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VERTIC BRIEF • 6 • NOVEMBER 2005

B R I E F

Adoption of procedures and mechanisms relating to compliance under the Kyoto Protocol: a guide

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VERTIC

Introduction

Lurking on the agenda for the first Conference of Parties serving as the Meeting of Parties to the Kyoto Protocol (COP/MOP 1) is the adoption of the procedures and mechanisms relating to compliance.[1] The procedures and mechanisms are laid out in the Annex to Decision 24/CP.7 of the Marrakesh Accords.[2] However, the legal character of the rules has been left to COP/MOP 1 to resolve.

This paper describes and analyzes the compliance system and the options for its adoption. The paper begins by introducing compliance theory concerning Multilateral Environmental Agreements (MEAs), it then charts the development of the 1997 Kyoto Protocol's compliance system and provides an outline and evaluation of it. The paper then examines the implications, both practical and legal, of the options for adoption of this system.

At this late stage in the run-up to the first commitment period of the protocol (2008–2012) the need to operationalize the compliance system and establish the Compliance Committee is pressing. The prompt adoption of this system will be conducive to the effective functioning of the protocol, its speedy implementation and to maintaining its environmental integrity. The options for adoption are by COP/MOP decision, amendment to the protocol or by some other approach. It is possible that the options can be combined. Each option or combination presents its own distinct practical and legal advantages and disadvantages. The most judicious way forward on this issue currently appears to be adoption of the compliance procedures and mechanisms by COP/MOP decision at COP/MOP 1. A process for adoption by amendment may also be initiated but the potential consequences of this course of action, as outlined in this paper, will need to be carefully evaluated. Consideration should also be given to the possibility of including this issue in the negotiations on the post-2012 regime. Adoption of the procedures and mechanisms could be included in a legal instrument or amendment which establishes commitments for the post-2012 regime. Again, this should be additional to a COP/MOP decision at COP/MOP 1.

Compliance theory

The options available to promote compliance with MEAs range from management (soft) to enforcement (hard) approaches. Some commentators[3] advocate management approaches based on a presumption that states are willing to comply with treaties and that non-compliance stems from lack of capacity or unintentional or uncontrollable circumstances or ambiguity in terms of an obligation. Others[4] advocate enforcement approaches presuming that states will not necessarily comply with MEAs unless it is more costly for a state not to comply. They argue that if levels of compliance with MEAs appear to be high, it is because of the weakness of these treaties' obligations that demand little more action than a state would have carried out in their absence. When more stringent obligations are introduced, harder enforcement measures are required.[5]

Management approaches which can identify and address compliance problems include national reporting, review and verification processes, consultation and negotiation, mediation and conciliation. Beyond these approaches are those involving a 'carrots and sticks' approach including financial and/or technical support and issuing warnings or cautions. Transparency, facilitation, assistance and encouragement should be key elements in MEAs. Enforcement approaches include making assistance funding conditional on compliance, the suspension of rights or privileges, financial or other penalties, trade measures and other economic sanctions.[6]

Finding the correct balance of these approaches is vital for the development and implementation of a successful regime. A treaty which contains strong obligations for parties needs to be able to address appropriately both intentional and unintentional non-compliance issues. Different methods are needed to respond to different types and levels of non-compliance. Verification and compliance procedures should be considered early in the development of a regime so as to establish a rational architecture and avoid ill-fitting provisions. This would also prevent procrastination on discussions on the desirability and form of these key treaty features.

The Kyoto Protocol monitoring, reporting, review and compliance system provides for a range of approaches to promote compliance, including both 'soft' and 'harder' approaches.

