioned before, would not have the legal and political authority to determine how to address "potential problems in, and factors influencing, the fulfillment of commitments". In principle, this function should be allocated to the COP/MOP, pursuant to the spirit of Article 13 of the Kyoto Protocol. For the sake of efficiency, however, it might not be appropriate to burden the COP/MOP, which will meet only once a year, with the task of deciding on further steps for each case of potential non-compliance raised by ERTs reports. One possible solution could be the establishment of a

committee composed of representatives of country Parties which would consider the reports and decide, in each case, whether to initiate the compliance procedure. The outcome of this committee should be reported to the plenary of COP/MOP. There could also be an opportunity for Parties to cure minor problems raised in those reports before triggering the procedure.

In addition to the expert review process, any Party or group of Parties should be able to raise a question related to its own compliance and to the compliance of another Party or group of Parties. In the first option, if a Party is seeking for advice or help on issues related to its own implementation, the request could be forwarded directly to the compliance body. In the second option, there will be a need to assess whether the Party or group of Parties wishing to initiate the procedure brings sufficient information on the question of implementation raised. In this case, the question should be previously examined by the committee established by the COP/MOP with a view to assessing whether there is a sound factual and legal basis for its consideration by the compliance body.

The main source of information for the compliance procedure will be the reports elaborated by expert review teams, since they are expected to provide an independent, transparent, thorough and comprehensive technical assessment of the implementation of the Kyoto Protocol by Annex I Parties, with a clear focus on the Article 3 obligations. If the compliance body deems necessary and if Parties involved do not object, additional information may be requested to other sources, including Parties, international organizations (as in the case of Secretariats of other conventions), scientific organizations, independent experts and non-governmental organizations with noted expertise in issues related to climate change and accredited by the Secretariat of the UNFCCC.

The compliance body should be standing, since this will contribute to ensure continuity and consistency of practices. It should be relatively small to perform its work in an efficient manner but should take fully into account the need for equitable geographical representation. Members of the compliance body should be experts appointed by Parties but acting in their own capacities. They should have legal and technical expertise related to the issues covered by the Convention and the Kyoto Protocol.

The elaboration of adequate rules of procedure is fundamental to ensure the observance of the principles of due process and transparency in the compliance regime, specially when enforcement is concerned. This work could be carried out by the existing Joint Working Group on Compliance or, in case there is no time for it, by the COP/MOP. The rules of procedure should address, among other issues, the participation of Parties in the proceedings, the use of information, procedures for appeal and decision-making rules.

Consequences of non-compliance

Consequences of non-compliance should be determined in advance. This would provide the compliance system with an adequate level of certainty and transparency. In line with the provisions of Article 18, consequences should be proportionate to the cause, type, degree and frequency of non-compliance.

The concept of “automatic consequences” needs further clarification. In principle, given the complexity and variety of potential causes of non-compliance, each case should be

addressed separately for further application of consequences (incentives and/or sanctions defined in an indicative list of consequences).

Brazil supports a system that aims at bringing Parties into compliance. The facilitation aspects of the system will play a significant role in promoting this objective. Positive measures, including technical assistance and advice for Parties in issues related to the implementation of the Kyoto Protocol, could contribute to prevent cases of non-compliance.

However, the system will need to address also cases where all means of facilitation have been explored and a Party still finds itself in non-compliance, requiring the system to perform its enforcement functions. This would entail the application of sanctions previously determined in a list of consequences, which will contribute to deter non-compliance and neutralize any benefit a Party might have obtained from the breach. The list of sanctions could include issuing of cautions and suspension of rights, including the right to participate in the Kyoto mechanisms.

On financial penalties, we believe they should be applied exclusively in the case of Annex B Parties that fail to meet their Article 3 commitments at the end of the commitment period, which will certainly constitute the most serious threat to the fulfillment of the objectives of the Kyoto Protocol. We understand, however, that this sanction makes sense if it represents not only a disincentive for non-complying Parties, but contributes also to repair the environmental damage caused by the breach. This target would be achieved if the resources collected from those financial penalties are channeled to mitigation projects in non-Annex B countries. In this case, penalties should be high enough so that countries do not feel encouraged to resort to paying them as cheaper alternative to compliance. Such penalties should have a fixed value determined by the COP/MOP. A percentage of the resources could also be used to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.

Implications of Article 18:

Brazil shares the concerns expressed by other Parties regarding the need to observe the provisions of Article 18 and, at the same time, to ensure that the compliance regime be implemented in an efficient, consistent and universal manner.

PAPER NO. 4: CANADA

Further proposals on procedures and mechanisms relating to a compliance system under the Kyoto Protocol

General

OBJECTIVES

- Objectives, if stated at all, could be set out in a short preamble.

- Relevant objectives include:

  - promoting the implementation of the Protocol

  - preventing non-compliance from arising and bring Parties back into compliance

  - providing both facilitative and enforcement tools to promote compliance with the Protocol

- The compliance regime should not focus only on advice and assistance: the majority of Parties that made commitments inscribed in Annex B to the Protocol are developed countries. Non-compliance is therefore less likely to result from technical or financial inability to comply than is the case in other multilateral environmental agreements and would seem appropriate only in a limited range of cases, either involving Parties undergoing the process of transition to a market economy ("EITs") and, potentially, developing countries, or involving exceptional circumstances.

- The kinds of changes that will be required to meet the emission limitation and reduction commitments inscribed in Annex B are such that the compliance regime must be designed to assure all Annex I Parties that everyone is doing its fair share, in other words that there is an level playing field.

- However, Canada sees value in designing the system as a continuum that includes facilitative approaches while being structured toward enforcement-oriented outcomes.

NATURE

- We believe that the nature and principles of the compliance system will be apparent from its design and do not need to be spelled out in the Decision.

- The institutional structure that will be established should ensure that the compliance system is credible, effective, unbiased, is based on due process and that consequences are both predictable and proportional.
- The system should also be sufficiently flexible to address questions of implementation as early as possible in the process. It should encourage formal and informal dialogue with the Party whose implementation is being assessed.

- The compliance system should be unified. At the end of the commitment period, emission credits acquired or transferred under the mechanisms will be taken into account to determine whether an Annex B Party met its target. Accordingly, target-related obligations set out in the Kyoto Protocol could be assessed by the same compliance body/entity/authority (in this submission, the expression "compliance body" will be used).

- The Party under review must have access to all the information used in the assessment process in order to fully respond to it. Reports prepared by expert review teams and the compliance body must be submitted to the CoP/moP.

PRINCIPLES

- Canada is **firmly** opposed to the inclusion of principles in any compliance decision.

- The principle of common but differentiated responsibilities applies to developing countries and, to a certain extent, to EITs. Article 10 of the Protocol, which applies to all Parties, including Parties not included in Annex I, imposes "soft law" obligations and incorporates this principle. With respect to EITs that made a quantified emission limitation and reduction commitment, Article 3.6 states that:

  > "Taking into account Article 4, paragraph 6, of the Convention, in the implementation of their commitments under this Protocol **other than those under this Article**, a certain degree of flexibility shall be allowed by the Conference of the Parties serving as the meeting of the Parties to this Protocol to the Parties included in Annex I undergoing the process of transition to a market economy." (my emphasis)

- Thus, the Protocol already deals with the extent to which flexibility or the principle of common but differentiated responsibilities should be taken into account.

- Canada firmly believes that the aim of a compliance system is not to create new rules or principles of international law but rather to ensure that the rules and principles already set out in the treaty are met.

Coverage

- The quantified emission limitation and reduction commitment in Article 3.1 as well as the related monitoring and reporting obligations in Articles 5 and 7 are the essential obligations of the Protocol and, accordingly, the most important preoccupation of the compliance regime.

- It should also be noted that other commitments in the Protocol

  - take into account factors such as national circumstances

  - are much less measurable and, hence, do not lend themselves to the kind of "hard" consequences included in most compliance systems proposals submitted by Parties. At the very least, the compliance system must take into account differences in the legal character and specificity of the Protocol's commitments.

Compliance body(ies)

Compliance assessment cannot only rely upon the review by expert teams under Article 8. At least one additional body will be required to undertake political and legal assessment of compliance, arrive at findings of compliance or non-compliance, and determine consequences to non-compliance.

1. Status

- Should compliance be assessed by a standing or an *ad hoc* compliance body? Canada supports a **standing** compliance body. This would avoid issues related to the selection of "panel" members on a given case, which arise in a dispute settlement context. As stated immediately below, a panel of three (or five) persons would serve in rotation.

2. Size

- Limited but sufficient to allow the compliance body to efficiently carry out its functions. Three (or five) persons could serve, in rotation, on any one case. All persons serving on the compliance body should be available at all times and on short notice, and should stay abreast of activities relevant to climate change. They should not participate in the consideration of any compliance issues that would create a direct or indirect conflict of interest.

3. Capacity in which members act

- The key advantage to determinations of compliance by a compliance body is that such determinations would be rooted in fact and be legally and technically sound.

- Canada believes that experts nominated by governments and acting on a personal basis is the best option to reduce political interference in the process.

4. Composition

- In multilateral environmental agreements such as the Montreal Protocol on Substances that Deplete the Ozone Layer, where **all** Parties are subject to the core obligations of a treaty, albeit on a different basis, it is appropriate to use the principle of equitable geographical distribution in the selection of members of the compliance body.

- However, Article 3.1, the core obligation of the Kyoto Protocol, applies only to those Annex I countries that made quantified emission limitation and reduction commitments inscribed in Annex B to the Protocol [5].

- This is why we believe that a majority of the members of the compliance body should be designated by the Parties included in Annex I that made a commitment inscribed in Annex B, the other members being designated by Parties not included in Annex I.

- In addition, a panel constituted in any one case should be composed by a majority of members designated by Parties that made a commitment inscribed in Annex B.

[5] Belarus and Turkey are included in Annex I but did not make commitments under Article 3.1.

5. Expertise

- The compliance body will have various roles to play at different stages in the process.

- We already stated that there is value in designing the compliance regime as a continuum that encompasses facilitative approaches while being structured toward enforcement-oriented outcomes. During the expert review, Parties must be afforded an opportunity to correct genuine errors to prevent "questions of implementation" from becoming "issues of compliance". However, once the compliance assessment procedure has commenced, a useful role could be played by a further, time-limited, opportunity for dialogue.

- Technical expertise such as scientific and policy expertise would be useful in the context of such a dialogue. Legal expertise may also be relevant during the assessment stage of the process. More generally, the compliance body should comprise persons of recognized authority, with demonstrated expertise in law and climate change issues.

6. Length of membership

- Members would occupy their functions for a limited time. They could serve on the compliance body for a four-year term, and each member could be reappointed once. However, the terms of a number of the members appointed should expire at the end of two years, to be determined by lot, in order to ensure continuity in the compliance body. Vacancies should be filled as they arise. A member appointed to replace a member whose term of office has not expired should hold office for the remainder of the predecessor's term.

7. Frequency of meetings

- This will depend on the scope of the compliance system, the number of problems in the fulfilment of commitments identified by expert review teams and the extent to which the process is initiated by other Parties.

Initiation of the process (references)

- A Party, including Parties not included in Annex I, must have direct access to advice or assistance offered by the regime's facilitative features.

- With respect to the regime's facilitative aspects, it is assumed that a process will be made available for "soft", non-target related, commitments [6].
- Questions of implementation listed by the secretariat pursuant to Article 8.3 of the Protocol as well as questions raised by a Party or a group of Parties during the review process should be forwarded automatically (or through the secretariat) to the compliance body.

[6] This process could be designed either as an entirely separate track, perhaps employing the Convention's MCP (so as to avoid multiplication of bodies), or could be channelled through a facilitation body housed within the model outlined below. A separate body may be necessary not only because a facilitative approach is more appropriate for soft commitments but also because the Article 8 gateway into compliance assessment is available only for Annex I commitments.

- At CoP V Canada stated that a "question of implementation" should become a "compliance issue" only if an expert review team identifies a potential problem in the fulfilment of commitments. Except for questions of implementation raised by Parties, which can be "screened out" by the compliance body if they do not merit further consideration (see below under "Functions"), the compliance procedure should come to an end if the expert review team does not identify any potential problem. Otherwise, the credibility of the expert review process could be compromised.

- Eligibility to participate in the mechanisms would be presumed unless challenged. It is also assumed that eligibility will be contingent upon compliance with target-related obligations under Articles 5 and 7 and other such conditions set out under the mechanisms rules. The compliance body would declare that the criteria are met or determine that they are not met. In case of non-compliance, ineligibility would not be a consequence to non-compliance, let alone a binding consequence, but would flow from the mechanism rules. [7]

Functions

The compliance regime could be structured along the following model.

In-Depth Review

Under the Kyoto Protocol, Annex I Parties' target related commitments are subject to in-depth review pursuant to Article 8. This is a necessary first step toward compliance assessment and provides the main gateway into the compliance procedure.

- Expert review teams review communications and inventories to determine
    - implementation of Articles 5 and 7
    - implementation of Article 3.1

- If the review raises a question of implementation, Parties are given the opportunity to address it (*e.g.* by means of an adjustment, by submitting inventories, missing data or other additional information). If the issue involves emissions in excess of assigned amount, Parties could acquire emission rights or reduction credits before the question becomes a compliance issue.
- To provide Parties with an opportunity to address implementation problems, there should be a grace period, beginning when Article 7 information is due for expert review and ending [x] months after completion of the review, at which time all questions of implementation are automatically passed to a compliance body (CB) for screening.

- Other Parties (Article 8.5(b)) can also raise questions of implementation. [8]

[7] This may deal with the question of the legal status of mechanism rules adopted through decisions of the CoP or the CoP/moP. To the extent that such decisions are not legally binding, violations of mechanism rules could not have "binding" consequences. Of course, non-compliance with Articles 5 and 7 as such can also have consequences, even binding consequences, so long as the compliance regime puts these on proper legal footing.

[8] The grace period must be structured so as to allow sufficient time between in-depth review reports and CB screening to allow Parties to take response action to questions raised by other Parties.

Compliance Assessment

Compliance assessment is undertaken within the CB. The process includes initial screening of all questions of implementation, assessment of "compliance issues" and, in the event of non-compliance, determination of consequences.

- All questions of implementation go through an initial screening by the CB. The screening process serves to
  - review information, representations, factual and legal arguments submitted by Parties
  - determine whether Parties, during the grace period, have taken adequate steps to resolve the questions of implementation. In the affirmative, the CB will confirm that these Parties are in compliance with their commitments under Articles 3, 5 and 7 thereby ending the compliance assessment process
  - determine whether there are any other reasons (*e.g.* obvious legal or factual errors; or *de minimis* violations such as minor omissions in national communications) why a given question of implementation identified by the expert review does not raise a compliance issue
  - determine, for questions of implementation that were raised not by expert review teams but by other Parties, whether these are serious questions that merit further consideration.
- All questions of implementation that are not eliminated through screening go to a hearing of a panel composed of members of the CB where the Party under review has a further opportunity to offer information and legal arguments. This part of the process could also provide a (time-limited) opportunity for further dialogue with the Party concerned and exploration of the merit of other facilitative approaches, such as advice and assistance. [9]
- Based on the hearing, the CB either confirms that the Party concerned is in compliance (the presumption being that Parties are in compliance), or recommends that the CoP/moP finds the Party to be in non-compliance.
- In cases of non-compliance, the CB will, for target-related commitments under Articles 5 and 7 [10]:
  - determine whether advice or assistance are appropriate means (e.g. due to lack of technical capacity, natural disaster, war or any other cases where non-compliance is due to force majeure)
  - inform all Parties that the Party concerned will, as of [x days/weeks] after the non-compliance finding, lose access to those elements of the

[9] It remains to be determined whether the CB itself should be engaged in this facilitative work, or whether a separate body (either a sub-group within the CB or the body to be created under the UN FCCC MCP) will be required. As it will be difficult to neatly separate the persuasive tools at the disposal of a compliance regime (ranging from facilitative to enforcement-oriented measures), it may be impractical to design a system that would have (non-) compliance issues go back and forth between different bodies. On the other hand, it may be equally impractical, indeed impossible, for one "super body" to undertake all compliance functions.

[10] Non-compliance with Articles 5 and 7 would be addressed on an annual basis.

Kyoto mechanisms that do not affect a Party's ability to get back into compliance or to meet its Article 3.1 commitment. [11]

- recommend that the CoP/moP publicize the non-compliance
- recommend that the CoP/moP publicize the non-compliance and issue a caution if it is a recurrence of non-compliance with Articles 5 and 7 [12]

- The Party concerned can appeal the finding to an appeal body [13].
  - for Article 3.1 commitments, options might include [14]:
    - determine whether advice and/or assistance are appropriate means (e.g. due to lack of technical capacity, natural disaster, war or any other cases where non-compliance is due to force majeure)
    - recommend that the CoP/moP publicize the non-compliance
    - recommend that the CoP/moP decides that the overage will be deducted (with further deduction of penalty units) from the Party's assigned amount for the next commitment period, unless the Party

      ✓ elects to pay into a compliance fund instead [15] or

      ✓ appeals the non-compliance finding to an appeal body

Appeal Process

The appeal process would be run, on an *ad hoc* or permanent basis, by an appeal body.

The appeal process would, of necessity, be expeditious. Whether mechanism eligibility issues require a yet faster track would have to be determined.

The structure of the body is left open [16]. In view of the extensive factual assessment up to this point, such an appeal should be limited to questions of law.

A representative of the CB would present the CB's conclusions [17].

[11] There should be a "fast-track" process for the Party to demonstrate that it has regained eligibility. It would be possible, for example, to provide access to the CB to regain eligibility, on a fast-track basis, during a given annual period.
[12] Further consequences could be considered for Parties that display a "persistent pattern of non-compliance".
[13] The appeal would not stay ineligibility for the Kyoto mechanisms. Given the expert review, screening and CB hearing conducted up to this point, it is assumed that an appeal body would reach different conclusions only in exceptional cases. Therefore, it seems undesirable to provide incentives for Parties to appeal CB findings in other than exceptional cases. Of course, a Party can always take the steps necessary to *regain* eligibility and request reinstatement, *e.g.* from the CB.
[14] Non-compliance with Article 3.1 would be addressed at the end of a commitment period.
[15] Various options exist for the parameters and beneficiaries of this fund.
[16] While different options exist, this body would need to be separate from the CB to ensure both bodies' integrity, especially since a representative of the CB would have to appear before the appeal body (see below in the text). Appeals could be heard by panels convened *ad hoc*.

The Party concerned could argue its case.

The recommendation reached by the appeal body would be the final step of the assessment procedure before returning the matter to the CoP/moP.

Decision of the CoP/moP

The final step in the process is a decision of the CoP/moP on the recommendations of the CB or the appeal body. This would apply only to recommendations concerning findings of non-compliance and consequences to such non-compliance [18]. It may be appropriate to treat mechanism eligibility questions separately and to leave such questions to the CB (subject to appeal).

In order to assist the CoP/moP to take the best possible decision, compliance bodies composed of legal and technical experts examine information, including the expert review team report, determine whether a Party met its Article 3.1 commitment (or its target-related obligations under Articles 5 and 7), and recommend a consequence.

Article 8.6 of the Protocol states that the CoP/moP "shall take decisions on any matter required for the implementation of th[e] Protocol". For Canada, this does not necessarily mean that the CoP/moP should be able to reverse the determination of a body of expert by a simple majority vote. Such a result would more than likely politicise a process which was precisely meant to be rooted in fact.

There are several options to ensure that the final outcome is legally and technically sound and not the result of a political debate

- the CoP/moP could take note of a compliance body decision and endorse it
- it could adhere to the rule of negative consensus followed by the Dispute Settlement Body of the World Trade Organization whereby a compliance body decision is adopted unless there is unanimous consensus **not** to adopt it
- it could also rely on super majority voting rules.

[17] The CB representative could be either a designated CB member, or the CB chair.
[18] Given that the compliance regime is based on the assumption that Parties are in compliance, the CB merely confirms this assumption. It seems unnecessary to have a further confirmation issued by the CoP/moP. However, it would be easy enough to have the CoP/moP confirm all actions of the CB.

Sources of information

Information provided by Parties concerned

Parties should respond promptly and fully to any request by a review team or a compliance body that such team or body considers necessary and appropriate.

At all stages of the procedure, Parties should be afforded an opportunity to provide additional information.

Confidential information which is provided should not be revealed without formal authorization from the Party providing the information.

Parties should also have access to information concerning the review or the assessment of their compliance in order to be able to provide an adequate response.

Report by expert review teams under Article 8 of the Protocol

These reports are submitted to all Parties to the Convention (Article 8.3), to the CoP/moP (Article 8.5) and to the compliance body for screening if questions of implementation are indicated in such reports.

The intent clearly underlying Article 8 is that the report resulting from the review process constitute the factual basis upon which Parties' compliance with their emission limitation and reduction commitments in Annex B will be assessed.

Information gathered in the territory of the Party in question

Whether such information is gathered during the review or compliance process, state sovereignty must be respected. In other words, site visits are acceptable provided that consent of the relevant Party has been obtained.

Outside experts asked to clarify facts

Expert review teams and compliance bodies should have the right to seek information and technical advice from any individual or body which they deem appropriate.

Before an expert review team or a compliance body seeks such information or advice from any individual or body within the jurisdiction of a Party it should inform the authorities of that Party.

Confidential information which is provided should not be revealed without formal authorization from the individual or body providing the information.

Expert review teams and panels of the compliance body could seek information from any relevant source and consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter, an expert review team or, if necessary, a compliance body could request an advisory report in writing from outside experts.

Secretariat

The secretariat should

- list those questions of implementation indicated in the expert review team reports for further consideration by the CoP/moP
- channel information, including the above information, to the compliance body
- provide secretarial and technical support

Procedure

Election of officers of compliance body(ies)

We assume that the term "officer" refers to members of the compliance body.

Canada's views are set out in numbers 3 and 4 under the heading "Compliance Body" of this submission.

Types of information that would be available to the relevant body(ies)

Canada's views are set out under the heading "Sources of information"

Time limit for filing cases

This may refer to the possibility given to a Party or group of Parties to raise a compliance issue with respect to the implementation by another Party. Canada believes that other Parties could raise questions of implementation during the expert review carried out under Article 8. Such questions would be subject to screening by the compliance body.

The words "filing cases" convey an adversarial meaning that may be appropriate in a dispute settlement context but should be avoided in a compliance process whose aim is to promote the implementation of commitments made by certain Parties.

Voting rules

If the compliance body is constituted in accordance with the views Canada set out in number 3 under the heading "Compliance body(ies)", simple majority would be appropriate.

With respect to the CoP/moP, Canada set out its views under "Functions".

Procedure for appeal

Canada set out its views under the heading "Functions".

Confidentiality

Canada stated its views in number 1 and 4 under the heading “Sources of information”.

Role of the CoP/moP

Canada’s views are set out under the heading “Functions”.

Possible outcomes or consequences of non-compliance or potential non-compliance

Part of Canada’s views on advice and assistance, publication of non-compliance, cautions and suspension of rights or privileges are set out elsewhere in this submission including under the heading “Functions”.

Any compliance structure that is established to ensure that commitments are met achieves better results when it contains sufficient means that allow Parties to voluntarily address failure to meet their commitments (in this regard, the application of adjustments under Article 5.2 is an option that should be fully explored).

For that reason, we find that options such as a grace or “true up” period and the possibility of a compliance fund used, for example, to underwrite reliable greenhouse gases mitigation projects, are interesting and helpful.

“Harder” consequences may also be necessary with respect to Parties that would not avail themselves of the opportunities that are offered to them to meet their commitments voluntarily.

However, such consequences should be directly related to the specific breach. Thus, while it may have drawbacks, the idea of subtraction of excess tonnes from a Party’s assigned amount for the subsequent commitment period, with a penalty set at a level sufficient to discourage non-compliance may be the consequence that is most directly related to a failure to meet an Article 3.1 commitment.

On the other hand, suspending the possibility to **acquire** emission rights or reduction credits in the next commitment period, again as a consequence to non-compliance with Article 3.1, may not be the most appropriate consequence given the difficulties it would place on a Party to meet its target in that subsequent commitment period.

With respect to “automatic” consequences, Canada prefers to think of “pre-agreed” or “predetermined” consequences. In the above model under the heading “Functions”, consequences do not “automatically” follow findings of non-compliance.[19] Rather, consequences for certain types of non-compliance are “predetermined”. This means that the process assumes that certain consequences are used for certain types of non-compliance unless it is shown that it would not be appropriate to do so. Several procedural layers are

[19]Arguably, “automatic” penalties, following a finding of non-compliance without assessing their appropriateness in individual cases, would run afoul of the requirement in Article 18 that consequences take into account the “cause, type, degree and frequency of non-compliance”. The approach outlined here, by contrast, meets that requirement.

used to this end: Parties have an opportunity to be heard, the CB can consider (limited) circumstances to conclude that the normal consequence should not follow, and the CB's conclusion that the predetermined consequence is warranted can be appealed.

These "procedural layers" provide opportunities to rebut the consequence presumption underlying a finding of non-compliance regime for quantified emission limitation and reduction commitments. This design was chosen because, once it is assumed that "real" consequences are required to ensure compliance with these commitments, including by enhancing the "persuasive force" of facilitative opportunities, there must also be a realistic chance of actual exposure to these consequences. "Real" consequences would have little impact if the process did not provide for a "real" chance that they will result.

Relationship with Article 19 of the Protocol

At first glance, experience gained under existing MEAs would suggest that dispute settlement will play an insignificant role in the Kyoto Protocol compliance regime. States have thus far avoided resort to binding settlement of differences regarding the interpretation or application of a MEA. Conventional dispute settlement procedures are unsuited to dealing with MEA compliance issues because they rely upon an adversarial rather than a cooperative model, and because, due to their largely bilateral focus, they cannot adequately address typically polycentric compliance issues. Further, competitiveness concerns may prompt individual Parties participating in the Kyoto mechanisms to resort to binding settlement, if available.

While these reservations apply also to the Kyoto Protocol, it nonetheless seems possible that the Protocol compliance regime can carve out a role for some features of a dispute settlement regime, for example, for an appeal process as outlined above. As noted, if non-compliance could attract consequences, especially predetermined consequences, the existence of an appeal option could make them more acceptable. Because all of these issues retain a polycentric quality, engaging not just the interests of individual Parties but the interests of all Parties in compliance with the Protocol, any such dispute settlement feature would have to be tailor-made for the Protocol compliance regime, rather than drawn from the Convention's dispute settlement provisions. The model sketched above addresses the polycentric aspects of the proceedings by relying upon a representative of the CB to present the CB's findings to the appeal body.

PAPER NO. 5: CHINA

On the basis of its previous submission as annexed to UNFCCC/SB/1999/CRP.3/REV.2 and pursuant to the Co-Chair's initial thoughts on procedures and mechanisms relating to a compliance system under the Kyoto Protocol as dated November 3, 1999, the Chinese government submits its further views on the issues concerning a compliance system under the Kyoto Protocol.

I. OBJECTIVES

The objectives of a compliance system for the Kyoto Protocol should ensure the compliance with the provisions of the Protocol in general and the commitments assumed by Annex I Parties under Article 3 of the Protocol in particular.

For this purpose, the system to be designed and developed should seek:

To facilitate compliance by providing advice and assistance to Parties having difficulties in meeting their commitments under the Protocol;

To prevent potential and actual non-compliance by allowing Parties opportunities to correct their problems that may result in or contribute to non-compliance; and

To deal with, in a timely, effective, and reasonable manner, cases of non-compliance by imposing certain binding consequences if a Party fails to fulfill its commitments under the Protocol.

The Chinese government believes that good faith and mutual trust among the Parties to the Protocol are the prerequisite and underlying guarantee for the successful operation of a compliance system. Therefore, this system should be designed and developed on the assumption that Parties are willing to comply with their commitments under the Protocol. Based on this approach, the system to be designed and developed should focus on measures that facilitate and promote compliance and prevent non-compliance in a cooperative manner. On the other hand, we also recognize the necessity for having within the system a certain kind of binding consequences in order for the system to adequately address questions of non-compliance. Their application, however, should be limited to cases of serious violation of the commitments under the Protocol and should be taken as a last resort to the solution of non-compliance problems.

II. NATURE AND PRINCIPLES

Nature

A compliance system as such will thus be a compliance-oriented system with credible, fair, coherent, and transparent procedures and mechanisms as well as reasonable certainty. It will address questions related to the compliance with the commitments under the Kyoto Protocol mainly in a facilitative and preventive manner.

Principles

We recognize the importance and necessity for setting forth certain general principles in the initial stage of elaborating specific rules of the compliance system. Some of these principles

will provide guidance for the design and development of the system itself. At present, these principles are particularly useful in that they may help Parties solve their disagreements as to how the compliance system should be designed. Other principles will serve as guidelines for the operation of the procedures and mechanisms of the system. Since we can not expect that the system is able to address, in an exhaustive manner, each and every kind of compliance-related problems, these principles will provide useful reference to fill in any gap that may occur in the operation of the system and should thus be reflected in the text *per se* of the rules for the procedures and mechanism of the system. For this purpose, we propose the following principles:

1. Principle of common but differentiated responsibilities between Annex I and non-Annex I Parties to the Framework Convention.

It is true that this principle has been embodied in the different commitments assumed by Annex I and non-Annex I Parties under the Protocol. It is also true that Parties that undertake the same commitments under the Protocol should be treated equally. In this context, the inclusion of this principle into the compliance system does not imply that these Parties should have different substantive obligations under the Protocol. Neither does it mean that they should be treated differently in terms of their obligations. However, some provisions of the Protocol are not operational without specific means for implementation. And it is possible that extra commitments may be derived from the process of formulating these specific means for implementation, which may in turn involve developing countries. This may well be the case in regard to CDM under Article 12. Therefore, this principle, in our opinion, will serve as a safeguard to ensure that different treatment should, as required by Article 3.1 of the Convention, be given to developing countries if they are involved, as the case may be, in these derived commitments for the implementation of the provisions under the Protocol. Accordingly, this principle should be reflected in the text of the rules for the procedures and mechanisms of the compliance system.

2. Principle of due balance between the sovereignty concerns of State Parties and their obligations under the Protocol.

A due cognizance should be given to the fact that a compliance system which reconciles with the sovereignty concerns of State Parties is likely to draw great support from Parties. In this connection, the compliance system to be designed and developed should encourage Parties to build and develop their domestic regimes in accordance with their national circumstances to effectuate their commitments under the Protocol, provided they satisfy agreed international obligations.

3. Principle of proportionality.

Consequences of non-compliance should be proportional to the type, nature and seriousness of the non-compliance in question.

4. Principle of coherency, effectiveness, impartiality, transparency, and predictability.

This principle should be fully reflected in the design of the system to ensure its credibility of the system. In regard to transparency, for example, all decisions, including the reasoning thereof, should be rendered on sound evidence and should be made available to the public. As far as predictability is concerned, an indicative list of consequences of non-compliance

should be identified in advance, taking into account the cause, type, degree, and frequency of non-compliance.

5. Principle of due process.

This principle requires that, among other things, any Party concerned with compliance-related problems should have the right to participate in the proceedings to make its presentations.

III. COVERAGE

The compliance system to be designed and developed should in principle cover all the commitments assumed by Parties under the Protocol. Having said that, we also recognize that the Protocol contains various types of commitments, some of them are more central to overall compliance than others. For instance, commitments under Article 3 are the most important ones among all other commitments under the Protocol and non-compliance with them will certainly entail the most serious consequences. On the other hand, full compliance with Article 3 is related to the compliance with other relevant commitments, such as those under Articles 5, 7, 6, 12, and 17. Moreover, the compliance system should not only deal with the consequences of non-compliance but should also facilitate compliance and prevent potential and actual non-compliance.

IV. COMPLIANCE BODY(IES)

1. Status

Given the decisive role the compliance body plays in determining whether a Party or Parties comply with its commitments under the Protocol, and the constant character of the tasks it is entrusted to fulfill, we propose that the compliance body should be a standing one. Also, in view of the timing of the Protocol's commitments (some are annual and others are continuous throughout the commitment period), an advantage in having a standing compliance body is apparent in that it will guarantee the consistency and evenness of its work. Depending on the merits of a case, however, we do not exclude the need and possibility to establish ad hoc bodies within the compliance body.

2. Size

From the perspectives of cost-effective and simplicity, the size of the body should not be very large. On the other hand, however, it should be large enough to accommodate equitable geographical representation. With other existing international institutions as reference, it may be appropriate, in our opinion, that this body should consist of no more than 21 members, no two of whom may be nationals of the same State Party.

3. Capacity

Members of this body should act in their personal capacity.

4. Composition
It should be based on equitable geographical distribution.

5. Expertise

The expertise of the members of the body should be based on their merits in technical, socio-economic, and legal fields related to the implementation of the Convention and the Protocol.

6. Length of membership

We propose that members of the body should be elected for four years and may be reelected once. In order to ensure continuity, of the members elected at the first election, the terms of half members should expire at the end of two years and the terms of the other half should expire at the end of four years.

7. Frequency of meetings

As the body to be designed is a standing one, there should not be restrictions to the frequency of meetings. In other words, the body should meet whenever it deems necessary.

V. INITIATION OF THE PROCESS (references)

For the purpose of initiation of the process, the principle of *nihil habet forum ex scena* should apply, *mutatis mutandis*. This suggests that the procedures for compliance should be triggered mainly by a Party or group of Parties with respect to their own implementation or by a Party or a group of Parties with respect to the implementation by another Party or group of Parties. On the other hand, the COP/moP, upon its findings concerning the reports of the expert review teams under Article 8, may decide to refer to the compliance body a case where a Party's compliance is in question.

In our opinion, the expert review teams as provided for in Article 8 of the Protocol should play no role in triggering the procedures for compliance. Although the expert review teams may provide relevant information on whether a Party or group of Parties is at risk of non-compliance or is not in compliance, determination of whether such Party or Parties is in non-compliance may involve not only factual but also legal as well as policy issues. As provided by Article 8.3 of the Protocol, the functions of the expert review teams are simply to review matters of technical or factual nature in regard to Parties' commitments under the Protocol and to refer their reports based on such review to all Parties and to the COP/moP as well, for their consideration.

VI. FUNCTIONS

The functions of the compliance body should include the following:

1. To assess the adequacy of an application by a Party or group of Parties for triggering the procedures for compliance;

2. To hear cases where a Party's or group of Parties' compliance with their commitments under the Protocol is in question, including those cases referred to it by the COP/moP;

3. To decide, on that basis, whether a Party or group of Parties is in non-compliance with its commitments; and

4. To decide whether to render advice or facilitative assistance or to apply binding consequences, if a decision is made against a Party or group of Parties regarding their compliance.

VII. SOURCES OF INFORMATION

The compliance body must make decisions on the basis of correct information, which serves as evidence in regard to a case of non-compliance. For this purpose, reports submitted by the expert review teams should be considered as a substantial information to that effect. Reports submitted to the COP/moP and to its subsidiary bodies and information provided by Parties concerned as well should also be considered as an important source of information. If necessary, the body may ask outside experts to clarify facts. However, the body should have no authority to gather information in the territory of a Party in question without that Party's approval in advance.

VIII. SECRETARIAT

The FCCC Secretariat should perform its duties as required by the Convention and the Protocol, such as the duties under Article 8.3 of the Protocol. As far as the administration of the compliance body is concerned, the Secretariat should provide all necessary service for meetings and other activities of the compliance body, unless otherwise decided by COP/moP.

IX. PROCEDURE

The COP/moP should take responsibility for the election of members of the compliance body. Members of the body should be elected on the basis of the nomination by their governments. The time limit for filing cases should be one year or otherwise decided by the COP/moP depending on the seriousness of the effect of non-compliance. The compliance body should make its decision by consensus. In case there is no consensus, the body should make its decision by two thirds majority of members present and voting. In case the COP/moP finds a decision unconscionable upon the request by a Party or group of Parties concerned, it may remand it back to the body for review or reconsideration.

X. ROLE OF THE COP/moP

For the purpose of the operation of the compliance system for the Protocol, the COP/mop should provide policy guidance to the compliance body. It may, upon its findings concerning the reports of the expert review teams, refer to the compliance body a case where a Party or Parties' compliance is in question. In case the COP/moP finds a decision rendered by the compliance body unconscionable upon the request by a Party or group of Parties concerned, it may remand it back to the body for review or reconsideration.

XI. POSSIBLE OUTCOMES OR CONSEQUENCES OF NON-COMPLIANCE OR POTENTIAL NON-COMPLIANCE

In our opinion, when the compliance body finds a Party or group of Parties in non-compliance with its commitments under the Protocol, it may provide that Party or Parties with incentive measures, advice and facilitative assistance to correct the non-compliance in question. That Party or Parties concerned may also take voluntary actions to that effect.

Only if these measures fail to bring that Party or Parties back into compliance, should the compliance body take the following actions:

1. Having the non-compliance exposed to the public;

2. Issuing cautions or warnings; and

3. Having that Party's or Parties' rights or privileges suspended.

Only if these measures also fail to correct non-compliance in question, should the compliance body take further binding actions as the last resort of remedy.

Whether these consequences are automatically entailed should depend on the merits of the case in question and should be decided by COP/moP. Moreover, in our opinion, automatic consequences are not necessarily binding consequences.

PAPER NO. 6: INDIA

PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL

Note: Further submissions and elaboration where required shall be made later

I. General Provisions

Objectives

1. The objective of the procedures and mechanisms under a compliance system is to ensure achievement of targets and time tables set by the Protocol for attaining the quantified emission limitation and reduction commitments of Annex I Parties, and the fulfilment of commitments of Annex I Parties related to transfer of financial resources and technology taking fully into account that economic and social development and poverty eradication are the first and overriding priorities of developing country Parties. The compliance system will aid, assist and promote the effective implementation of these commitments, in accordance with the principles of the Convention. The system will elucidate and determine situations leading to non-compliance, conduct analysis and assessment, provide warning of non-compliance, offer advice, and facilitate the carrying out of corrective measures by the Party concerned for achieving compliance with the commitments. An objective, also, of the compliance system is to enable self-determination by a Party about the degree of its compliance to enable commensurate action for full compliance.