Development of the compliance rules[7]

Deliberation on a compliance system for the Kyoto Protocol began in 1996 with a suggestion for a non-compliance procedure in a climate change convention secretariat's paper.[8] The 1987 Montreal Protocol's Non-compliance Procedure provided the model. There was a divergence of views among parties over what form the

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system should take. These negotiations resulted in the protocol stating in Article 18 that appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance should be approved by COP/MOP 1, and that an indicative list of consequences should be developed which would take into account the cause, type, degree and frequency of non-compliance. In particular, the issue of the consequences sparked divisions among parties. Article 18 was formulated so that any procedures and mechanisms which entail binding consequences have to be adopted by an amendment to the protocol, meaning a new formal agreement has to be ratified by parties to the protocol. The procedure for entry into force of amendments to the protocol (Article 20) entails that parties' parliaments will be consulted before the introduction of any specific penalties.[9]

In 1998, the Joint Working Group (JWG) on compliance was established to develop the procedures and mechanisms on compliance. The JWG received views from parties and non-governmental organizations (NGOs) on the compliance system and heard presentations from secretariats of other international organizations on the issue of compliance and dispute resolution. Once negotiations on the system got underway, the three issues that proved the most problematic were the composition of the Compliance Committee, the consequences of non-compliance and the legal character of the consequences.[10] The first and second of these issues were resolved by the time the system was consolidated at COP 7, Marrakesh, 2001, but the third was left outstanding.[11]

Before COP 6, part 1, The Hague, 2000, different options were presented for adoption of the compliance system. The first was adoption by decision without reference to its legal character. This was regarded as weak. The second would have had the COP/MOP adopt the system as a legally binding decision without further procedures to give it legal force. This was regarded as having little or no legal basis. The third option involved adoption of a legal instrument available for ratification at the same time as ratification of the Kyoto Protocol. However, this approach gave rise to uncertainty over whether parties would ratify both the protocol and the instrument. The fourth option recommended that a future COP/MOP adopt the binding consequences as part of the legal instrument adopting targets for the second Kyoto Protocol commitment period. This option could have left a long delay and possible uncertainty over adoption of the compliance system. None of these approaches was taken, nor were the issues of adoption or legal character resolved at COP 6, part II, Bonn, 2001, and the Marrakesh Accords have deferred the issue to COP/MOP 1.[12]

The compliance system

The Kyoto Protocol compliance system is designed to safeguard the environmental integrity of the treaty and the credibility of the economic systems it has created as well as enhance international cooperation by clearly demonstrating each state's level of effort and deterring free-riding. It provides for both 'facilitation' and 'enforcement' of compliance. The system is possibly the most elaborate and rigorous of any MEA, however, it is not without its limitations. Under the protocol, parties are subject to both procedural (monitoring and reporting) and substantive (emissions reduction targets) commitments. The compliance system is involved in determining and addressing both types of obligation. The enforcement aspects of the compliance system are directed at Annex I (developed country) parties which are bound by specific emissions reduction targets and which can trade emissions units. Facilitation is directed at both Annex I and non-Annex I (developing country) parties.

In order to achieve and maintain environmental credibility, the protocol needs to provide for the accurate and transparent assessment of parties' emissions levels and trends and their adherence to their emissions reduction commitments. The treaty therefore contains extensive monitoring and reporting requirements. The backbone of the monitoring requirements is the submission by parties of national inventories of greenhouse gases to the secretariat. Annex I parties must compile their inventories in accordance with agreed guidelines to maintain their transparency, consistency, comparability, completeness and accuracy. Their inventories must be submitted annually. Inventories are essential for assessing the total and individual efforts made to address climate change and progress towards meeting the ultimate goal of the convention[13] as well as compliance under the Kyoto Protocol.[14] They are also needed for evaluating mitigation options, assessing the effectiveness of policies and measures, making long term emissions projections and providing the basis for emissions trading. The treaty also includes formal review processes carried out by impartial expert review teams (ERTs). ERTs check that parties' national inventories have been compiled in accordance with guidelines and are accurate.[15] The review processes are also intended to assist parties in improving their standard of monitoring and reporting by providing them with helpful feedback. These processes feed into the compliance system which will determine adherence or non-adherence to the monitoring and reporting standards and the emissions reduction targets. The compliance system contains provisions for deterrence against non-compliance and restitution of missed emissions targets.