Nature

2. The compliance procedures and mechanisms must facilitate Parties to develop national systems for ensuring compliance. The procedures and mechanisms under Article 18 should be facilitative and prevention oriented, for enhancing the effectiveness of the Protocol in the achievement of its objectives. The compliance system, in its framework, must take into account Articles 5, 7 and 8 of the Protocol related to Annex I Parties, which provide for estimation of emissions and removals, communication of information and review. Transparency and dissemination of information shall help in the construction of a credible compliance system with requisite predictability about the consequences to follow in the event of non-compliance. The system should have a built-in multilateral consultative process, with both preventive and curative elements.

Principles

3. The compliance system must reflect the target and timetable orientation of the quantified emission limitation and reduction commitments of Annex I Parties. The principles must promote consistency, coherence, transparency and credibility. There must be predictability about the consequences of the varying degrees of non-compliance. An indicative list of consequences of non-compliance may be identified, in proportion to the nature of non-compliance. Due process should entail multilateral consultations. Process involving determination of findings in the compliance system must be transparent.

4. The principle of common but differentiated responsibilities distinguishes between developed and developing countries. No new commitments have been introduced for developing countries by the Protocol. The existing commitments of developing countries

have been reaffirmed taking into account Article 4.3, 4.5 and 4.7 of the Convention. Article 4.7 of the Convention states that the extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

II. Coverage

Types of Issues

5. Issues emanate from the targets and time-tables relating to the achievement by Annex I Parties of their emission limitation and reduction commitments. There are issues relating to the fulfillment of commitments of Annex I Parties pertaining to transfer of financial resources and technologies. The commitments are supported by various provisions including, Article 2 of the Protocol relating to policies and measures, and reporting, including guidelines and modalities developed thereunder, provided for in Articles 5, 7 and 8 of the Protocol. The commitments regarding transfer of financial resources and technology are directed by Article 4.3, 4.5 and 4.7 of the Convention. Annex I Parties' obligations will also arise out of principles, modalities, rules and guidelines developed for the mechanisms under Article 6, 12 and 17. Different procedures will be required for the varying type of issues.

Characteristics of Commitments

6. Commitments have different characteristics and timelines. Assessment of compliance with Articles 5 and 7 is an annual feature. The fulfilment of emission limitation and reduction commitments is based on a commitment period, but periodic assessments will be required. The compliance system should be able to address differing time-frames.

7. Commitments will take into account the principle of common but differentiated responsibilities which distinguishes between the developed and developing countries. No new commitments have been introduced for developing countries by the Protocol. The existing commitments of developing countries are reaffirmed taking into account Article 4.3, 4.5 and 4.7 of the Convention. Article 4.7 of the Convention states that the extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

Provisions related to guidelines, etc.

8. Annex I Parties, in the achievement of their quantified emission limitation and reduction commitments, must follow any guidelines to be formulated for standardizing action. The purpose of the guidelines is to establish process for facilitating the fulfillment of targets, information gathering, monitoring and verification. Shortcomings in the application of guidelines will invite immediate corrective action.

III. LINKAGES

Expert review process under Article 8 of the Kyoto Protocol

9. A review may provide technical assessment and bring out facts related to the achievement of commitments. The expert review process under Article 8 is distinct from the compliance process under Article 18. Article 8 process cannot determine compliance or non-compliance. Article 18 process, may, however use the facts and technical assessment which emerge from the Article 8 process. Any multilateral consultative process, as part of a Article 18 process may use the findings of the Article 8 process for further deliberation. If the review of national inventories and communications of Annex I Parties undertaken in Article 8 process reveals cause for examining the matter further for the purpose of initiating Article 18 process, follow-up may be undertaken. Parties will not be precluded from raising questions if the report of the review team does not indicate non-compliance.

Multilateral consultative process under Article 13 of the Convention

10. The multilateral consultative process under Article 13 of the Convention relates to the Convention. Though the concept of multilateral consultations is pertinent to a compliance system but the context in which Article 13 is placed is different from the requirements entailed by quantified commitments in the Protocol where there are specific targets and timetables for Annex I Parties.

Conference of the Parties serving as the meeting of the Parties to the Protocol

11. The compliance system under Article 18 will conform to COP/moP decisions. The COP/moP as the highest decision making body must have a central role in the compliance system. But, the COP/moP will need to be supported by a body dealing with compliance, with the necessary expertise in the legal, scientific and related socio-economic fields, with an indicative list of issues for referral.

Subsidiary bodies

12. The Subsidiary Bodies may make recommendations about issues of procedure and methodology with a view to assessing the effectiveness of the compliance system. Regarding the consideration of compliance body findings by the COP/moP, the Subsidiary Bodies will undertake preparatory work for the COP/moP.

Kyoto Mechanisms

13. The mechanisms in the Protocol, in Article 6, 12 and 17, are instruments through which Annex I Parties will seek to achieve part of their quantified emission limitation and reduction commitments in accordance with the principles, rules, modalities and guidelines to be formulated. Only after the principles, etc., and issues related to supplementarity have been decided, will it possible to establish the link between the mechanisms and compliance.

Executive board of the clean development mechanism

14. The executive board does not appear to have a direct role in the context of the compliance system envisaged in Article 18 of the Protocol. But, certain facts related to any CDM project activity, in question, may have relevance.

Operating entity of the financial mechanism

15. The operating entity of the financial mechanism does not appear to have a direct role in the compliance system, though the entity can be a source of information regarding availability of financial resources.

Secretariat

16. The role of the Secretariat would be to provide information available with it, if requested by a body operating the compliance system or by a Party requesting for such information. The Secretariat would be performing the duties and functions assigned to it by the COP/moP in relation to the compliance system. The Secretariat will aid and assist the compliance body to carry out its functions.

Settlement of disputes under Article 19 of the Kyoto Protocol

17. Article 19 of the Protocol deals with Article 14 of the Convention which is about the settlement of disputes between two or more Parties concerning the interpretation or application of the Convention. Article 18 of the Protocol deals with issues arising from non-compliance with the provisions of the Protocol. In broad terms, issues relating to non-compliance with the provisions of the Protocol do not pre-suppose dispute between Parties.

IV. Compliance Procedure

One procedure or more than one procedure

18. Keeping in view an overall compliance approach, underlining facilitation and prevention of deviance, there is the need for plurality in procedures for handling different issues and situations likely to emerge in the course of implementation of the Protocol.

Sub-procedure for the Kyoto Protocol mechanisms

19. The compliance dimension of the Kyoto Protocol mechanisms is connected with the principles, rules, modalities and guidelines. Issues related to supplementarity are likely to be of significance. A sub-procedure should be considered.

Eligibility to raise questions

20. The COP/moP, Subsidiary Bodies, the compliance body or the Parties will be eligible to raise questions.

Sources of information

21. The sources of information include the information submitted in Article 7, the review reports in Article 8, and the information submitted by the Parties.

Standing/Ad hoc body

22. The body may be ad hoc, to begin with.

Size, Composition and Expertise

23. The experts should be nominated by Parties, and serve in their personal capacities. The expertise must be legal, scientific and in the socio-economic fields. There must be requisite geographical representation.

Frequency of meetings

24. The meeting should be convened, at least once, annually, though there should be ample discretion to convene extraordinary meetings.

Rules of procedure

25. The rules of procedure under Article 18 may be framed under guidance of the COP/moP after determining the nature and scope of the compliance system.

V. Consequences of Non-Compliance

General Comments

26. Primarily, the system must be designed to facilitate compliance and prevent non-compliance. Any situation of non-compliance must be calibrated in accordance with the nature of commitment, the circumstances of non-compliance, the contributory factors, if any, leading to non-compliance, the degree and frequency of non-compliance.

Automatic consequences

27. While Article 18 envisages the development of an indicative list of consequences taking into account the cause, type, degree and frequency of non-compliance, yet, in practice, there will be considerable variance in situations and the circumstances leading to non-compliance. Non-complying Parties will also highlight the contributory factors because of which they were unable to prevent non-compliance. At the same time predictability is required for fairness. The implication is, that the aforementioned list and accompanying elaboration in any listing of automatic consequences will require adequate consideration. A list of possible preventive action to preempt non-compliance and undertake corrective measures when evidence of non-compliance emerges, would also require discussion.

PAPER NO. 7: JAPAN

Japan's Preliminary Proposal on Procedures and Mechanisms relating to a Compliance System under the Kyoto Protocol

Japan

This proposal is submitted by the Government of Japan in response to the passage contained in the "Report of the Joint Working Group on Compliance on its work during the eleventh sessions of the subsidiary bodies" (FCCC/SB/1999/CRP.7) to invite comments from Parties. This submission should be considered preliminary.

1. Objective

1.1. The objective of these procedures and mechanisms is to promote implementation of the Kyoto Protocol, to ensure the implementation of commitments under the Protocol, and to deter non-compliance by:
(a) Determining the cases of non-compliance;
(b) Providing advice and assistance to Parties to overcome difficulties encountered in their implementation of the Protocol;
(c) Providing both facilitative and enforcement tools to promote compliance with the Protocol.

1.2. The compliance system applies to all commitments under the Protocol.

> **Note. "Nature and Principles"**[20] of the compliance system should be as follows:
> (a) Nature: credible, coherent, effective, predictable, and transparent;
> (b) Principles: due process, proportionality, efficiency.

2. Bodies

2.1. Compliance Body
2.1.1. A Compliance Body is hereby established as a standing body. It consists of X [21] members elected for X years by the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/moP). A majority of them should be from Parties included in Annex I. Members may be re-elected for one immediate consecutive term.[22]

2.1.2. The Body will elect its own President and Vice-President. Each will serve for one year at a time. The Vice-President will, in addition, serve as the rapporteur of the Body.

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[20] These elements are to be taken into account in developing the detailed procedures and mechanisms on compliance, but need not be spelled out in the final legal text of the COP/moP decision on Compliance.
[21] The number should be small enough for the Body to be efficient.

[22] Membership and methods for the selection should be further elaborated.

2.1.3. The Body will, unless it decides otherwise, meet twice a year. The UNFCCC Secretariat will provide services for the meetings.

2.2. Committee on the Kyoto Mechanisms

2.2.1. A committee on the Kyoto Mechanisms will be established under the Compliance Body, as a standing body which will meet as necessary to perform its functions mentioned in 4.2. A majority of the members will be from Parties included in Annex I.[23]

2.2.2. The Committee will elect its own Chair and Vice-Chair. Each will serve for X years at a time. The Vice-Chair will, in addition, serve as the rapporteur of the Committee. A Chair may be re-elected for one immediate consecutive term.

3. Issues to be treated by the Bodies

3.1. issues to be treated by the Compliance Body
The Compliance Body will consider any kind of non-compliance issues other than those related to the Kyoto Mechanisms mentioned in 3.2, if these issues are:
(a) indicated in the report of expert review teams prepared under Article 8 of the Protocol;
(b) raised by a Party or a group of Parties with respect to its/their own implementation;
or
(c) raised by a Party or a group of Parties with respect to the implementation of another Party or group of Parties with sufficient evidence;
(d) forwarded by the Committee on the Kyoto Mechanisms after the Committee has determined on non-compliance, for the Compliance Body to decide on consequences;
(e) appealed by a Party or a group of Parties over a determination made by the Committee.

3.2. Issues to be treated by the Committee on the Kyoto Mechanisms
The Committee on the Kyoto Mechanisms will consider the following issues:
(a) A question on whether a Party included in Annex I is in non-compliance with Articles 5 and 7 in relation to its eligibility for transaction of units through Articles 6, 12 and 17 [24] indicated in the report of expert review teams or raised by a Party or a group of Parties with sufficient evidence;
(b) A question of implementation of a Party included in Annex I of the requirements referred to in Article 6, indicated in the report of expert review teams or raised by a Party or a group of Parties with sufficient evidence;
(c) Other questions relating the Kyoto Mechanisms.

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[23] Membership and methods for the selection should be further elaborated.
[24] Article 6.1 (c) provides that a party does not acquire any ERUs under Article 6 if it is not in compliance with the obligations under Article 5 and 7. The Umbrella Group, of which Japan is a member, is of the position that the same condition should be used for acquiring CERs under Article 12 and acquiring/transferring AAUs in Article 17.

4. Functions [25]

4.1. Compliance Body

4.1.1. The Body decides whether it proceeds with the issue listed in 3.1.

4.1.2. The Body determines if the Party or the group of Parties is in non-compliance with respect to issues other than those related to the Kyoto Mechanisms.

4.1.3. The Body may provide advice and assistance to the Party or the group of Parties in order to prevent non-compliance.

4.1.4. The Body decides on a consequence or a combination of consequences from the indicative list in case non-compliance is determined by itself or by the Committee.

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4.2. Committee on the Kyoto Mechanisms

4.2.1. The Committee decides whether it proceeds with the issues listed in 3.2.

4.2.2. The Committee determines if a Party or a group of Parties is in non-compliance with respect to issues referred to in 3.2.

4.2.3. The Committee may forward its determinations to the Compliance Body when the Committee deems that the Body should decide on the consequences of the case of non-compliance.

5. Secretariat

The UNFCCC Secretariat provides the Compliance Body and the Committee on the Kyoto Mechanisms with the following information:
(a) Reports by expert review teams under Article 8 of the Protocol;
(b) Questions of implementation identified in accordance with the relevant provisions of Article 8 of the Protocol.

6. Procedure

6.1. General

The Compliance Body and the Committee on the Kyoto Mechanisms will follow decisions and guidance of the COP/moP.

6.2. Sources of Information

The Compliance Body/the Committee on the Kyoto Mechanisms will consider the following informations.
(a) Information provided by Parties concerned;
(b) Report by expert review teams under Article 8 of the Protocol;
(c) Information from outside experts;[26]

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[25] "Functions" might be incorporated into the "Procedures".
[26] The current roster of experts of UNFCCC might be further elaborated and utilized for this purpose.

(d) Information from any other sources that the Compliance Body/the Committee on the Kyoto Mechanisms deems appropriate.

6.3. Compliance Body [27]

6.3.1. In addition to its regular meetings, the Chair of the Compliance Body may call a special meeting when it is necessary to address the issues brought to the Body's attention in accordance with 3.1.

6.3.2. As provided in 4.1.1, the Body decides whether it proceeds with the issues listed in 3.1. In case of 3.1(c), the first meeting of the Body on the issue will consider whether the question raised has sufficient evidence. If found negative, the question is dismissed. If found positive, it proceeds with the issue.

6.3.3. The Body may request, where it considers necessary, through the UNFCCC Secretariat, further information on matters under its consideration by the following means:
(a) The Parties concerned may be requested to submit further information;
(b) Expert review teams under Article 8 of the Protocol may be requested to re-examine the facts;
(c) Outside experts [28] may be requested to clarify the facts.

6.3.4. The Body examines the relevant issues listed in 3.1, considering information provided in accordance with 6.3.3, and from any other sources that the Compliance Body deems appropriate.

6.3.5. The Party or the group of Parties concerned will be given opportunities to express its/their views to the Body prior to and after the determination/decision made by the Body.

6.3.6. As provided in 4.1.2, the Body considers and determines if the Party or the group of Parties is in non-compliance.

6.3.7. As provided in 4.1.4, the Body decides on a consequence or a combination of consequences of a non-compliance case from the indicative list.

6.3.8. When the Body makes a determination/decision, it will be informed to all Parties. The determination/decisions will be made public. The Body will submit a report on its actions taken to the COP/moP.

6.3.9. The Party or the group of Parties whose implementation of the commitment was in question is entitled to request re-examination to the COP/moP.

6.3.10. The Body will re-examine the issue when so requested by the COP/moP.

6.4. Committee on the Kyoto Mechanisms

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[27] Timeframe of the procedures, as well as voting rules should be written out elsewhere.
[28] The current roster of experts of UNFCCC might be further elaborated and utilized for this purpose.

6.4.1. The Chair of the Committee on the Kyoto Mechanisms will expeditiously call a meeting when an issue is brought to the Committee's attention in accordance with 3.2. The Chair may decide to hold a committee meeting in an electronic form for the sake of efficiency.

6.4.2. As provided in 4.2.1, the Committee decides whether it proceeds with the issues listed in 3.2. If a question is raised by a Party or a group of Parties other than the Party or the group of Parties directly involved in the transaction of the units, the first meeting of the Committee on a case will consider whether the question raised has sufficient evidence. If found negative, the issue is dismissed. If found positive, it proceeds with the issue.

6.4.3. The Committee will resolve the question expeditiously. In principle, it should make a determination on an issue within 60 days after the issue is brought to the Committee's attention.

6.4.4. The Committee may request, where it considers necessary, through the UNFCCC Secretariat, further information on matters under its consideration by the following means:
(a) The Parties concerned may be requested to submit further information;
(b) Expert review teams under Article 8 of the Protocol may be requested to re-examine facts;
(c) Outside experts may be requested to clarify facts.

6.4.5. The Committee will examine the relevant issues listed in 3.2, considering information provided in accordance with 6.4.4, and from any other sources that the Committee deems appropriate.

6.4.6. The Party or the group of Parties concerned will be given opportunities to express its views to the Committee prior to and after the determination made by the Committee.

6.4.7. When the Committee makes determinations, it will be informed to all Parties. The determination will be made public. The Committee will submit a report on its determination to the Compliance Body and the COP/moP.

6.4.8. The Party or the group of Parties whose implementation was in question is entitled to request re-examination to the Compliance Body.

7. Role of COP/moP

7.1. COP/moP should provide general policy guidance to the Compliance Body and the Committee on the Kyoto Mechanisms;

7.2. COP/moP should receive and review reports from the Compliance Body and the Committee on the Kyoto Mechanisms.

7.3. After reviewing the reports from the Compliance Body and the Committee on the Kyoto Mechanisms, COP/moP should either authorize them or request the Compliance Body to re-examine the case when appropriate.[29]

8. Indicative List

The Indicative list of possible consequences of non-compliance will be as follows:

(a) Appropriate technical and/or financial assistance, including providing advice;

(b) Issuing caution;

(c) Recommendation;

- strengthening of reporting requirements;
- acceptance of teams to examine policies and measures;
- policies and measures;

(d) Recommendation to the Cop/moP to suspend specific rights and privileges under the Protocol in accordance with the applicable rules of international law concerning the suspension on the operation of a treaty [30] (after having exhausted measures (a)-(c) above).

[29] "Negative consensus" system as in WTO case might be considered as an option.

[30] This should be further elaborated.

PAPER NO. 8: NEW ZEALAND

Kyoto Protocol: Compliance

Further Submission from New Zealand

This submission builds upon New Zealand's previous submissions on a compliance regime for the Kyoto Protocol, using the structure provided by the "Co-Chairs Initial Thoughts on Procedures and Mechanisms Relating to a Compliance System under the Kyoto Protocol."

General

Objectives, Nature and Principles

The following are our views on the objectives, nature and principles of the compliance regime. We do not believe it is necessary to develop legal text to cover this; rather, the objectives, nature and principles should provide benchmarks by which to judge the adequacy and effectiveness of the compliance system to be developed.

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, and be structured towards preventing non-compliance.