These procedures, which can identify and deal with parties' implementation of the protocol, promote the stability and credibility of its trading system and are a prerequisite for the market to flourish. The compliance system determines parties' eligibility to participate in the mechanisms.[16] The development of strict rules and robust trading arrangements under the protocol are intended to ensure the credibility and workability of the system.[17] They prevent against a defective trading system in which cheating and overselling could occur, damaging the environmental integrity of the regime.

At the core of the compliance system is the Compliance Committee which consists of a facilitative branch and an enforcement branch. Each branch has 10 members elected to it by the COP/MOP. The Committee has a bureau comprised of the chair and vice-chair of each branch. The plenary consists of the members of both branches and, in addition to some administrative tasks, is responsible for developing rules of procedure. Membership of the Compliance Committee is intended to be balanced between Annex I and non-Annex I parties.

The facilitative branch provides advice and assistance with the aim of promoting compliance and also 'early-warning' of cases where a party may be in danger of not complying with its emissions target. It can facilitate financial and technical assistance to any party concerned.[18] It will be concerned with compliance both with the monitoring and reporting requirements as well as the emissions reduction obligations.

The enforcement branch determines cases of parties' compliance with emissions targets, monitoring and reporting requirements[19] and eligibility to participate in the flexible mechanisms. It can apply certain 'consequences' in cases of non-compliance. The nature of these consequences are listed below:

- When a party fails to meet the monitoring and reporting requirements it must develop a compliance action plan.
- When a party fails to meet one or more of the eligibility requirements for the flexible mechanisms it will have its eligibility suspended in accordance with the relevant provisions. An expedited procedure exists for parties to have their eligibility restored.
- When a party exceeds its assigned amount:

  1. A number of tonnes equal to 1.3 times the amount in tonnes of excess emissions can be deducted from the party's assigned amount for the second commitment period.
  2. A compliance action plan must be developed by the party.
  3. A party's eligibility to transfer quotas can be suspended.

In addition, ERTs can apply adjustments to inventory data (including base year data) if data is unavailable or if the inventory has not been prepared in accordance with the guidelines. If the party disagrees with the ERT decision the issue will be forwarded to the Compliance Committee to resolve.

The compliance system contains considerable measures to ensure due process. This is fitting for a system in which a treaty organ—the enforcement branch—can apply consequences that are so potent.

The Committee's mechanisms are triggered when it receives 'questions of implementation',[20] either in reports by the ERTs, or from a party with respect to itself or from any party with respect to another party as long as it has corroborating information. However, unlike the secretariats of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Montreal Protocol, the climate change convention secretariat cannot raise questions of implementation. This was decided in order to avoid 'politicizing' its role and to preserve its neutrality. The bureau of the Committee is responsible for allocating questions of implementation to the appropriate branch. Each branch bases its work on information from several sources: ERT reports; the party itself; a party which has submitted a question of implementation regarding another party; reports of the COP, the COP/MOP and the COP subsidiary bodies; and the other branch. Intergovernmental organizations and NGOs may also submit factual and technical information. Each branch may seek expert advice. In addition, subject to rules relating to confidentiality, information considered by the branch should be made available to the public. However, the branch may decide of its own accord or at the request of the party concerned, not to release information until its decision has become final. Any party about which a question of implementation is raised has the opportunity to comment in writing on information used in examination of such questions and represent itself at hearings.

Finally, parties can appeal to the COP/MOP on a decision of the enforcement branch but only if the party believes it has been denied due process. The COP/MOP can only overturn the decision of the enforcement branch with a two-thirds majority.

Compliance assessment takes place before, during and after the commitment period. Parties must have an effective national system for estimating greenhouse gas emissions in place at least one year before the commitment period begins. They must also supply data needed to calculate their assigned amount and must have submitted their most recently required inventory. Furthermore, parties must submit a pre-commitment period report to

the secretariat by 2007 to demonstrate adherence to the protocol's preconditions.[21] This report will be reviewed by an ERT and then go through the compliance procedures with a view to endorsement by the Committee. During the commitment period ERTs will check inventories against the climate change convention and Kyoto Protocol criteria. A party may lose eligibility with respect to the flexible mechanisms during the commitment period. After the commitment period there is an additional period of 100 days during which parties can make final transactions to bring themselves into compliance. Parties must submit a report on the additional period. Compliance assessment can only take place once the ERTs have access to all the commitment period inventories. Since there is a time lag of two years in inventory preparation, compliance assessment for the first commitment period will not take place until 2015.