Incidents of non-compliance should be dealt with in a cooperative and facilitative manner which promotes the protection of the environment. Any compliance response should be relevant to, and consistent with, the environmental objective of the Protocol.

Coverage

The key focus of the compliance system should be on encouraging and facilitating compliance with emission limitation and reduction commitments. While it will be important to establish a comprehensive compliance framework, the core obligation in the Kyoto Protocol to which a compliance system needs to be addressed is the Article 3.1 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 3.1. 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.

Compliance bodies

These should be simple and cost effective, building on existing institutions where necessary and appropriate.

New Zealand proposes a three tier structure for dealing with compliance under the Kyoto Protocol. The first tier would consist of the technical review team operating under Article 8. The second tier would comprise a "Compliance Body" which would assess the findings of the review team and make determinations correcting any problems. Finally, in the interests of due process, a "Review Body" could be established as the third tier of the compliance system. Some elaboration of these institutions is provided below.

Article 8 Review

The Kyoto Protocol already establishes a process for the review of information under Article 8. Article 8 review teams will carry out an important first step in the compliance process by conducting a technical assessment of information and bringing forward factual information regarding reporting and monitoring issues. It would not be appropriate, however, for the review team to make an assessment of compliance or non-compliance (this is the role of the "Compliance Body", see below). The review team may, however, have a role in carrying out the calculations necessary to "adjust" the inventory in accordance with agreed methodologies under Article 5.2.

Compliance Body

A "Compliance Body" will be required to assess the findings of the review team, notify the Party concerned of the results of its assessment, and to make determinations correcting any problems. To ensure an expedient process, this should be a standing body comprising a limited number of scientific, technical and legal experts. In practice, most problems should be solvable through this process and at this level.

Review Body

In order to support due process it may be necessary to consider how a right of appeal could be built in to the system. One possible way to do this would be through a "Review Body", which could meet on an ad-hoc basis to hear questions of appeal as they arise. The right of appeal could be exercised only in limited and defined circumstances, for example where there are serious differences of view over technical or interpretative issues. The "Review Body" should compromise a limited group of experts.

Initiation of the Process

The compliance process could be initiated by a Party or a group of Parties with respect to their own implementation and by a Party or group of Parties with respect to implementation by another.

Functions

The functions of the compliance bodies are elaborated above.

Possible outcomes or consequences of non-compliance or potential non-compliance

The compliance system and the consequences of non-compliance should be designed to promote the achievement of the environmental objective of the Protocol. In order to do this, a facilitative and cooperative approach will be required. Parties should consider what

positive measures of assistance could be used to help overcome implementation or compliance problems.

Exceeding assigned amount

The central obligation in the Kyoto Protocol provides for Parties to ensure that emissions do not exceed their assigned amounts. The Protocol does not explicitly state, however, how this is to be assessed and what should happen if Parties fail to do this. The means of assessment should be made explicit. If Parties are using the mechanisms in Articles 4, 6 12 and 17, it should be expressly stated that if a Party's actual emissions exceed the number of units of account equivalent to their assigned amount then the Party has an issue of compliance on which to respond. It should further be made explicit, as general rule, that if a Party's actual emissions exceed their assigned amount as expressed in comparable units of account then that Party would be liable to make good the difference. These additional requirements would enhance the transparency of compliance and its legal certainty.

Other rules would be required on determining the precise period beyond which a Party would be regarded as out of compliance and when the rules of procedure regarding any action under Article 18 would begin to apply. A "grace period" of, say, six months would be necessary to allow a Party to balance the books and to come into formal compliance.

Further, if after the grace period, a Party has still not been able to comply with its obligation, then a Party might have the option of further purchases at a penalty rate or of an automatic deduction from its next emissions budget, again at a penalty rate, possibly a higher one to reflect the inter-temporal nature of this activity.

Other issues

Relationship with Article 19 - New Zealand regards Article 19 as providing a remedy of last resort, where there are legal disputes over the interpretation or application of the Protocol. In practical terms recourse to such formal dispute settlement is likely to be rare. A more responsive and flexible system will be needed to ensure timely and effective responses to issues of 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.

Grace or "true up" period - As noted above a "grace period" of about six months would be necessary to allow a Party to balance the books and to come into formal compliance.

Compliance action at the domestic level - New Zealand regards domestic compliance systems as an essential part of the overall compliance regime. A fundamental building block of the compliance system will be domestic control measures and their effective implementation at the national level. At this level the precise means of implementation may be different in each case according to the approach to implementation adopted and the particular legal requirements of each national jurisdiction. Whilst the means of domestic implementation would be a matter for individual Parties to determine, the implementation mechanisms, legislative requirements and administrative procedures adopted in each case should be

reported to the UNFCCC for transparency purposes and to foster confidence in the compliance process.

PAPER NO. 9: POLAND
On behalf of Czech Republic, Hungary, Slovakia and Slovenia

Czech Republic, Hungary, Poland, Slovakia and Slovenia are of the opinion that June Meeting of the Joint Working Group on Compliance should consider a legal text – draft decision or amendment. To make it possible March workshop should discuss the elements of the decision, content of that decision and make the list of necessary elements.
In our opinion the decision on the compliance mechanism should describe precisely the procedure of assessment of compliance of a Party and decision-making process. The description of the procedure should constitute a thorough instruction for the Compliance Body to follow.
The decision on compliance should include the following elements:

1. A list of commitments, definitions of non-compliance and the list of consequences in case of non-compliance. Proposed consequences should take into account the degree and frequency of breach.
2. Decision should precisely describe the procedure to be followed. In out opinion it should include the main steps:

    a) Parties send their national inventories and communications to the Secretariat. A Party may also submit to the Secretariat information on possible non-compliance and non-compliance of itself in view of obtaining possible assistance. Annex I national inventories and communications undergo a review. The review team submits its report to the secretariat. This report should include the conclusions listing the commitments and their implementation.
    b) Secretariat prepares lists of problems from the report of Annex I review and sends them together with the review report, non-Annex I communications and other information received from Parties to the Compliance Body.
    c) Compliance Body considers documents and
        i. In case of compliance (when commitments are fulfilled) prepares information for moP.
        ii. Not all commitments fulfilled, country needs assistance – the Compliance Body provides Party with the appropriate assistance (e.g. recommendations) or sends the case to any enabling Body that might be established.
        iii. In case of non-compliance (commitment not fulfilled), e.g. emissions exceeded assigned amount, Compliance Body determines consequences.
    d) Compliance Body assesses if the Party fulfils conditions for participation in flexible mechanisms. Decision on suspension of rights to participate in flexible mechanisms should be communicated to all Parties.
    e) Compliance Body informs the Party about the decision taken.
    f) Party within a given period may provide additional information if not agreeing with the decision taken by the Compliance Body.
    g) Compliance Body considers additional information and informs the Party about its decision.
    h) Compliance Body submits to moP information on decision taken.
3. During the procedure the Compliance Body may request additional information, and a Party has a possibility to submit new information and explanations.
4. Compliance body: status, composition, size, expertise, length of membership, frequency of meetings, functions, voting and quorum rules, time limit, confidentiality.
5. Sources of information

6. Procedures of appeal.
7. As compliance with some commitments may change over time the decision should describe how the compliance Body should address the delay in fulfilment of some commitments and review its decisions on consequences of non-compliance.
8. Role of COP/moP
9. Role of the Secretariat
10. List of consequences. Consequences may include among others:
    - providing advice and facilitating assistance,
    - publication information on non-compliance
    - cautions
    - suspension of right to participate in Kyoto mechanisms
    - suspension of rights under the Protocol
    - obligation to buy excess at a penalty price.

PAPER NO. 10: PORTUGAL

Presidency of the EU

SUBMISSION BY PORTUGAL ON BEHALF OF THE EUROPEAN COMMUNITY, ITS MEMBER STATES AND BULGARIA, ESTONIA, LITHUANIA AND ROMANIA

ON

A COMPLIANCE SYSTEM UNDER THE KYOTO PROTOCOL

1. Portugal on behalf of the European Community, its Member States and Bulgaria, Estonia, Lithuania and Romania welcomes the invitation by the Joint Working Group on Compliance to submit further proposals on compliance (FCCC/SB/1999/CRP.7). While developing our submission we have found the co-Chairs' paper, dated 3 November 1999, setting out their initial thoughts on procedures and mechanisms relating to a compliance system particularly valuable as an aid to focussing our thinking and it would serve as a very sound basis for the work of the Joint Working Group in developing a compliance system. The European Community, its Member States and Bulgaria, Estonia, Lithuania and Romania remain interested to hear and benefit from the views of other Parties.

2. The views of the European Community, its Member States and Bulgaria, Estonia, Lithuania and Romania on a comprehensive compliance system have been elaborated in co-ordination with the development of the ideas concerning, in particular, the mechanisms and methodological issues. Thus, this submission has to be read in conjunction with the submissions on the above mentioned topics, in particular, the submissions on article 5.2 and articles 7 and 8 of the Protocol (dated 1 February 2000).

3. This submission is structured as follows: headings are divided into a narrative description of our views on the elements of a compliance system, and draft legal text - also included in full in an Annex.

General

4. The European Community, its Member States and Bulgaria, Estonia, Lithuania and Romania believe that the primary objective of the compliance system should be to prevent cases concerning non-compliance and disputes from arising. The system should thus promote implementation of the Kyoto Protocol by providing advice and assistance to individual Parties and overcoming difficulties encountered by such Parties. However, it should also impose consequences, including sanctions, where a Party fails to fulfil its obligations under the Protocol.

5. Collection, communication and review of information will be corner stones of the compliance system, and in this respect the review process of article 8 will play a central role (see the submissions of the European Community, its Member States and Bulgaria, Czech Republic, Estonia, Lithuania, Poland, Romania and Slovakia on articles 7 and 8 of the Protocol, dated 1 February 2000).

6. The compliance system should be comprehensive, coherent, transparent, efficient and effective, and it should be based on the principles of due process, proportionality, predictability and equality of Parties.

7. These characteristics do not, we consider, need to be listed in the text, as their existence will be apparent from the design of the compliance system. It would, however, be desirable to spell out the purposes or objectives of the system in the text. Such an article might read as follows:

The objectives of the compliance system are to:

a) Provide advice and assistance to individual Parties in implementation of the Kyoto Protocol;

b) Overcome difficulties encountered by individual Parties in implementation of the Protocol;

c) Prevent cases of non-compliance and disputes from arising; and

d) Impose consequences, including sanctions, where appropriate, if a Party fails to fulfil its obligations in and under the Protocol.

Coverage

8. We believe that the compliance system should be comprehensive and thus apply to all obligations under the Protocol. Of particular significance will be its application to policies and measures (Article 2); quantified emission limitation and reduction commitments (Article 3); methodologies and reporting (Articles 5 and 7 as well as the guidelines and modalities developed under those articles); and any obligations arising under the relevant principles, rules, modalities and guidelines developed for the Kyoto Mechanisms: joint implementation (Article 6), clean development mechanism (Article 12) and emissions trading (Article 17). We consider that the compliance system should apply to the Kyoto mechanisms in conjunction with any special or additional rules on compliance contained in the rules and procedures relating to such mechanisms.

9. An article determining the scope of the compliance system could read as follows:

This compliance system shall apply to all obligations in and under the Protocol.

Compliance body

10. The European Community, its Member States and Bulgaria, Estonia, Lithuania and Romania considers that there should be a standing compliance body, since it will have an important and continuing task to fulfil under the Kyoto Protocol. A standing body will be

able to develop consistent practices and apply an evenness of approach to its work that will be in the interest of effective supervision of compliance by Parties with their obligations.

11. The compliance body should have both facilitative and enforcement functions which should be exercised in two separate branches. Because of the difference in their functions, there should also be a separate membership for the two branches.

12. We believe that the compliance body should be of limited size and should be composed of experts of recognised competence in relevant fields, such as those of science, socio-economics and law. Members of the enforcement branch should have judicial experience, or exposure to such experience. However, in performing its tasks the body should be allowed to draw upon such outside expertise, as it deems necessary. The members should be designated by the COP/MOP for four years, and should serve in their personal capacity. A provision should be made to make it possible for those who are elected to serve for up to two consecutive terms. The COP/MOP should assign two thirds of the individuals elected to serve in the body for the duration of their term to the facilitative branch and one third to the enforcement branch.

13. The compliance body should have a plenary meeting at least once a year. The two branches should, however, meet as often as necessary to fulfil their functions.

14. Provisions defining the structure of the compliance body could read as follows:

A Compliance Committee ("the Committee") is hereby established.

The Committee shall consist of [fifteen] members. It shall be composed of persons who are experts of recognised competence in relevant fields, such as those of science, socio-economics and law. The Committee may draw upon such outside expertise, as it deems necessary.

The members of the Committee shall be designated by the COP/MOP for four years. The COP/MOP shall elect [eight] members for a term of two years and [seven] members for a term of four years. At each biennium thereafter, the COP/MOP shall alternately elect [eight/seven] new members for a term of four years. They shall be elected and shall serve in their personal capacity. Outgoing members may be re-elected for one consecutive term.

Two thirds of the individuals elected to serve on the Committee shall be assigned for the duration of their term to the facilitative branch and one third of the individuals shall be assigned for the duration of their term to the enforcement branch.

The Committee shall have a plenary meeting at least once a year. The members of the branches shall meet as often as necessary to fulfil their functions. The Secretariat shall arrange for and service the meetings of the Committee and its branches.

Initiation of the process (references)

15. We consider that a single Party or a group of Parties should be able to bring matters to the attention of the facilitative branch, in order to address and determine non-compliance with respect to its or their own implementation or with respect to the implementation by another Party or group of parties. Furthermore, the Secretariat should be authorised to bring to the attention of the facilitative branch any information concerning a Party's possible non-

compliance. There might also be a case for the automatic initiation of the process in the case of certain, pre-specified situations, particularly in relation to the mechanisms.

16. A draft article could read as follows:

Questions regarding the implementation of the Protocol may be brought to the attention of the facilitative branch of the Committee, with corroborating information, by:

(a) A Party or a group of Parties with respect to its or their own implementation;

(b) A Party or a group of Parties with respect to the implementation by another Party or group of Parties; and

(c) The Secretariat.

Functions

17. We consider that the facilitative branch and the enforcement branch should have separate functions. The facilitative branch should receive and consider any information regarding a Party's implementation of its obligation under the Protocol and decide which avenues to pursue. The main function of the facilitative branch should be to provide advice and assistance to the Party concerned regarding implementation. At any time, the facilitative branch may refer a case to the enforcement branch, if no constructive solution is found.

18. The enforcement branch should receive and review individual cases referred to it by the facilitative branch. On the basis of those referrals, the enforcement branch should determine, in individual cases, the consequences, including sanctions, of non-compliance. Furthermore, in order to meet the need for an expedited procedure, the enforcement branch should deal with cases, on the basis of information referred to it by the Secretariat, in particular, those concerning the operation of the mechanisms.

19. The expedited procedure should address issues concerning the functioning of the Kyoto mechanisms, in particular the eligibility criteria for participation in the mechanisms. It would allow the Secretariat to refer a case (e.g. with the approval of the facilitative branch or its head) to the enforcement branch for consideration.

20. A draft article on functions could read as follows:

The functions of the facilitative branch are:

(a) to receive and consider any information regarding a Party's implementation of an obligation in and under the Protocol;

(b) to request, where it considers necessary, through the Secretariat, further information on matters under consideration;

(c) to gather, with the concurrence of the Party concerned, additional information in the territory of that Party; [this may include site visits;] and

(d) to provide advice and assistance to the Party concerned regarding its implementation of the Protocol.

The functions of the enforcement branch are:

(a) to determine appropriate provisional measures to safeguard the functioning of the Kyoto mechanisms in accordance with the expedited procedure [referred to in paragraph...].

(b) to receive and review individual cases referred to it by the facilitative branch regarding a Party's compliance with its obligations in and under the Protocol;

(c) to receive and review communication submitted to it by way of the Secretariat regarding another Party's compliance with its obligations under the Protocol; and

d) to determine, in individual cases, the consequences, including sanctions, of non- compliance under paragraphs b) and c) above.

Sources of information

21. The timely availability of transparent, consistent, complete, comparable and accurate information provided pursuant to articles 5 and 7 will be an essential element of the compliance system. In this regard, review of national greenhouse gas inventories and national communications undertaken pursuant to article 8 will play a central role in the compliance system. A thorough and comprehensive technical assessment of the implementation by a Party of the Protocol, and questions arising from such an assessment, both form part of a comprehensive compliance system providing a factual basis for compliance/non-compliance determination.

22. The structure and nature of the compliance system should be taken into account when further elaborating guidelines for national systems, for the preparation of national communications and for the review of implementation.

23. In particular, it is important to establish, as already mentioned, a link between the review process and the compliance process (see the submission of European Community, its Member States and Bulgaria, Czech Republic, Estonia, Lithuania, Poland, Romania and Slovakia on article articles 7 and 8 KP, dated 1 February 2000). Since the purpose of the review process is to provide factual information for determining whether or not a Party is in compliance, the expert review team should not possess authority to initiate, on its own determination, a non-compliance procedure. One possibility is that all reports of the expert review teams should automatically be referred to the facilitative branch of the Committee, which would make the formal decision on how to proceed in the compliance process. Moreover, it might be desirable to adopt provisions on the authorisation of site visits and notice periods concerning such visits.

24. In addition to the information provided under articles 5, 7 and 8, the compliance body should consider any relevant information forwarded to it. In order to assist it in the performance of its functions, the compliance body should be entitled to request, through the Secretariat, further information on matters under its consideration from the Party/body that

triggers the compliance process or the Party in respect of which the process is commenced or from any other source that may be in possession of relevant information.

Secretariat

25. The Secretariat should provide administrative and technical support to the two branches of the Compliance Committee. It should also service the meetings of both branches. Furthermore, it should co-ordinate the work of the review teams in accordance with article 8 of the Protocol. As noted above, as part of its support function the Secretariat should bring to the attention of the facilitative branch, respectively to the enforcement branch, significant information concerning a Party's possible non-compliance. In addition, the Secretariat will have a role with regard to the administration and operation of the Kyoto mechanisms.

Procedure

26. It is important to specify the procedure to be applied in the compliance process. The compliance body could adopt more detailed standard operating procedures for the facilitative branch and rules of procedure for the enforcement branch.

27. The facilitative branch of the Compliance Committee may, at any time, refer a case to the enforcement branch if no constructive solution is found. The facilitative branch could conclude that the information provided by a Party is insufficient to determine whether such Party is in compliance, and despite repeated requests and/or site visits no sufficient information has been made available within a reasonable period of time, or that there is, based on the information available to the facilitative branch, a prima facie case of non-compliance with a Party's obligations under the Protocol that has not been solved or cannot reasonably be expected to be solved through facilitative measures. The facilitative branch may conclude that a matter cannot be reasonably expected to be solved through facilitative measures, for example, if a Party fails to co-operate with the facilitative branch and accept the assistance or advice offered by the facilitative branch and thus to bring itself in compliance within a reasonable period of time set by the facilitative branch.

28. There should also be special provisions for an expedited procedure addressing issues concerning the functioning of the Kyoto mechanisms, in particular the eligibility criteria for participation in the mechanisms.

29. Information exchanged by or with the compliance body should be generally available upon a request. However, the confidentiality of any information received in confidence will have to be secured.

30. The issue of the right to appeal must be further elaborated.

31. The procedural provisions could read as follows:

> *Where a Party concludes that, despite having made its best, bona fide efforts, it is or will be unable to comply fully with its obligations under the Protocol, it may address to the Secretariat a submission in writing, explaining, in particular, the specific circumstances that it considers to be the cause of its non-compliance. The Secretariat shall transmit such submission to the facilitative branch of the Committee, which shall consider it as soon as practicable.*

If one or more Parties have reservations regarding another Party's implementation of its obligations under the Protocol, those concerns may be addressed in writing to the Secretariat. Corroborating information shall support such a submission. The Secretariat shall, within two weeks of its receiving the submission, send a copy of that submission to the Party whose implementation of a particular provision of the Protocol is at issue. Any reply and information in support thereof is to be submitted to the Secretariat and to the Parties involved within three months of the date of the despatch or such longer period as the circumstances of any particular case may require. The Secretariat shall then transmit the submission, the reply and the information provided by the Parties to the facilitative branch of the Committee, which shall consider the matter as soon as practicable.

Where the Secretariat becomes aware of possible non-compliance by any Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response from the Party concerned within three months or such longer period as the circumstances or the matter may require or the matter is not resolved through administrative action or through diplomatic contacts, the Secretariat shall inform the facilitative branch of the Committee accordingly.

A Party identified in a submission forwarded to the Committee shall be entitled to nominate a person to take part in the consideration by the Committee of the submission. The Party or Parties concerned shall be given the opportunity to comment on the draft conclusions and recommendations of the Committee, but shall not take part in the elaboration and adoption of decisions of the Committee on that matter.

No member of the Committee, who is a national of a Party that is involved in a matter under consideration by the Committee, shall take part in the elaboration and adoption of decisions of the Committee on that matter.

The facilitative branch may decide at any time to refer a case to the enforcement branch if:

> *a) the information provided by a Party is insufficient to determine whether such Party is in compliance, and despite repeated requests and/or site visits no sufficient information has been made available within a reasonable period of time; or*
>
> *b) there is, based on the information available to the facilitative branch, a prima facie case of non-compliance with a Party's obligations under the Protocol that has not been solved or cannot reasonably be expected to be solved through facilitative measures.*

The Secretariat may refer a case with the approval of the facilitative branch/the Head of the facilitative branch to the enforcement branch for appropriate action.

The members of the Committee and any Party involved in its deliberation shall protect the confidentiality of information they receive in confidence.

Role of the COP/MOP

32. The Compliance body, like all other bodies under the Kyoto Protocol, will be subject to the overall policy-guidance by the COP/MOP. In particular, the Committee should report on its activities to the COP/MOP on a regular basis.

33. A draft provision could read as follows:

The Committee shall report on its activities, through the Secretariat, to each ordinary session of the COP/MOP.

Possible Outcomes or consequences of non-compliance or potential non-compliance

34. The outcome, or aim, of the compliance system should be to bring about full compliance by individual Parties with their obligations under the Protocol. Compliance should as far as possible be promoted through incentive measures. For example, the compliance system could apply the following facilitative measures:

- assistance (providing technical assistance, financial assistance or advice to individual parties);

- peer pressure (e.g. publication of a decision by the facilitative branch on a Party's potential non-compliance);

- issuing cautions (warnings).

35. Consequences to be indicated by the enforcement branch should be designed so as to serve the overall substantive goal of sustainable development through quantified emission limitation and reduction commitments as specified in the Protocol. A specific breach should be met with a consequence that will reflect the nature of the obligation by a Party and that should be proportionate to the breach. This could cover options ranging from a basic finding of non-compliance to sanctions. In that regard, we are currently reflecting upon different possible outcomes.

Other issues

36. With regard to the relationship between the compliance procedure and settlement of disputes, we note that key precedents in the field of the environment, such as the non-compliance procedures under the Montreal Protocol on Substances that Deplete the Ozone Layer and the 1979 Convention on Long-range Transboundary Air Pollution and its protocols, are applied without prejudice to dispute settlement procedures. We consider, however, that the circumstances of the Kyoto Protocol may require clarification of the relationship between the compliance procedure and dispute settlement procedures.

37. With regard to the evolution of the compliance system, we consider that there should be provision for the procedure to be amended in order to take account of any amendment to the Protocol, decisions of the COP/MOP or experience gained with the working of the process.

38. Finally, we would like to recall that it is well-established under international law that parties to an international agreement must adopt appropriate measures at the national level, including legislative and enforcement measures, to ensure compliance with the obligations undertaken. Therefore, it goes without saying that there is also a need for strong internal compliance systems in addition to establishing a compliance regime at the international level.

ANNEX

This annex reflects the preliminary thoughts of the European Community, its Member States and Bulgaria, Estonia, Lithuania and Romania on a compliance system under the Kyoto Protocol.

Purpose and scope

1. The objectives of this compliance system are to:

(a) Provide advice and assistance to individual Parties in implementation of the Kyoto Protocol ("the Protocol");

(b) Overcome difficulties encountered by individual Parties in implementation of the Protocol;

(c) Prevent cases of non-compliance and disputes from arising; and

(d) Impose consequences, including sanctions, where appropriate, if a Party fails to fulfil its obligations in and under the Protocol.

2. This compliance system shall apply to all obligations in and under the Protocol.

Structure and function of the Compliance Committee

3. A Compliance Committee ("the Committee") is hereby established.

4. The Committee shall consist of [fifteen] members. It shall be composed of persons who are experts of recognised competence in relevant fields, such as those of science, socio-economics and law. The Committee may draw upon such outside expertise, as it deems necessary.

5. The members of the Committee shall be designated by the COP/MOP for four years. The COP/MOP shall elect [eight] members for a term of two years and [seven] members for a term of four years. At each biennium thereafter, the COP/MOP shall alternately elect [eight/seven] new members for a term of four years. They shall be elected and shall serve in their personal capacity. Outgoing members may be re-elected for one consecutive term.

6. The Committee shall by consensus:

a) elect its chairman and the heads of its branches; and

b) adopt its own rules of procedure.

7. The Committee shall have two functions: a) facilitative and b) enforcement. The facilitative functions of the Committee are those sets out in paragraph 9 and its enforcement functions are those set out in paragraph 10.

8. Two thirds of the individuals elected to serve on the Committee shall be assigned for the duration of their term to the facilitative branch and one third of the individuals shall be assigned for the duration of their term to the enforcement branch.

9. The functions of the facilitative branch are:

(a) to receive and consider any information regarding a Party's implementation of an obligation in and under the Protocol;

(b) to request, where it considers necessary, through the Secretariat, further information on matters under consideration;

(c) to gather, with the concurrence of the Party concerned, additional information in the territory of that Party; [this may include site visits;] and

(d) to provide advice and assistance to the Party concerned regarding the implementation of the Protocol.

10. The functions of the enforcement branch are:

(a) to determine appropriate provisional measures to safeguard the functioning of the Kyoto mechanisms in accordance with the expedited procedure [referred to in paragraph...];

(b) to receive and review individual cases referred to it by the facilitative branch regarding a Party's compliance with its obligations in and under the Protocol;

(c) to receive and review communication submitted to it by way of the Secretariat regarding another Party's compliance with its obligations under the Protocol; and

d) to determine, in individual cases, the consequences, including sanctions, of non- compliance under paragraphs b) and c) above.

11. The Committee shall report on its activities, through the Secretariat, to each ordinary session of the COP/MOP.

Procedure

12. The Committee shall have a plenary meeting at least once a year. The members of the branches shall meet as often as necessary to fulfil their functions. The Secretariat shall arrange for and service the meetings of the Committee and its branches.

13. Questions regarding the implementation of the Protocol may be brought to the attention of the facilitative branch of the Committee, with corroborating information, by

(a) A Party or a group of Parties with respect to its or their own implementation;

(b) A Party or a group of Parties with respect to the implementation by another Party or group of Parties;

(c) The Secretariat

14. Where a Party concludes that, despite having made its best, bona fide efforts, it is or will be unable to comply fully with its obligations under the Protocol, it may address to the Secretariat a submission in writing, explaining, in particular, the specific circumstances that it considers to be the cause of its non-compliance. The Secretariat shall transmit such submission to the facilitative branch of the Committee, which shall consider it as soon as practicable.

15. If one or more Parties have reservations regarding another Party's implementation of its obligations under the Protocol, those concerns may be addressed in writing to the Secretariat. Corroborating information shall support such a submission. The Secretariat shall, within two weeks of its receiving the submission, send a copy of that submission to the Party whose implementation of a particular provision of the Protocol is at issue. Any reply and information in support thereof is to be submitted to the Secretariat and to the Parties involved within three months of the date of the despatch or such longer period as the circumstances of any particular case may require. The Secretariat shall then transmit the submission, the reply and the information provided by the Parties to the facilitative branch of the Committee, which shall consider the matter as soon as practicable.

16. Where the Secretariat becomes aware of possible non-compliance by any Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response from the Party concerned within three months or such longer period as the circumstances or the matter may require or the matter is not resolved through administrative action or through diplomatic contacts, the Secretariat shall inform the facilitative branch of the Committee accordingly.

17. A Party identified in a submission forwarded to the Committee shall be entitled to nominate a person to take part in the consideration by the Committee of the submission. The Party or Parties concerned shall be given the opportunity to comment on the draft conclusions and recommendations of the Committee, but shall not take part in the elaboration and adoption of decisions of the Committee on that matter.

18. No member of the Committee, who is a national of a Party that is involved in a matter under consideration by the Committee, shall take part in the elaboration and adoption of decisions of the Committee on that matter.

19. The facilitative branch may decide at any time to refer a case to the enforcement branch if:

a) the information provided by a Party is insufficient to determine whether such Party is in compliance, and despite repeated requests and/or site visits no sufficient information has been made available within a reasonable period of time; or

b) there is, based on the information available to the facilitative branch, a prima facie case of non-compliance with a Party's obligations under the Protocol that has not been solved or cannot reasonably be expected to be solved through facilitative measures.

20. The Secretariat may refer a case with the approval of the facilitative branch/the Head of the facilitative branch to the enforcement branch for appropriate action.

21. The members of the Committee and any Party involved in its deliberation shall protect the confidentiality of information they receive in confidence.

Outcomes or Consequences

22. Any measures and consequences concerning a possible or established non-compliance by a Party shall serve the objectives of the Kyoto Protocol.

23. [Measures to be taken by the facilitative branch]

24. [Consequences to be imposed by the enforcement branch]

Other Provisions

- Relationship to Article 16 and Article 19
[to be further developed]

Evolution

25. These terms of procedure may be amended to take account of any amendment to the Protocol, decisions of the COP/MOP or experience gained with the working of the process.

PAPER NO. 11: SAMOA

SUBMISSION of SAMOA on behalf of the ALLIANCE OF SMALL ISLAND STATES (AOSIS)

PROCEDURES AND MECHANISMS RELATING TO A COMPLIANCE SYSTEM UNDER THE KYOTO PROTOCOL

Introduction

1. The Joint Working Group on Compliance (JWG) meeting at the eleventh sessions of the Subsidiary Bodies to the Convention, invited Parties to make submissions to the Secretariat on the further development of a compliance system under the Kyoto Protocol. AOSIS welcomes this opportunity to present its views on this issue, and calls the attention of delegations to the group's earlier submissions contained in FCCC/SB/1999/MISC.4 and MISC.12.

2. This submission elaborates the concepts contained in previous AOSIS submissions, and places them in a structure that tracks the discussions thus far in the JWG. It also seeks to indicate how these concepts could best be reflected in a Decision on the Establishment of a Compliance System for the Kyoto Protocol to be adopted at the sixth session of the Conference of the Parties. While AOSIS is committed to working with other delegations to ensure that the text of such a Decision is ready for adoption at COP-6, more work needs to be done to promote consensus on basic approaches to the compliance system before negotiating text can be developed.

3. AOSIS strongly supports the need for a robust and effective Compliance System at the international level. However, AOSIS wishes to draw attention, once again, to the overriding importance of strong domestic compliance regimes in enforcing emissions reductions at their source, both in Annex I Parties and in non-Annex I Parties that are hosting CDM projects.

General issues

Objectives and nature

4. The main **objective** of the compliance system is to provide a transparent, predictable, and effective means of promoting the compliance by Parties with the Protocol's commitments.

5. The **nature** of the system should be comprehensive and coherent, covering all of the Protocol's commitments, but graduated in a way that takes into account the differing characteristics of these commitments. While the main focus of the system should be on facilitating Parties' compliance in a non-confrontational manner, the system should also be capable of dealing with issues that have ripened into full "disputes" or that require a formal judgement and response to non-compliance.

6. *AOSIS feels that these objectives should guide negotiators in the development of the Compliance System and should be reflected, generally, in whatever text is agreed. While these objectives could be set out in preambular text, or in the report accompanying the adoption of the Compliance System, it is not essential that they be catalogued in the operative text of the Decision.*

Principles

7. AOSIS believes that the compliance system should be:

- preventative and precautionary, in that it should aim to prevent non-compliance before it occurs and carry out assessments based upon the precautionary approach;
- comprehensive and coherent, in that it should be capable of addressing issues related to all commitments under the Protocol;
- credible, in that it should be able to take up, examine and effectively resolve compliance related issues, without political intervention;
- transparent, in that its rules and procedures should be clearly and simply stated, and the reasoning and results should be based on sound information and be made publicly available;
- graduated and proportionate, in that the procedures and mechanisms should take into account the cause, type, degree and frequency of non-compliance, and the common but differentiated characteristics of Parties' commitments and capacities;
- predictable, in that Parties should be able to know in, advance, the range of consequences that might attach to different categories of non-compliance; and
- based on principles of efficiency and due process, that allow Parties, and in particular the Party concerned, an opportunity for a full, fair and timely resolution of compliance-related issues.

8. *AOSIS would like to see these principles set out in the text of the Decision Establishing the Compliance System. These principles are consistent with the spirit of the Convention and the Protocol, and appear to enjoy a broad-based of support among those delegations that have made submissions and that have participated in the JWG. Incorporating them into the text of a Compliance Decision will provide a useful guide for the operation and future development of a Compliance System*.

Coverage

9. The Compliance System should address any issue related to the non-compliance or potential non-compliance of a Party with its commitments under the Protocol. It is, however, anticipated that the timing and specificity of these commitments will in large part determine the timing, nature and proportionality of the System's response to these issues.

10. The Compliance System will also need to address compliance related issues raised by the Protocol's expert review process and issues associated with the eligibility of Parties to participate in the Protocol's mechanisms.

11. *For drafting purposes issues of coverage should be reflected in text related to the initiation of various procedures under the Compliance System and the functions to be performed by the institutional arrangements for the Compliance System.*

Functions and Institutional Arrangements

12. A Compliance System under the Protocol will need to accommodate four basic functions that are sufficiently distinct to justify discrete institutional arrangements:

Function	*Institutional Arrangement*
1. **Technical Assessment** of information submitted by Annex I Parties under Articles 5 and 7 and: ➢ Identification of potential problems or questions of implementation arising from the assessment; ➢ Referral of problems or questions to the Compliance Committee and to the Mechanism Eligibility Committee	Expert Review Teams (ERT)
2. **Determination of eligibility of a Party** to participate in the Mechanisms	Mechanism Eligibility Committee (MEC)
3. **Promoting Parties' compliance** with Protocol commitments	Compliance Committee (CC)
4. **Final determination of non-compliance with Article 3.1** and imposition of penalties and consequences	Enforcement Panel process

13. The status, size, composition, and operational modalities of the Mechanism Eligibility Committee, the Compliance Committee and an Enforcement Panel process will need to be developed in the text of a Decision on a Compliance System. AOSIS has formulated the following preliminary views on how each of these might be developed:

Mechanism Eligibility Committee (MEC)

14. The MEC could be a standing committee with a membership of approximately ten individuals with technical expertise in the design and operation of the Mechanisms. Members could be selected by the COP/MOP, upon the nomination of the Secretariat, on the basis of equitable geographical distribution, and would serve in their personal capacities. The membership could include at least one *ex officio* member of the CDM Executive Board.

15. The MEC could conduct rapid technical determinations of whether a Party is in conformity with the principles, modalities, rules and guidelines agreed by the COP and COP/MOP in the further elaboration of Articles 6, 12 and 17. Such determinations could be made, as a matter of course, for all Parties wishing to participate in the Mechanisms for any given calendar year, and would be based upon Parties' national communications and any reports from the ERT process. The MEC could also consider any referrals from the Compliance Committee. Any Party found ineligible that wished to participate in the mechanisms could seek to have the determination reversed or mitigated by the Compliance Committee.

16. The technical determinations made by the MEC could be carried out with the facilitation of the Secretariat and rely predominantly on electronic correspondence.

Compliance Committee

17. The Compliance Committee could be standing in nature and comprised of 15-21 members, elected by the COP/MOP on the basis of equitable geographical distribution. Members could be required to have expertise in scientific, socio-economic and legal fields relevant to the implementation of the Protocol. Members would serve in their personal capacities. The Committee would elect a Chairman and would adopt its own rules of procedure.

18. The functions of the Compliance Committee could be to:

- receive, consider and report on any problems or questions of implementation or compliance of any Party or Parties referred it to it, through the Secretariat, by the ERTs, and/or by any Party or Parties;

- provide technical and practical advice and assistance;

- facilitate financial and technical assistance through the Financial Mechanism and through any other available channels;

- seek clarifications and further data from relevant Parties and whatever other sources it deems appropriate;

- undertake information-gathering through country visits;

- instruct the Eligibility Committee to re-instate or to suspend the eligibility of a Party to participate in the Mechanisms during the current commitment period;

- publicise potential and actual non-compliance;

- issue cautions against potential and actual non-compliance;

- suspend rights and privileges of Parties applicable to the current commitment period;

- initiate, on its own volition, or, by negative consensus, upon the request of a Party or group of Parties, an Enforcement Panel process charged with the determining whether an identified Party has failed to comply with its commitments under Article 3.1.

19. The Compliance Committee could, unless it decided otherwise, meet twice a year in conjunction with the meetings of the subsidiary bodies and of the COP/MOP.

Enforcement Procedures

20. Final determinations of non-compliance with Article 3.1 and the imposition of any penalties in response to such non-compliance could be made by an Enforcement Panel. The Enforcement Panel procedure could be initiated by the Compliance Committee, or in response to a request by a Party or group of Parties. Requests from a Party or group of Parties would have to be supported by corroborating information, and would will lead, automatically to the initiation of an Enforcement procedure unless rejected by a consensus of the Compliance Committee.

21. When the Committee has initiated the Enforcement Procedures on its own volition, the complaint could be taken forward by the Chairman of the Committee. When the procedure has been initiated at the request of a Party or group of Parties it could be taken forward by that Party or group of Parties.

22. Enforcement Panel members could be *ad hoc* or standing in its nature. If ad hoc, its membership could be selected from a roster of legal experts established by the Parties. The procedures of the Panel could be modelled on rules for binding intergovernmental arbitration that have been developed under other regimes.