Compliance system problems

Although the compliance system is thorough, it is not without its weaknesses. First, some commentators have argued that the current design of the system could, though by no means necessarily would, provoke strategic considerations in the application of compliance system penalties.[22] Second, factors external to the structure of, and capacity in, the system affect its efficacy. Since the emissions reduction penalty comes into effect after the end of the first commitment period, then increasing certainty over the post-2012 regime's implementation will increase the potency of this penalty's deterrent effect—as long as this regime is compatible with the compliance procedures. However, greater uncertainty surrounding the post-2012 regime will weaken its potency. Third, if a party believes that it will fall into non-compliance in the first period, it could conceivably attempt to negotiate a weak emissions limit in the next period to make up for any penalty that is applied or make its participation conditional on being allowed a high emissions ceiling. Alternatively, if the 1.3 emissions deduction penalty is applied, a party could conceivably put off the punishment repeatedly to each subsequent commitment period or withdraw from the treaty.[23] Fourth, the convention and protocol contain various provisions related to the settlement of disputes concerning their interpretation or application. Ultimately, appeals can be made to the International Court of Justice (ICJ).[24] However, hitherto, states have been reluctant to pursue this route in MEAs.[25] Finally, there are no mechanisms as yet, such as trade measures provided for in the climate change regime, which could perhaps act as a deterrent to non-compliance or make non-participation costly for states.[26] Of course, it is quite possible that external trade measures or sanctions may be used to offset any competitive advantage non-ratifiers or non-compliers hold.[27] Fortunately, it may be possible to defend the emissions trading system against certain levels of non-compliance by preventing trading by ineligible states through the registry system. The credibility and viability of the market would therefore only be at risk insofar as a state decides to disregard treaty obligations altogether.

However, one hopes that states that become parties to MEAs intend to fulfil their commitments. It would seem better not to sign than to undermine international law by flouting an agreement.[28] Moreover, non-acceptance of penalties could compromise the compliance system.[29] If, then, non-compliance results from a lack of capacity rather than an unwillingness to comply, or an uncontrollable change in circumstances, the 'early warning', facilitation and assistance that the facilitative branch can provide will be most apposite. Other external actors such as international organizations also promote action and compliance by providing assistance.

On the other hand, it is conceivable that parties may sign and then subsequently see an advantage in non-compliance that overrides their concerns of adhering to international law on a particular issue. If non-compliance is indeed intentional then stronger enforcement measures may be necessary. When complying with treaty obligations either is, or is perceived to be costly, states may well wish to exact compliant behaviour or participation from other states by using trade measures. This may occur either externally to the regime or through development of such measures within the regime. Furthermore, actors such as NGOs can review and promote compliance. Stakeholders and public pressure can also play a part in the promotion of compliance. The transparency generated by reporting, review and compliance procedures greatly assists these forms of compliance promotion. A state's potential loss of reputation and international standing from non-compliance may well affect its resolve to comply.

Implementing the compliance system

The primary concern in the matter of adopting the mechanisms and procedures relating to compliance is to make the system operative and establish the Compliance Committee as soon as is possible, that is, at COP/MOP 1. The compliance system should be furnished with the strongest possible political and legal backing. In

addition, this matter should be dealt with promptly so it does not impede the meeting.

There are several reasons for expeditiousness in operationalizing the compliance system. First, it would be beneficial for the facilitative branch to have as much time as possible to provide advice and assistance to parties before the Kyoto Protocol first commitment period. Second, parties should have the appropriate national systems in place and their eligibility established before the beginning of the first commitment period. Delaying the establishment of the compliance system will make the timeframe for achieving eligibility tighter. Delay could also increase any strain on the institutions and processes which check that parties meet the protocol pre-commitment period conditions if there happens to be a 'traffic jam' effect of many parties trying to get approved at the same time. In this regard it is worth remembering that parties are required to have in place effective national systems for estimating their greenhouse gas emissions, and to have submitted their report to the secretariat that demonstrates compliance with protocol's pre-conditions, by 2007. Parties may be able to begin trading and participate in the flexible mechanisms before the first commitment period and therefore require early establishment of the Compliance Committee. Third, the Compliance Committee should be given as much time as possible to find its feet before tackling issues of substance. Delaying its establishment would mean a delay in seeing a fully matured Compliance Committee. Fourth, once established, the Committee will develop further rules of procedure. These then must be adopted by the COP/MOP, adding to the overall time lag. In summary, the compliance system should be operationalized as soon as possible to ensure the smooth functioning of the protocol monitoring, reporting and review systems as well as the flexible mechanisms. Long-term delay in operationalization would weaken faith in the environmental integrity of the protocol's obligations and flexible mechanisms as well as these mechanisms' economic credibility.

Decision 24/CP.7[30] states that the COP, noting that it is the prerogative of the COP/MOP to decide on the legal form of the procedures and mechanisms relating to compliance, decides to adopt the text containing the procedures and mechanisms relating to compliance. The COP then recommends that COP/MOP 1 adopt these procedures and mechanisms, in terms of Article 18 of the Kyoto Protocol. Article 18, as noted above, states that COP/MOP 1 "shall approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance" and that any "procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol".

What then are the options for adoption of the compliance system and what is the best course of action? COP/MOP 1, Agenda Item 7 states that the COP/MOP should respond to the recommendation in 24/CP.7 by adopting the procedures and mechanisms relating to compliance in the form of a COP/MOP decision, or in the form of an amendment or by some other approach. In fact, a combination of these options is also possible. The following sections examine the ramifications that follow from these options.

COP/MOP decision

The successful adoption of the compliance system by COP/MOP decision would enable the compliance system to be operationalized and the Compliance Committee to be established immediately. If the issue were resolved early on in COP/MOP 1, it would allow the conference to get on with the other issues on the table. However, following Article 18, adoption by decision alone, depending on its wording, may give rise to the argument that the compliance system consequences are not 'binding'.

Amendment

Article 20 of the Kyoto Protocol stipulates that parties shall make every effort to reach agreement on any proposed amendment by consensus. If all efforts at consensus are exhausted and no agreement is reached the amendment shall, as a last resort, be adopted by a three-fourths majority vote. The amendment would enter into force for those parties that have accepted it on the ninetieth day after the date of receipt by the depositary of an instrument of ratification by at least three fourths of the parties. The amendment would enter into force for any other party on the ninetieth day after the date on which that party deposits its instrument of acceptance.

The amendment option is on the table at COP/MOP 1 as a result of the proposal by Saudi Arabia.[31] Successful adoption of an amendment would faithfully follow the stipulation laid down in Article 18 and provide a concrete legal basis for Compliance Committee decisions. It would also give a strong initial indication by parties that they mean to support the Kyoto Protocol process, follow its rules and comply with its obligations, although a COP/MOP decision could also show a similar willingness. Successful adoption by amendment at COP/MOP 1, pending entry into force, could still allow the Compliance Committee to be established and the system operationalized, perhaps by means of a COP/MOP decision to that effect.

If, indeed, adoption resulted in entry into force, the compliance procedures would be supported by the force of Article 18 and would be considered 'binding'. However, it is conceivable that negotiations could be disrupted by concerns over this rather sensitive issue. In this respect, Article 20's stipulation that all efforts to reach consensus must be exhausted is most pertinent. An inability to agree on this issue could result in a loss of time for the compliance system.

Even if the amendment is adopted, there could be a considerable delay before entry into force due to the time-consuming parliamentary processes involved in ratification. Moreover, entry into force is by no means guaranteed. Ratification may not be approved by parliaments or governments that adopted the amendment may have been replaced by those that may not wish to ratify. Following adoption of the amendment, indefinite and potentially interminable delay or actual non-entry into force would be a most unsatisfactory state of affairs for the compliance system.