Penalties in Response to Non-Compliance with Article 3.1

23. AOSIS understands the term "binding consequences" as used in Article 18, and as referred to in this submission, as meaning a range of penalties that have been identified by the Parties in advance, and that impose obligations on the defaulting Party that are punitive in nature, i.e., that impose a penalty in addition to requiring full compliance with commitments under the Protocol. Such penalties would only be imposed on a Party as a result of its breach of Article 3.1, and could therefore only be assessed at the end of the commitment period.

24. These could include, for example, financial penalties, suspension or limitations on participation in Mechanisms in a subsequent commitment period, or penalties in the form of additional commitments in a subsequent commitment period. Penalties in the form of additional commitments in a subsequent period would only be acceptable if agreed subsequent to the adoption of commitments within that subsequent commitment period.

25. AOSIS is continuing to formulate its views on appropriate penalties in response to non-compliance with Article 3.1.

26. The term "binding consequences" as it is used in Article 18 does not include the mandatory suspension of rights or privileges associated with the current commitment period, such as eligibility to participate in mechanisms, or the surrender of banked emissions or "compliance reserves".

PAPER NO. 12: SAUDI ARABIA

SUBMISSION OF PROPOSALS BY SAUDI ARABIA

TO

JOINT WORKING GROUP ON COMPLIANCE

January 2000

Saudi Arabia respectfully requests the Co-Chairs of the Joint Working Group on Com-pliance (JWG) and the Secretariat to include in the paper they develop pursuant to Paragraph 6(d) of the "Report of the Joint Working Group on Compliance on Its Work During the Eleventh Sessions of the Subsidiary Bodies" (FCCC/SB/1999/CRP.7) the following proposals:

1. All proposals previously submitted by Saudi Arabia, as set forth in the following paragraphs of the "Synthesis of Submissions" (FCCC/SB/1999/7/Add.1, dated 17 September 1999): 9, 18, 29 (including all subparagraphs), 57, 58, 76, 77, 78, 79, 80, 109, 110, 122, 134, 142, 167, 173, 179, 190, 201, 210, 211, 212, 213, 225, 235, 236, 258, 267, 281, 282, 283, 284, 295, 305, 333, 346, 354, 355, 367, and 368.

2. In the event it is decided that non-compliance with Article 5.1 of the Kyoto Protocol (or with guidelines adopted pursuant to Article 5.1) should result in use or applica-tion of the procedures and mechanisms relating to compliance under the Protocol, whether or not resulting in "binding consequences" to the non-complying Party, the fact that there has been, or may be, adjustment to the non-complying Party's esti-mated anthropogenic emissions by sources and removals by sinks, pursuant to Article 5.2, shall not bar use or application of such procedures and mechanisms nor bar impo-sition of "binding consequences" against the non-complying Party.

3. In order to develop on a more informed basis the procedures and mechanisms relating to compliance under the Kyoto Protocol, the JWG should:

(a) Request the Co-Chairs of the JWG to arrange for a comprehensive report to be made to the JWG as early as possible in the course of its work during the twelfth sessions of the SBI and the SBSTA, which report identifies, and discusses the status of, all proposals pending before any contact group or similar body concerning rules, principles, guidelines, modalities, and pro-cedures to implement any provision of the Kyoto Protocol to the extent the Co-Chairs of the JWG, or either of them, believe, or have reason to believe, that such proposals may influence the development by the JWG of any aspect of the procedures and mechanisms relating to compliance or non-compliance with such rules, principles, guidelines, modalities, and procedures;

(b) Discuss the aforesaid report and, in light of such discussion, should request the Co-Chairs of the JWG to forward to the Chair of any contact group or similar body such questions or comments as the JWG, or any Party partici-pating in the JWG, may have with respect to proposals referred to in the report or in the JWG's discussion of the report; and

(c) Develop, at least on a tentative basis, a definition or understanding of what types of consequences (including loss or temporary suspension of, or any other limitation upon, rights or privileges contained in or contemplated by the Kyoto Protocol or increase in any duty or commitment contained in or con-templated by the Protocol) should be regarded as constituting “binding consequences” within the meaning of Article 18 of the Kyoto Protocol, including examples thereof.

PAPER NO. 13: SOUTH AFRICA

FURTHER SUBMISSION BY SOUTH AFRICA RELATING TO A COMPLIANCE SYSTEM UNDER THE KYOTO PROTOCOL

South Africa wishes to make a further submission with regard to specific aspects relating to the compliance system to which lesser attention was paid in our previous submissions. The question of the linkages of the compliance system with the provisions of other articles relevant to compliance need further consideration. Another aspect that we wish to consider in more detail is the kind of consequences that would be attached to cases of non-compliance.

1. Linkages

In our previous submissions South Africa expressed the view that a comprehensive compliance system should be developed and structured in such a manner that it would be able to address **any issue related to the non-compliance** or potential non-compliance of a Party with its commitments under the Protocol. The compliance system should thus be applicable to all obligations under the Protocol and should not be fragmented.

Specific aspects of the Kyoto Protocol as reflected in various articles would be of particular relevance in the development of the compliance system. These include Article 3 on quantified emission limitation and reduction commitments; reporting requirements set out in Articles 5 and 7; the role of expert review teams as defined in Article 8; the Kyoto Mechanisms namely joint implementation in Article 6, Article 12 on the clean development mechanism and emissions trading contained in Article 17. The linkages with Articles 16 and 19 also need further consideration.

Article 3 contains the crucial obligations on which any determination of compliance should focus. The compliance procedures to be established should be such that it would be able to ensure that the overall aim of the compliance system is achieved, namely to ensure compliance with the quantified emission limitation and reduction commitments stipulated in Article 3.

Timely, reliable and comprehensive reporting on the basis of Articles 5 and 7 is an essential aspect to ensure compliance and the compliance system should take note of the obligations stipulated in these articles. A comprehensive compliance system should by necessity provide for differentiation between different obligations. For example an assessment of the obligations contained in Articles 5 and 7 could be done annually whilst others such as those contained in Article 3 will have to be assessed at the end of the commitment period.

The expert review process under Article 8 that will provide a "thorough and comprehensive technical assessment of all aspects of the implementation by a Party" of the Protocol will be an important element of the compliance system. This technical assessment and verification of Parties' inventories and reporting will in our view be the major instrument through which compliance would be determined, as such determination will be contingent on the technical/factual assessment of the

Parties' performance in meeting their obligations. As far as the role of the expert review teams are concerned, it is noted that they are mandated to provide a thorough and comprehensive technical review of an Annex I Party's implementation of the Protocol and to prepare reports to the COP/moP in which an assessment of Parties' implementation of commitments are given. These expert review teams should not determine compliance but should provide the technical and factual assessment of the compliance of Parties. A separate independent and impartial body should be tasked to do the determination of non-compliance as such a determination may involve legal as well as policy issues. In this regard we note that the COP/moP does not appear to be an appropriate body/forum to undertake the task of determining compliance due to its nature, size and annual meeting schedule.

The Multilateral Consultative Process (MCP) adopted under Article 13 of the Convention could with the appropriate modification under Article 16 of the Protocol contribute to the facilitative "arm" of the compliance system by preventing non-compliance. It could be utilized in an advisory capacity to prevent non-compliance by dealing with a question of implementation before it becomes a problem of non-compliance. We do not see the MCP as part of the compliance system but as an auxiliary tool to ensure compliance by Parties with their commitments.

As far as the relationship between the compliance system and settlement of disputes as envisaged in Article 19 of the Protocol is concerned, the compliance system should be designed without prejudice to Article 19 of the Protocol. The compliance system and the settlement of disputes procedures have different objectives in mind and different procedures will be applied. The compliance system does not aim to resolve a dispute arising between two or more Parties, but should as a first priority ensure that Parties meet their obligations. The settlement of disputes process under Article 19 is therefor regarded as a separate matter.

The role of the COP/moP with respect to the compliance system should be carefully considered. The COP/moP might have a role to play as trigger of the compliance procedures or to approve the outcome of the compliance process. The latter might be appropriate where the enforcement aspect of the compliance process is involved and where binding consequences are to be applied to the Party that is found in non-compliance. The COP/moP should not be involved in more than one facet of the compliance procedure. As already indicated above the COP/moP does not appear to be an appropriate body/forum to undertake the task of determining compliance due to its nature, size and annual meeting schedule and that this task should be entrusted to an independent and impartial body especially established for this purpose.

The linkage between the compliance system and the Kyoto Mechanisms warrants attention. Due to the fact that the modalities of these mechanisms have not been finalized it is difficult to come to a final conclusion of what the best option would be for dealing with non-compliance issues stemming from these mechanisms. Given the complexity and special character of each mechanism, there might be a need for sub-procedures to deal with the non-compliance elements of each mechanism. In order to maintain the integrity of the compliance system such sub-procedures should form an integral part of the compliance system and not be ad hoc arrangements that would operate separately. Having noted this, it should also be remembered that joint

implementation, the CDM and emissions trading have the same objective in mind, namely to assist Parties to achieve compliance with the commitments stipulated under Article 3 and that separate procedures might not be necessary if overall compliance is to be assessed.

2. Consequences of non-compliance

Appropriate consequences for cases of non-compliance would be essential if the compliance system is to be effective and have any credibility. As the compliance procedure will have to differentiate between the character of various commitments, appropriate consequences which are proportionate to the nature of the obligations taking into account the cause, type, degree and frequency of non-compliance, will have to be identified.

It is also realized that the various consequences, including incentives to comply, would be applicable at different times such as to non-compliance during the pre-commitment period, the commitment period and the post-commitment period.

Both positive and negative consequences will have to be devised in order to give effect to the envisaged two edged functions of the compliance system. Positive consequences or measures of assistance to help Parties overcome problems or difficulties in the implementation of their commitments will be essential in order to give effect to the facilitative function of the compliance system. Negative consequences such as penalties that form part of the enforcement function of the compliance system will be equally important.

As indicated in earlier submissions we are of the view that there is a need for reasonable certainty and transparency as far as consequences for non-compliance are concerned. This will also prevent non-compliance as Parties will be aware in advance of consequences that will be attached to non-compliance. This would requires the development of an indicative list of potential cases of non-compliance and the appropriate consequences that will be applicable to such cases, taking into account the cause, type, degree, and frequency of non-compliance. In order to achieve this a clear identification of the various obligations of Parties will be necessary. Such a list of consequences will by necessity have to be open-ended as not all the potential cases of non-compliance would be identifiable in advance.

An indicative list of consequences could include, at least, the following aspects:

a) Facilitation through *inter alia* appropriate assistance, technical and financial expertise and capacity building;

b) Issuing cautions;

c) Suspension of rights, including the ability to participate in the Kyoto Mechanisms under Articles 6, 12, and 17;

d) Invalidation of certificates issued as a result of participation in the Kyoto Mechanisms if non-compliance is determined;

e) Penalties, including financial penalties.

As far as the automatic application of consequences are concerned, it is realized that circumstances causing non-compliance may vary and that the automatic application of consequences may not be fair in all circumstances. It would therefor be appropriate that the independent body that will be tasked to determine non-compliance will have to consider each case individually and then choose from the list of consequences the appropriate response measures for a specific case. There might also be non-compliance cases where the automatic imposition of a pre-identified consequence might be appropriate and these should be identified. For example a finding of non-compliance with a particular requirement or condition for participation in the Kyoto Mechanisms should lead to the automatic suspension of the right to participate in the said Mechanisms. Automatic consequences could also be used in case of lack of national system for estimation of anthropogenic emissions and annual inventories or national communications being not reported on time. Another example of an automatic consequence would be the provision in Article 6 that non-compliance with the obligations in Articles 5 and 7 disallows a Party to acquire emission reduction units. An analogous consequence could be considered in relation to the other mechanisms.

Financial penalties could be used if an Annex I Party is found to be in non-compliance with its obligations under Article 3, provided that it is of a high enough monetary value to ensure that Parties would not be able to “buy” themselves out of non-compliance. If backed by a mechanism authorized to assess and to collect them, financial penalties could serve the dual purpose of deterring non-compliance and of making available resources for investment in adaptation and capacity building projects in developing countries.

Non-compliance with the central obligations of the Protocol contained in Article 3 as well as with the obligations of the Kyoto Mechanisms should entail binding consequences. Binding consequences could be defined as those that have been identified by the Parties in advance and that impose additional obligations on the Party in default. Financial penalties would fall under this category. Binding consequences should be adopted by means of an amendment to the Protocol in accordance with Article 18.

PAPER NO. 14: SWITZERLAND

Subsidiary Bodies of the UNFCCC
Twelfth session, Bonn, 5 - 16 June 2000

Compliance Regime under the Kyoto Protocol

Establishment of the compliance regime	**1. Establishment of the compliance regime** 1. The Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) serving as the Meeting of the Parties (MOP) to the Kyoto Protocol (KP) hereby establishes a compliance regime in the form of the following set of procedures.
Applicability and coverage	**2. Applicability and coverage** 1. The procedures of this compliance regime shall be applicable to all questions relating to the individual implementation of and compliance with the KP by Parties and to all commitments in or under the KP, in particular to the fulfilment by Parties of relevant decisions of the COP/MOP and the use of guidelines, rules and procedures adopted by the COP/MOP for the implementation of the KP.
Institutions Expert Review Teams Compliance Body	**3. Institutions** 1. The procedures under the compliance regime shall be served by the Expert Review Teams (ERT) provided for in Article 8 KP and by a Compliance Body (CB) to be established under the compliance regime. ERT and CB take the necessary measures in accordance with the present rules to prepare decisions of the COP/MOP relevant to the implementation of and compliance with the KP.
Establishment of the Expert	**4. Establishment of the Expert Review Teams (ERT)**

Review Teams	1. The Secretariat shall establish and maintain a list of experts in relevant fields related to the implementation of the provisions of the KP. 2. The Secretariat shall establish an ERT formed by six experts, drawn from this list, to review the information provided by each Annex I Party[31]. The task of an ERT is achieved when the COP/MOP adopts a final decision on the compliance status of the Party under review. 3. The Secretariat shall establish as many ERT as necessary to review the information submitted by all Annex I Parties. 4. Each ERT shall be constituted of an equal number of experts from Annex I and non-Annex I Parties to the KP. 5. The chairman of each ERT shall be elected among and by its members. 6. ERT experts act in their personal capacity.
Establishment of a Compliance Body	**5. Establishment of a Compliance Body (CB)** 1. A CB shall be established under the authority and guidance of the COP/MOP to assist it in taking decisions on any matter required for the implementation of the KP in accordance with Article 8.6 KP. 2. Members of the CB shall be experts in relevant fields related to the implementation of the provisions of the KP. 3. The first COP/MOP shall designate the chairman and the members of the CB. 4. The CB shall be composed of twelve members, six elected from Annex I Parties and six from Non-Annex I Parties, serving for a period of four years. They can not be re-elected. 5. CB members act in their personal capacity. 6. In establishing the CB, the Secretariat shall avoid potential conflicts of interest for the members of the CB.
Organisation of work of the ERT	**6. Organisation of work of the ERT** 1. The COP/MOP, with the assistance of the Secretariat, shall establish a work plan for each ERT containing i.a. a timetable for the review of the information provided by Parties and the list of Parties to be reviewed by each ERT. 2. The ERT shall conduct the review in accordance with the relevant decisions and guidelines adopted by the COP/MOP and in consultation with the Party under review. 3. A Party shall co-operate with the ERT designated by the COP/MOP to proceed to its review. 4. In establishing the ERT, the Secretariat shall avoid potential conflicts of interest for the experts. Therefore the ERT shall not be composed of experts designated, employed or funded by Parties under its review. 5. The ERT may consult with independent experts during the conduct of its review. Names and functions of these experts shall be made available to the Party under review. The review is conducted under the sole

[31] In this compliance regime, the word "Party" refers either to a Party fulfilling its commitments individually or to a group of Parties fulfilling their commitments jointly in accordance with Article 4 KP.

	responsibility of the ERT. 6. The ERT may adjust, pursuant to Article 5.2 KP, the annual GHG inventories submitted by Parties in accordance with Article 7 KP. 7. The ERT shall take its decisions by consensus.
Sources of information for the review by the ERT	**7. Sources of information for the review by the ERT** 1. The sources of information for the review of a Party by an ERT shall be the information provided by the Party under review according to Article 7 KP as well as any additional information that the Party may make available to the ERT prior to the review process. 2. The ERT may request from the Party under review more information than initially provided, if it is found that the information is inappropriate according to Article 7 KP. The Party under review shall provide this additional information within two months.
Confidentiality of information and/or sources of information	**8. Confidentiality of information and/or sources of information** 1. A Party under review may indicate to the ERT what information and/or what sources of information shall not be made public during the review. 2. This information shall not be disclosed during the whole compliance procedure.
Report of the ERT to the COP/ MOP	**9. Report of the ERT to the COP/MOP** 1. In accordance with Article 8.3 KP, the ERT shall prepare a report for consideration by the COP/MOP containing an assessment of the implementation of the Party's commitments, identifying any potential problems in, and factors influencing, the fulfilment of the Party's commitments. The report of the ERT shall also be submitted to the CB for consideration to assist the COP/MOP in taking its decision. 2. A draft of the report shall be consulted with the Party under review. If the Party has divergent views on elements of the report, it may submit written comments to the COP/MOP and to the CB. 3. The report shall contain conclusions on the implementation of relevant decisions and guidelines adopted by the COP/MOP for the implementation of the KP. 4. The report shall contain conclusions on compliance by the Party under review with its obligations under the KP. The report drawn at the end of the commitment period 2008 to 2012 shall contain conclusions on compliance by the Party under review with its obligations under Article 3 KP.
Mandate and tasks of the CB	**10. Mandate and tasks of the CB** 1. The CB shall make recommendations to a Party who, following non-submission of its annual GHG inventory by April 15, is found in non-compliance. 2. On the basis of the report and possible adjustments by the ERT, and possible comments by the Party under review, the CB shall assess

	whether a Party, has complied with its commitments under the KP and with relevant COP/MOP decisions for its implementation. The result of such an assessment, which shall be one of the following : (a) a Party is in compliance (b) a Party is in non-compliance and/or has potential problems in the fulfilment of its commitments, shall contain draft decisions for the COP/MOP. 3. Based on any relevant decisions of the COP/MOP, the CB may : (a) recommend to a Party measures to facilitate the implementation of or its compliance with the KP (b) provide appropriate assistance to a Party in relation to difficulties encountered in the course of implementation of the KP in accordance with paragraph 15 of this compliance regime. 4. The CB may also respond to requests from a Party on recommendations and assistance to fulfil their commitments. 5. In case of grave, intentional or negligent non-compliance by a Party, the CB shall make recommendations to the COP/MOP with a view to taking sanctions as listed in paragraph 17 of this compliance regime.
Functioning of the CB	**11. Functioning of the CB** 1. The CB shall be a standing body. It shall meet as often as necessary, at least once a year. 2. The CB shall prepare a report for each session of the COP/MOP on all aspects of its work. 3. The CB may be assisted by external experts. Before external experts are admitted to assessing information provided by the Party under review in accordance with Article 7 KP or the ERT's report, the Party's agreement is required.
Procedural rules for the CB	**12. Procedural rules for the CB** 1. A Party under consideration shall be entitled to participate fully in the process, except for the final deliberations and decision-making process of the CB. 2. The CB may request further information or advice from any body established under the Convention or the KP including the ERT, external experts and the Party under consideration. 3. The CB may make, with the consent of the Party under consideration, inquiries within the territory of this Party. 4. The CB shall take its decisions by consensus.
Outcome of the consideration by the CB	**13. Outcome of the consideration by the CB** 1. Conclusions and recommendations of the CB based on the assessment pursuant to paragraph 10.2 of this compliance regime shall be sent immediately to the COP/MOP and to the Party under consideration. They shall be consistent with the mandate as described in paragraph 15 of this compliance regime. They shall include a statement on whether the Party under consideration is in compliance or in non-compliance and/or has

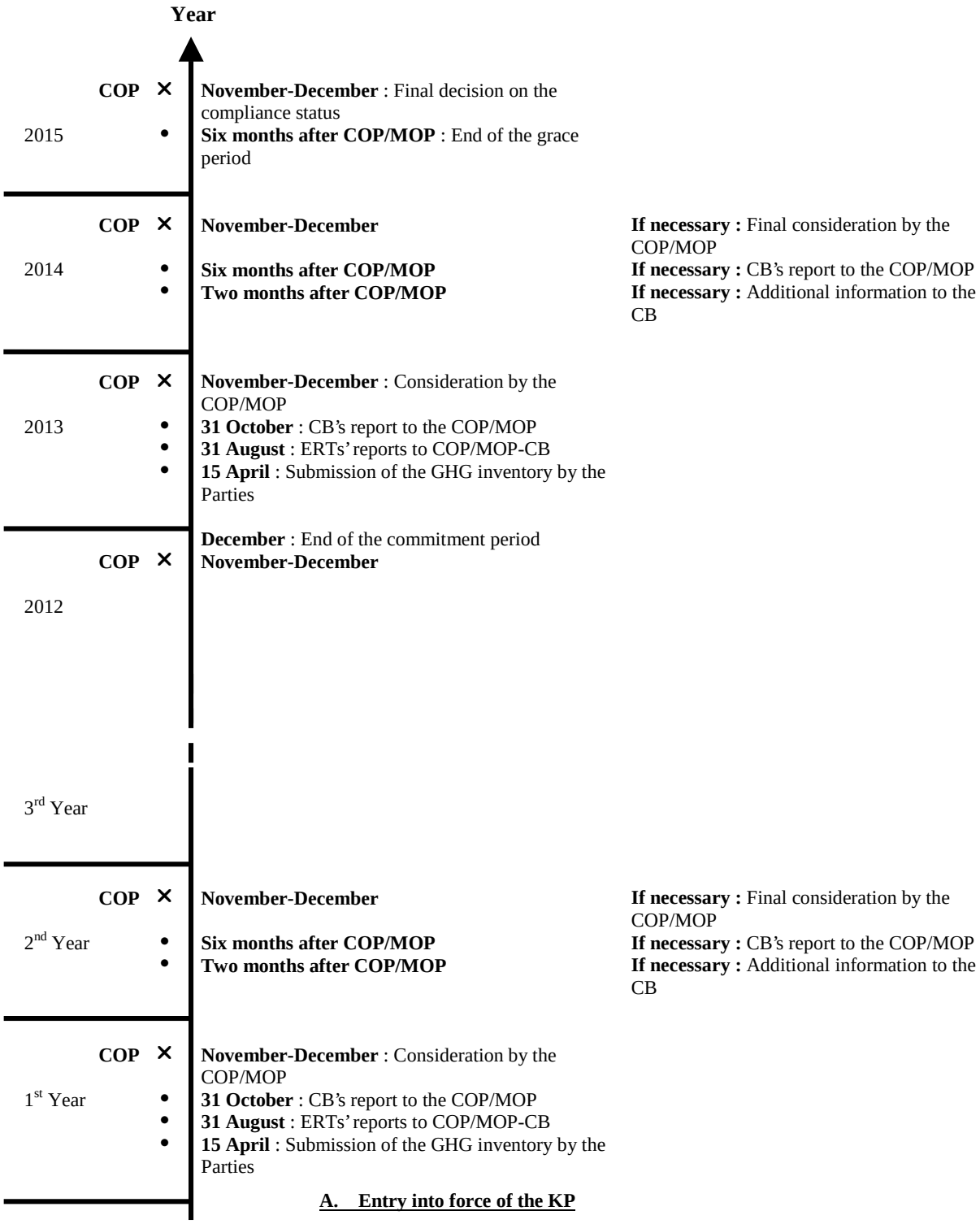
	potential problems in the fulfilment of its commitments. They may also include draft decisions of the COP/MOP containing measures to further a Party's implementation of and compliance with the KP. 2. The Party under consideration shall be given the opportunity to comment on the conclusions and recommendations. The CB shall forward its conclusions and recommendations and any written comment of the Party under consideration to the COP/MOP in due time before its next ordinary session.
Outcome of the consideration of the ERT report by the COP/MOP	**14. Outcome of the consideration of the ERT report by the COP/MOP** 1. After consideration, with the assistance of the SBI, the SBSTA, the ERT and the CB, of the information submitted by a Party under Article 7 KP, the COP/MOP shall take a decision on the Party's compliance. 2. If a Party is found in non-compliance and/or has potential problems in the fulfilment of its commitments, the COP/MOP shall take a decision on assistance, recommendations or sanctions based on the findings of the CB. The COP/MOP can authorise the CB to take the following measures : (a) recommendations regarding co-operation between the Party under consideration and other Parties to further the objective of the KP (b) measures that the CB deems suitable to be taken by the Party under consideration for the effective implementation of the KP (c) assistance to the Party under consideration (d) in a case of non-compliance, the CB may recommend : - measures to be taken to the Party under consideration - sanctions against the Party under consideration to be decided upon by the COP/MOP. 3. The Party under consideration shall comply with the decisions of the COP/MOP. 4. Sanctions are listed in paragraph 17 of this compliance regime.
Recommendations and assistance to a Party	**15. Recommendations and assistance to a Party** 1. Recommendations and assistance measures to a Party made by the CB shall contain a timetable for their implementation and the return of the Party to compliance. External experts may assist the CB in preparing these recommendations. 2. The CB may determine a time limit within which the Party under consideration has to submit information on the effects of the measures taken pursuing to the recommendations or the assistance provided for by the CB. 3. If the information submitted by the Party under consideration is not substantive enough to enable the CB to assess the Party's compliance, the CB may request further clarification.
Automatic sanctions	**16. Automatic sanctions** 1. The Secretariat communicates to the CB and to Parties the list of Parties who have not submitted their GHG inventories. This information is made available to the public.

	2. If a Party has not submitted its annual GHG inventory in due time by 15 April, it is automatically declared in non-compliance and is eligible for sanctions according to paragraph 17 of this compliance regime. 3. The Party found in no-compliance shall follow the recommendations of the CB in order to submit its GHG inventory by 31 May. 4. If the Party submits its GHG inventory by 31 May, it is automatically in compliance.
Sanctions	**17. Sanctions** 1. If a Party, which is found in non-compliance, does not follow the recommendations or the assistance proposed to return in compliance, it shall be subject to sanctions decided by the COP/MOP. 2. A Party found in non-compliance with Article 3 KP at the end of the commitment period 2008 to 2012 shall be subject to sanctions after the grace period pursuant to paragraph 18 of this compliance regime has expired. 3. The following sanctions may be taken alternatively or cumulatively : (a) deprivation of the Party's rights under the KP as long as the Party is in non-compliance (b) deprivation to use the mechanisms of the KP (Articles 6, 12 and 17) as long as the Party is in non-compliance (c) financial penalties corresponding to 1.2 times the current market price of the CO2-equivalent exceeding the assigned amount of the Party for the commitment period 2008 to 2012.
Grace period	**18. Grace period for a Party found in non-compliance with Article 3 KP at the end of the commitment period 2008 to 2012** 1. A Party, which is found in non-compliance with Article 3 KP at the end of the first commitment period 2008 to 2012, shall be allowed to fulfil its reductions commitments through the use of the mechanisms of the KP (Articles 6, 12 and 17) within six months after this finding.
Linkages Adjustments Mechanisms of the KP Dispute settlement MCP Article 18	**19. Linkages to other provisions of the KP and the UNFCCC** 1. The provisions of Article 5 KP related to possible adjustments shall apply without prejudice to the application of the compliance regime. 2. The modalities, rules and guidelines for the use of the mechanisms of the KP (Articles 6, 12 and 17) form an integral part of this compliance regime. 3. The provisions of Article 19 KP on the settlement of disputes between any two or more Parties concerning the interpretation or application of the KP shall apply without prejudice to this compliance regime. 4. The provisions of Article 13 UNFCCC on a multilateral consultative process for the resolution of questions regarding the implementation of the UNFCCC shall apply for matters not covered by this compliance regime, without prejudice to this compliance regime. 5. This compliance regime shall be applied without prejudice to the application of other binding consequences that could be adopted by means

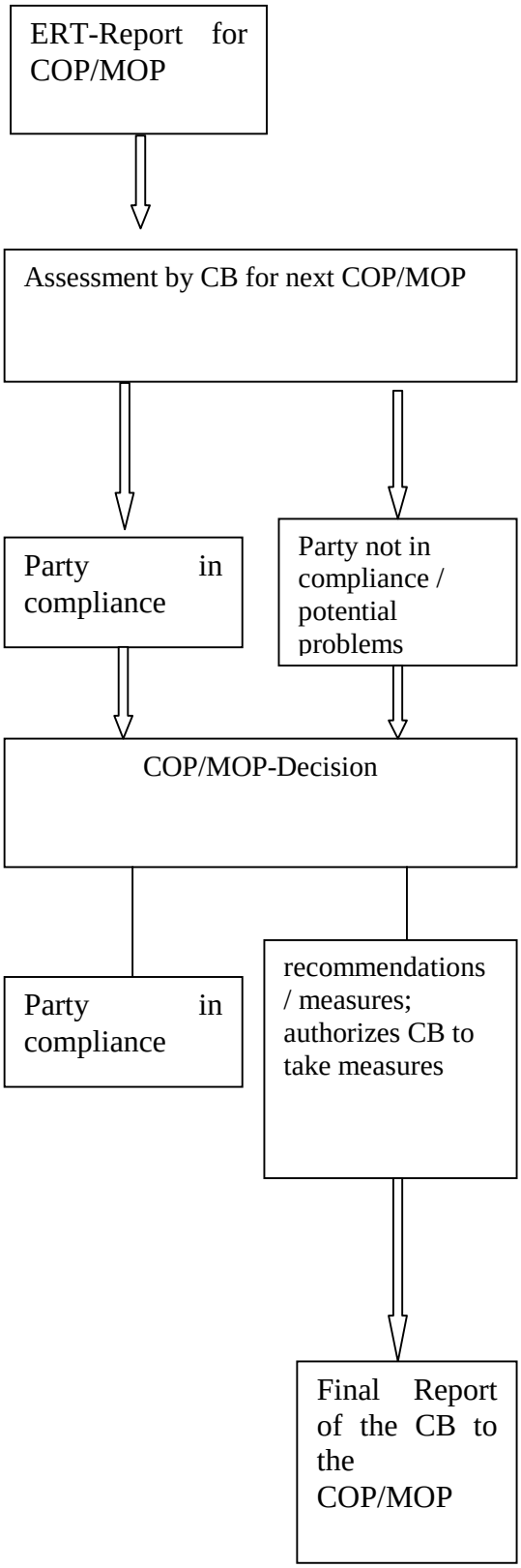
	of an amendment to the KP pursuant to Article 18 KP.
Secretariat	**20. Secretariat** 1. The Secretariat of the Convention serving as the Secretariat of the KP shall co-ordinate, assist and provide administrative and logistic support to the ERT and to the CB. 2. The Secretariat shall make available to the ERT and the CB the information relevant to their work.
Subsidiary Bodies	**21. Subsidiary Bodies** 1. The UNFCCC Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA) shall assist the COP/MOP, upon request, to consider the information submitted by Parties under Article 7 KP, the reports of the ERT and the work of the CB.
Evolution of the compliance regime	**22. Evolution of the compliance regime** 1. The terms of reference of this compliance regime may be amended by the COP/MOP to take into account any amendment to the KP, decisions of the COP/MOP or experience gained with the working of this regime.

Glossary of terms used in the compliance regime

CB	Compliance Body
COP/MOP	Conference of the Parties / Meeting of the Parties
ERT	Expert Review Teams
GHG	Greenhouse gases
KP	Kyoto Protocol
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
UNFCCC	United Nations Framework on Climate Change



Timing in the Compliance Regime under the Kyoto Protocol



Flow Chart for the Compliance Regime under the Kyoto Protocol

PAPER NO. 15: UNITED STATES

Compliance-Related Issues:
Submission of the United States (1/31/00)

General

- The United States welcomes this opportunity to submit views that supplement previous U.S. submissions and interventions in a number of areas that are either directly or indirectly related to the compliance regime under the Kyoto Protocol. Many of these views address linkages between compliance and other aspects of the Protocol, such as mechanisms.

- The submission also contains a text containing proposed elements of a compliance regime (see attachment). The text generally follows the topic headings contained in the co-chairs' elements paper from COP 5.

- In general, we see a substantial convergence of view among Parties in areas such as:

  -- objectives/nature of the regime;
  -- coverage of the regime;
  -- the need for both facilitative and enforcement elements;
  -- functions of the regime's institution(s);
  -- certain outcomes of the regime; and
  -- identification of legal issues concerning procedure and institutions.

- The more controversial issues appear to revolve around:

  -- whether the regime should result in any mandatory outcomes;
  -- if so, which ones; and
  -- the precise institutional structure necessary to perform the required functions.

- In working toward the COP 6 deadline, Parties should give priority to the critical elements of the regime, such as outcomes and the major aspects of procedures and institutions. The Parties should consider whether any of the more technical issues related to procedure and institutions (such as details regarding, e.g., length of term on a body) could appropriately be decided at a later time.

Compliance Body(ies)/Functions

- The compliance "entity" should function as a supplement to other compliance-related institutions and bodies under the Protocol. For example:

  -- Article 8 expert review teams will, in the first instance, review national communications and annual inventories of Annex I Parties. Key issues will include a Party's implementation of any mechanism eligibility requirements and of Article 3.1 commitments. If the assessment raises a question of implementation, a Party will have an opportunity to cure the deficiency, if appropriate (for example, by submitting missing data, by accepting "adjustments" under Article 5.2). [See separate

submission on Articles 5, 7, and 8 for further views on adjustments.] Article 8 teams will refer their reports to the compliance entity, as discussed below.

-- CDM institutions will decide on the issuance of CERs, i.e., whether particular projects and reductions therefrom comply with Article 12 requirements.

-- The compliance entity will function without prejudice to the more traditional, State-to-State dispute settlement option under Article 19.

- The compliance entity should have the following functions:

-- to decide which referred matters will be pursued, in accordance with agreed criteria;
-- to provide advice and facilitate assistance to individual Parties;
-- to address allegations that a Party is failing to meet the eligibility requirements of one or more mechanisms under Articles 6, 12, and 17;
-- to determine whether an allegation of non-compliance is well founded; and
-- to determine appropriate outcomes or, where a mandatory outcome is concerned, to apply such outcome.

- To ensure that the form of the regime follows its designated functions, the compliance entity should be divided into two components:

-- One component should provide advice and facilitate assistance to individual Parties and otherwise handle questions of implementation whose treatment can potentially lead to outcomes of a non-mandatory nature, such as advice, assistance, recommendations, warnings. The potential coverage of this component should be very broad, including all aspects of Protocol implementation.

-- A second component should handle questions of implementation that warrant treatment of a more judicial nature (i.e., more enforcement-oriented) and that can potentially lead to pre-agreed outcomes of a mandatory nature. The coverage of the this component should be focused on Article 3.1 commitments, including:

  - determining whether a Party's alleged non-compliance with Article 3.1 is well founded, with pre-agreed outcomes of non-compliance; and

  - determining whether a Party's alleged failure to meet mechanism eligibility requirements is well founded, with pre-agreed outcomes of failure to meet such requirements specified in the rules for the particular Kyoto mechanisms.

-- In addition, the compliance entity will need to have the ability to screen referred questions of implementation, in accordance with agreed criteria that should be adopted at COP 6.

- The attached elements text elaborates the U.S. position on the institutional/procedural aspects of the compliance regime.

Initiation of the process (references)

- References are to be distinguished from initiation of the compliance process:

  -- There will be several sources for references of questions of implementation (see below).

  -- However, the decision whether to pursue a particular question of implementation should be made by the compliance entity itself.

- Two issues then arise:

  -- who can refer an issue to the compliance entity for further consideration; and

  -- whether the compliance entity should screen issues on a case-by-case basis or whether there is a need for generally applicable rules.

- In terms of the first issue, it seems that:

  -- Any Party or group of Parties should be able to refer an issue with respect to its own implementation.

  -- Article 8 expert review teams should refer all reports related to implementation by Annex I Parties.

  -- A Party or group of Parties should be able to refer an issue with respect to implementation of another Party under certain circumstances.

- In terms of the second issue, there should be screening rules, both to provide agreed criteria to the entity as to which issues should be pursued and to promote consistency among cases. The screening aspect of the compliance entity should have minimal discretion.

Outcomes of the Regime

- There are at least four categories of potential outcomes:

  -- One category includes outcomes that are purely facilitative in nature, for example, incentives, advice, or assistance.

  -- A second category includes outcomes that are beyond facilitative, yet stop short of legally requiring a Party to take or refrain from a particular action, for example, warnings, or publication of non-compliance.

  -- A third category includes loss of access to a Kyoto mechanism as the result of failure to meet that mechanism's eligibility requirements (for example, loss of access to emissions trading if a Party does not maintain an appropriate registry).

  -- A fourth category includes outcomes for non-compliance that are mandatory, i.e., that require a particular result as a result of non-compliance with a specific Protocol

obligation.

- In the U.S. view, all four categories of outcomes should be part of the Protocol's compliance regime.

- Application of the first two categories of responses by the compliance entity should be discretionary.

- Application of the third should flow from whatever rules/results are set forth in the provisions/rules/guidelines governing the Kyoto mechanism in question. The U.S. view on mechanism eligibility requirements is contained in its submissions on the individual mechanisms.

- Application of the fourth category should flow from whatever are the agreed mandatory outcomes resulting from particular Protocol violations and should be automatically applied.

- In the U.S. view, agreed mandatory outcomes should result only from non-compliance with Article 3.1 (quantified targets).

  -- There should be a short period after the end of a commitment period known as a "true-up period."

  -- During a true-up period, a Party may continue to utilize Articles 6, 12 and/or 17 to cure any overage it may have with respect to the previous commitment period.

  -- Consideration should be given to whether to include an additional option of making voluntary payments into a climate change fund(s); this idea is set forth in the Co-Chairs' elements paper from COP 5.

- To the extent that a Party continues to have an overage after the expiration of the true-up period:

  -- Its assigned amount for the subsequent commitment period should be reduced by a number of tonnes equal to [1.3] the number of tonnes by which it exceeded its assigned amount.