Finally and perhaps most worryingly, due to the stipulation that entry into force of the amendment occurs after the ratification of three-fourths of parties to the protocol, the unfortunate situation could arise in which the amendment does not apply to all Kyoto Protocol parties at the same time: those protocol parties that have ratified are bound by the amendment, while non-ratifying protocol parties are not. This situation could be disruptive to the protocol process. An attempt to adopt by amendment and achieve entry into force may have been difficult at any point since adoption of the protocol, due to the lengthy and potentially fragmentary nature of the process, but such a course of action at this late stage could increase the effect of the problems outlined above.

Although consensus is required for adoption of COP/MOP decisions it is reasonable to assume the passage of a COP/MOP decision, along with the other Marrakesh Accords, would be far less contentious than that of an amendment proposal. Most crucially, there appears to be widespread, if not total, support for adopting the compliance system by COP/MOP decision at this meeting.

COP/MOP decision and process started for amendment

A seemingly attractive proposition is to adopt the compliance system by COP/MOP decision and, simultaneously, launch a process for adoption by amendment. Its attractiveness lies in the fact that such an approach appears to cover both bases: the compliance system could be operationalized promptly and the Article 18 stipulation is addressed directly. However, this option presents its own problems. In such a situation one could potentially question why an amendment is necessary after a COP/MOP decision has been made on the issue: would an amendment or the perceived need for an amendment not undermine the COP/MOP decision and imply that a COP/MOP decision is not sufficient? Would it not be better simply to adopt a strong COP/MOP decision which shows parties' willingness to accept the Kyoto Protocol rules? Moreover, if an attempt to follow the amendment route was made, the problems outlined above might emerge. On the other hand, if there is substantial political momentum behind adoption and entry into force of an amendment, the process should be started in order to achieve the extra legal clarity and force that this approach would provide. Once established by COP/MOP decision, the compliance system could be regarded as a 'fait accompli' and ratifying an amendment a desirable confirmation of its importance in the effective functioning of the treaty.

The COP/MOP could adopt a decision to provisionally apply the compliance system until entry into force of an amendment. However, this approach is open to the problems associated with the amendment route and may intensify any uncertainty around the compliance system, since it would have 'provisional' status. Indeed, the term 'provisional' may be regarded as unsatisfactory by parties.

Further options

A further option is for each party to declare unilaterally that it considers the compliance system consequences to be binding. The greater the number of states that do this, the greater would be the force of the system. In addition, it is possible that the compliance procedures and mechanisms could also be adopted by another legal instrument. A neat option may be to use the approach suggested for COP 6 whereby an amendment or some other legal instrument which establishes second commitment period targets for parties could also include the 'binding consequences'. If used in addition to a COP/MOP decision at COP/MOP 1 this approach means that the compliance system would be operationalized immediately and parties would be bound when an emissions deduction penalty would actually bite. In addition, as noted above, it may be both possible and also within the discretion of enforcement branch on the basis of its establishment by COP/MOP decision (see the section below on binding consequences) to prevent an ineligible party from trading emissions units during the first commitment period.

Binding consequences

The formulation of Article 18 is clear with regard to the compliance system and its mode of adoption. Entry into force of an amendment would entail that the compliance system consequences are binding. The term 'binding' is to be interpreted as 'legally' binding, since it requires the consequences to be agreed on through a legally binding method, that is, by an amendment, which is a formal ratified agreement rather than an affirmative decision of the COP/MOP. An amendment may therefore provide enhanced legal clarity and certainty. As indicated above there are difficulties associated with following the amendment route. What then would a COP/MOP decision entail? As a result of Article 18, adoption by COP/MOP decision alone would mean that the consequences may not be regarded as binding. However, if parties' accept and adopt the compliance system through COP/MOP decision by consensus they are still fully expressing their intent to abide by its rules and the Compliance Committee decisions, especially if the decision contains language of a mandatory nature.