  -- It should not be able to transfer assigned amount through emissions trading in the subsequent commitment period (i.e., the period following the true-up period) until it can demonstrate that it will have an AAU surplus in that period.

- In addition, there should be a mandatory procedural outcome when a Party operating under Article 4 is found to be in non-compliance with Articles 5 and 7. Specifically, the result set forth in Article 4.5 of the Protocol (i.e., individual responsibility to meet levels of emissions in the Article 4 agreement) should apply. The reason is that, when one Party operating under Article 4 is not measuring/reporting properly, inaccurate or missing information cannot be allowed to taint the entire Article 4 arrangement. Where one Party has inaccurate or missing information, each Article 4 Party needs to be responsible for its own level of emissions set out in the burden-sharing agreement.

Linkages with Kyoto Mechanisms

- Many Parties have commented on the need to examine, and appropriately address, the linkages between the compliance regime and the Kyoto mechanisms.

- The first linkage area involves the eligibility requirements for the various Kyoto mechanisms. Article 6 denies the ability to acquire JI units to a Party not in compliance with its obligations under Articles 5 and 7. Proposals on emissions trading and CDM make similar linkages between mechanism eligibility and non-compliance with Articles 5 and 7.

- An issue that arises is the substantive one of what kind/level of inconsistency with obligations under Articles 5 and 7 should trigger the full or partial loss of access to Kyoto mechanisms.

- In the U.S. view, loss of mechanism eligibility (as opposed to non-compliance with Articles 5 and 7 generally), should be linked directly to the environmental integrity of the mechanisms. As such, a Party should lose full or partial access (depending on the mechanism in question) to a mechanism when it is in non-compliance with the inventory- and registry-related obligations in Articles 5 and 7.

- Recognizing that Article 5.2 is an inventory-related obligation (and would therefore be relevant to mechanism eligibility), a second issue is what role "adjustments" play in determining non-compliance with Article 5.2. Article 5.2 provides that, where IPCC methodologies are not used for estimating emissions and removals, "appropriate adjustments shall be applied" according to methodologies agreed upon by the COP/moP at its first session.

- In the U.S. view, the application of adjustments will prevent a Party from being in non-compliance with Article 5.2, provided:

  -- the Parties can agree upon methodologies that result in adjustments that are sufficiently conservative so as to provide appropriate assurance that inventory estimates are not underestimated; and

  -- that particularly egregious cases of not following IPCC methodologies (with egregiousness being based on quantitative criteria) be considered cases of non-compliance with obligations under Article 5.2.

- The focus on inventory- and registry-related obligations under Articles 5 and 7 would only be relevant to mechanism eligibility requirements (and would be included in mechanism rules); the assessment generally of whether a Party is in non-compliance with Articles 5 and 7 would not be limited to inventory- and registry-related obligations.

- However, the role that adjustments play in determining non-compliance with Article 5.2 would be relevant not only to mechanism eligibility requirements, but also to a general assessment of whether a Party were in non-compliance with Articles 5 and 7.

- (The U.S. submission on Articles 5/7/8 will provide more specificity in this regard, including with respect to how egregiousness would be defined in quantitative terms.)

- The second linkage area is who reviews which aspect of compliance related to the mechanisms:

  -- At the end of a commitment period, an Article 8 expert review team (as well as the compliance entity, if the screening rules direct a case there) will have the target formula before it in reviewing compliance with Article 3.1 targets.

  -- The formula provides that emissions (based on estimation under Article 5 and reporting under Article 7, including any adjustments under Article 5.2) cannot be larger than:

  - original assigned amount, plus/minus
  - tonnes from sinks, plus/minus
  - tonnes from emissions trading, plus/minus
  - tonnes from JI, plus
  - tonnes from CDM, plus/minus
  - tonnes from banking.

  -- The question arises whose job it is to determine whether an Annex I Party can count the tonnes it is claiming from sinks, trading, JI, and CDM.

  -- For sinks, there is no sinks-specific body under the Protocol, so an Article 8 expert review team (and subsequently the compliance entity, if there is a compliance issue) will have the ability to review the use of sinks, i.e., whether they meet the rules under Articles 3.3 and Article 3.4.

  -- For each Kyoto mechanism, there are two issues: whether the Party in question qualifies under the mechanism's eligibility requirements to use the tonnes it seeks to use; and whether the particular tonnes in question are usable.

  - Article 8 expert review teams will be responsible for reviewing whether an Annex I Party qualifies to use the AAUs, ERUs, or CERs in question (with the compliance entity subsequently addressing compliance issues, in accordance with the screening criteria).

  - In terms of the validity of particular tonnes:

    -- The validity of CERs will be determined by the relevant CDM institutions, not by Article 8 expert review teams or the compliance entity.

    -- The question of whether particular ERUs meet Article 6 criteria, in particularly the additionality requirement under Article 6.1.b, would not be reviewed by Article 8 expert review teams (or subsequently by the compliance entity). Additionality would be presumed if the host country were in compliance with Articles 5 and 7. If the host country had been found not to be in compliance with Articles 5 and 7, a specialized audit process under Article 6/8 would be responsible for verifying ERUs.

- The third linkage area involves the issue whether the compliance regime should provide for any kind of distinct treatment (for example, with respect to timing, body) for addressing alleged failures to meet mechanism eligibility requirements.

- In the U.S. view, alleged failures to meet mechanism eligibility requirements should be accorded distinct treatment within the compliance regime:

  -- The distinct treatment should be in the form of timing, rather than body. Alleged failures should be reviewed under an expedited process, while respecting due process.

  -- In terms of the body, it appears that such cases can be handled by the same body that addresses target issues (i.e., the more enforcement-oriented second component). While there might be sound arguments for a distinct body to address such cases, we believe these arguments are outweighed by the interest in avoiding any unnecessary proliferation of compliance bodies.

Linkages with Reporting under Article 7

- Beyond the indirect linkages between compliance and Article 7 through the mechanism eligibility requirements, there are several direct linkages between the compliance regime and Article 7:

  -- First, the requirements under Articles 7.1 and 7.2 are directly related to compliance (with Article 7.1 calling for the "necessary supplementary information for the purposes of ensuring compliance with Article 3…" and Article 7.2 calling for "supplementary information necessary to demonstrate compliance with … commitments" under the Protocol).

  -- Second, because an assessment of compliance with Article 3.1 depends upon complete and accurate reporting, Article 7 needs to be elaborated in a legally binding manner.

  -- Third, reporting requirements under Article 7 need to be structured in such a way (i.e., in as quantified and standardized a manner as possible) that ascertaining compliance therewith (and with Article 3.1 targets) is reasonably straightforward.

  -- Finally, many Parties have stressed the importance of effective domestic enforcement regimes in realizing implementation of the Protocol's quantified targets. The United States proposes the following elements as part of the reporting requirements under Article 7.2:

    -- a description of the relevant domestic compliance and enforcement programs a Party has in place to meet its commitments under Article 3.1 of the Protocol, including the legal authority for such programs, how they are implemented, and what resources are devoted to implementation;

    -- a description of the effectiveness of the above programs, including a summary of actions to identify, prevent, address, and enforce against cases of non-compliance with domestic law (e.g., inspections, investigations, audits,

notices of violation, administrative actions for voluntary and involuntary compliance, judicial enforcement actions, penalties and sanctions); and

-- a description of how information related to domestic compliance/enforcement (e.g., rules on compliance and enforcement procedures, actions taken) is made public.

Attachment:
Elements of the Compliance Regime:
Submission of the United States (1/31/00)

General Provisions

- The objectives of the compliance procedure are:

  -- to promote effective implementation of the Protocol;
  -- to prevent non-compliance with obligations under the Protocol; and
  -- to address cases of non-compliance, should they arise.

- (The nature of, and principles governing, the compliance regime will be reflected in the design of the regime. These include concepts such as credibility, predictability, due process, etc.)

- (Similarly, the coverage of various aspects of the compliance regime will be reflected in the provisions governing those aspects.)

Coverage

- The compliance regime will apply to all commitments in or under the Protocol, except where expressly provided that a particular aspect of the regime only applies to a particular commitment(s), e.g., Component 2.

Functions

- The Compliance Entity will function as a supplement to other compliance-related institutions and bodies under the Protocol. For example:

  -- Article 8 expert review teams will, in the first instance, review national communications and annual inventories. Key issues will be a Party's implementation of any mechanism eligibility requirements and of Article 3.1 commitments. If the assessment raises a question of implementation, a Party will have an opportunity to cure, if appropriate (for example, by submitting missing data or by applying applicable adjustments). Article 8 teams will refer their reports to the compliance entity, as discussed below.

  -- CDM institutions will decide on the issuance of CERs, i.e., whether reductions from particular projects meet the Article 12 requirements.

  -- Regarding ERUs from JI, if the host country had been found not to be in compliance with Articles 5 and 7, a specialized audit process under Article 6/8 would be responsible for verifying ERUs.

  -- The compliance entity will function without prejudice to more traditional State-to-State dispute settlement option under Article 19.

- The Compliance Entity will have the following functions:

-- to decide which references will be pursued, in accordance with agreed criteria;
-- to provide advice and facilitate assistance to individual Parties;
-- to address allegations that a Party is failing to meet the eligibility requirements of one or more mechanisms under Articles 6, 12, and 17;
-- to determine whether an allegation of non-compliance is founded; and
-- to determine appropriate outcomes or, where a mandatory outcome is concerned, to apply such outcome.

Compliance Body(ies)

- The Compliance Entity will be a standing entity.

- It will have two Components.

- Before a question reaches either Component for substantive handling, a process will be needed to screen referred questions of implementation, in accordance with agreed criteria to be adopted at COP 6.

    - Screening will apply to questions of implementation contained in Article 8 review team reports, as well as other referrals (see below).

    - Screening will be done both in terms of whether a question will be pursued at all (screening out, for example, de minimis and unmeritorious questions) and, if so, to which of the two Components of the system the question will be sent.

- Whether the screening process should be handled by one or both of the two Components, or otherwise, needs to be further considered.

- Component 1 will provide, or provide for, advice and facilitate assistance to individual Parties and otherwise handle questions of implementation whose treatment can potentially lead to outcomes of a non-mandatory nature, such as advice, assistance, recommendations, warnings. The potential coverage of Component 1 is very broad, including all aspects of Protocol implementation, by both Annex I and non-Annex I Parties.

- Component 2 will handle questions of implementation that warrant treatment of a more judicial nature (i.e., more enforcement-oriented) and that can potentially lead to pre-agreed outcomes of a mandatory nature. The coverage of Component 2 is focused on Article 3.1 commitments, including:

    - determining whether a Party's alleged non-compliance with Article 3.1 is founded, with pre-agreed outcomes of non-compliance specified below; and

    - determining whether a Party's alleged failure to meet mechanism eligibility requirements is founded, with pre-agreed outcomes of failure to meet such requirements specified in the rules/guidelines for the particular Kyoto mechanisms.

- Component 1 will be composed of a limited number of Party representatives.

- The composition of Component 2 will need to be further considered, given its quasi-judicial, more adversarial character.

- The composition of both Components should contain an appropriate balance of representation; Component 2 in particular should have a larger proportional representation from Annex I Parties, because it is these Parties that are subject to Article 3 commitments. Composition issues should be decided at COP 6.

- Concerning requisite expertise, membership on Component 1 would require a certain level of technical expertise in order to assess implementation problems and promote solutions. Component 2, as a more judicial body, would require legal expertise and technical expertise (whether directly or through access to such expertise), given the many ways in which assessing implementation of targets and mechanism eligibility requirements could involve technical issues.

- The precise expertise requirements of membership, the length of membership of the Compliance Entity's various components, and the frequency of meetings of the Compliance Entity's various components could be decided either at COP 6 or subsequently.

Initiation of the Process (References)

- References are to be distinguished from actual initiation of the compliance process:

  -- There will be several sources for references of questions of implementation (see below).

  -- However, the decision whether a particular question will be pursued will be made by the compliance entity itself, based on agreed criteria to be decided at COP 6.

- Concerning references:

  -- Any Party or group of Parties may refer an issue concerning its own implementation. The agreed criteria noted above will provide broad scope for such self-referred issues to be pursued.

  -- Article 8 expert review teams will refer their reports concerning implementation by Annex I Parties. The agreed criteria will determine which questions of implementation merit further treatment and by which Component.

  -- A Party or group of Parties may refer an issue with respect to implementation of another Party under certain circumstances. Again, the agreed criteria will determine which questions of implementation merit further treatment and by which Component, 1 or 2.

- Concerning initiation of the compliance process, the screening process will determine whether a referred question will be pursued and, if so, to which of the two Components the question will be sent. Such screening decisions will be made in accordance with agreed criteria and will involve limited discretion. The criteria will, inter alia:

  -- provide broad scope for self-referred issues to be pursued;
  -- provide for the screening out of de minimis and unmeritorious questions; and
  -- limit initiation of Component 2 to those cases specified herein (i.e., related to Article 3.1 commitments and mechanism eligibility requirements).

Sources of Information

- In general, the Compliance Entity should have broad access to information, including information provided by, e.g., Article 8 expert review team reports, Parties, outside experts, and non-governmental organizations (both environmental and business).

- Regarding Component 2 in particular, its quasi-judicial nature suggests that its use of various sources of information must be consistent with due process. Such issues should be addressed in that Component's rules of procedure.

Secretariat

- The Secretariat will, at a minimum, be involved in the Article 8 review process. According to that provision, the Secretariat is to coordinate expert review teams, as well

as list questions of implementation indicated in expert review teams' reports for further COP/moP consideration.

- There will likely be other appropriate roles for the Secretariat in the compliance regime, e.g., servicing the meetings of the Compliance Entity, helping Parties to procure financial or technical assistance, making known that a Party is not eligible to participate in a particular Kyoto mechanism, etc.

Procedure

- "Procedure" refers to both the general way in which the compliance regime will operate and the more specific "rules of procedure" governing the operation of the Compliance Entity's various components.

- In terms of the way in which the regime will operate:

  -- References will be received from various sources, e.g., reports from Article 8 expert review teams, some of which may indicate questions of implementation; and Parties with respect to either their own implementation or another Party's implementation, pursuant to the rules on references noted above.

  -- The screening process will determined, based on agreed criteria, whether a question of implementation that has been referred to it warrants further treatment and, if so, whether it is to be pursued by Component 1 or Component 2.

  -- Component 1, as described above, has discretion to apply various outcomes (e.g., assistance, warnings) appropriate to the issue at hand. Consideration by Component 1 of a question of implementation cannot lead to imposition of consequences specifically reserved to Component 2.

  -- Component 2 will address Article 3.1 issues, including the use of Kyoto mechanisms in meeting Article 3.1. Its jurisdiction will include mechanism eligibility requirements.

    - From a procedural standpoint, mechanism eligibility issues should be handled in an expedited manner, while respecting due process.

-- Substantive criteria will dictate the forwarding of questions for further treatment. In addition, a procedural voting requirement (e.g., consensus, majority voting) may be necessary in case of disagreement on the application of the criteria to the forwarding of questions for further treatment.

-- Concerning Component 1, its relatively informal nature will not likely require detailed rules of procedure. However, a voting requirement may still be necessary in terms of making decisions concerning, e.g., warnings, recommendations.

-- Component 2, having a more judicial function with the ability to apply serious outcomes, will require more rules to deal with added complexities and to incorporate due process. Among the issues that will need to be addressed, some in advance and others subsequently, include those relating to:

- Structure: composition of the body/branch; selection of members; length of membership

- Decision-making: quorum and voting rules; avoidance of conflict of interest; contents of decisions

- Information: types of evidence or information that can be used; how and under what circumstances, including information other than that provided by expert review teams and by Parties, can be used; which Parties/groups can file briefs or make arguments before the body/branch; transparency

- Other aspects of due process: hearings; ability of the Party in question to reply to factual or legal contentions raised; burden of proof; standard of review; possible appeals (<u>see</u> below under <u>Role of the COP/moP</u>)

- Timing: time limits for filings/decisions

-- As noted above, the procedures for Component 2 should be developed in a way that streamlines the timing for decisions related to mechanism eligibility.

<u>Role of the COP/moP</u>

- At a minimum, the COP/moP will receive reports from the Compliance Entity.

- It should be further considered whether the COP/moP should play any other role at the end of the compliance process (and, if so, what).

  -- It would not appear necessary for the COP/moP to play any role regarding outcomes of Component 1, at least not in terms of hearing an "appeal."

  -- The issue would be whether a mandatory outcome emerging from Component 2 should be capable of being "appealed" to the COP/moP. If the COP/moP were to have such a role, it should not have to approve the outcomes from Component 2; such outcomes should stand unless affirmatively overridden by the COP/moP.

Outcomes, Generally

- The compliance regime may result in four categories of potential outcomes:

  -- One category includes outcomes that are purely facilitative in nature, such as incentives, advice, assistance, or the arrangement thereof.

  -- A second category includes outcomes that are beyond facilitative, yet stop short of legally requiring a Party to take or retrain from a particular action, for example, warnings, publication of non-compliance or potential non-compliance.

  -- A third category includes loss of access to a Kyoto mechanism as the result of failure to meet that mechanism's eligibility requirements, for example, loss of access to emissions trading if a Party does not maintain the required registry.

  -- A fourth category includes outcomes that are mandatory, i.e., that require a particular result as a result of non-compliance with a specific Protocol obligation.

- Application of the first two categories of responses by the compliance entity is discretionary.

- Application of the third category will flow from the rules in the decisions governing mechanisms under Articles 6, 12, and 17.

- Application of the fourth category will flow from the agreed mandatory outcomes resulting from particular Protocol violations, as contained below.

Mandatory Outcomes

- Mandatory outcomes will relate to non-compliance with Article 3.1 of the Protocol.

- There will be a [X-month] period at the end of a commitment period known as a "true-up period."

- During a true-up period, a Party may cure any overage it may have with respect to the previous commitment period by utilizing Articles 6, 12, and/or 17.

- [further consideration of voluntary fund used to remain in compliance]

- To the extent that a Party continues to have an overage after the expiry of the true-up period:

  -- Its assigned amount for the subsequent commitment period will be reduced by a number of tonnes equal to [1.3] the number of tonnes by which it exceeded its assigned amount.

  -- It may not transfer assigned amount under Article 17 in the subsequent commitment period (i.e., the period following the true-up period) until it demonstrates that it will have an AAU surplus in that period.

-- In addition, there should be a mandatory procedural outcome when a Party operating under Article 4 is found to be in non-compliance with Articles 5 and 7. Specifically, the result set forth in Article 4.5 of the Protocol (i.e., individual responsibility to meet levels of emissions in the Article 4 agreement) should apply. The reason is that, when one Party operating under Article 4 is not measuring/reporting properly, such inaccurate or missing information cannot be allowed to taint the entire Article 4 arrangement. Where one Party has inaccurate or missing information, each Article 4 Party needs to be responsible for its own level of emissions set out in the burden-sharing agreement.

Other Issues

- The compliance regime is without prejudice to Article 19 of the Protocol.

- Any modifications to the compliance regime must be made by consensus of the Parties to the Protocol.