Lingering legal ambiguity may affect each of the consequences differently. Suspension of eligibility to participate in the flexible mechanisms may be considered to be within the discretion and competence of the enforcement branch. As noted above, this consequence may have particular force since it does not depend on a party itself carrying out restorative action but rather the treaty institutions denying its privileges within the regime. The same discretion may be considered to apply to the compliance action plan. However, with respect to the consequence entailing deduction of excess emissions in the second commitment period, a party that has not had to ratify an amendment may attempt to argue that it is not bound by this penalty.[32]

While an amendment may provide some advantage in terms of legal certainty, the practical effect of the differing modes of adoption might be rather muted since, as noted above, the treaty provides no means to force a party into compliance with its emissions reduction commitments. As noted above, there are no further options as yet, such as trade measures, provided for in the climate change regime and the ICJ is currently not considered a desirable way of resolving compliance disputes in the context of MEAs. In addition, the utility of leaning on the State Responsibility rules[33] and the 1969 Vienna Convention on the Law of Treaties for addressing issues of non-compliance in the climate change regime is uncertain.[34] Nevertheless, insofar as binding instruments and legal certainty are of benefit in effective treaty implementation it remains a crucial feature of the climate change regime that the emissions reduction obligations listed in the protocol are indeed legally binding on parties. Any action that is taken to enforce this, either externally to the treaty, through trade measures, or indeed by shaming, public and NGO pressure or through the dispute resolution mechanisms, would be able to take this into account.

Ultimately then, both modes of adoption are expressions of intent to abide by a legally binding treaty. Any non-acceptance of the compliance system in the future would mean that parties would have been acting in bad faith by agreeing to adopt it. Taking these factors together, a COP/MOP decision backed by strong political will from parties could, at this point, provide the required certainty for the effective functioning of the treaty and indeed, the nascent emissions trading market.

Conclusion

The Kyoto Protocol provides for a sophisticated, though somewhat limited, compliance system and exacting monitoring and reporting requirements as well as a formalized review process. The proximity of the first commitment period of the protocol necessitates the operationalization of the compliance system and the establishment of the Compliance Committee at COP/MOP 1. The most pragmatic way to do this currently appears to be through adoption of the procedures and mechanisms contained in the Annex to Decision 24/CP.7 by COP/MOP decision. Parties should aim to reach agreement promptly so as to streamline the meeting. A process to adopt by amendment may also be initiated. However, when considering this route, there will need to be careful evaluation of the potential advantages related to legality and potential disadavantages related to the entry into force procedure and the amendment's relationship with the COP/MOP decision. Consideration should also be given to the possibility of including this issue in negotiations on the post-2012 regime. Adoption could be included in a legal instrument or amendment which establishes commitments for the post-2012 regime. Again, this should be additional to adoption by COP/MOP decision at COP/MOP 1.

Endnotes

1 'Procedures and mechanisms relating to compliance under the Kyoto Protocol', Item 7. FCCC/KP/CMP/2005/1, 2 September 2005, www.unfccc.int.

2 The Marrakesh Accords, FCCC/CP/2001/13 and FCCC/CP/2001/13/Add.1-4, 21 January 2002, www.unfccc.int.

3 Chayes, A. and A. Chayes (1995): *The New Sovereignty: Compliance with international regulatory agreements*, Harvard University Press, Cambridge and London.

4 Raustiala, K. and D.G. Victor (1998): Conclusions. In: Victor, D.G., Raustiala, K. and E.B. Skolnikoff (eds) (1998): *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice*, MIT Press, Cambridge; Downs, G., Rocke, D. and P. Barsoom (1996): Is the good news about compliance good news about cooperation?, *50 INT'L ORG*. Victor D. (1999): Enforcing international law: implications for an effective global warming regime. *10 DUKE ENVTL. L & POL'Y*.

5 For an overview see Crossen, T (2003): Multilateral Environmental Agreements and the Compliance Continuum, Berkley Electronic Press, www.law.bepress.com/expresso/eps/36 and Corfee Morlot, J. (1998): Ensuring compliance with a global climate change agreement, *Organization for Economic Co-operation and Development (OECD) Information Paper*, ENV/EPOC(98)5/REVI.

6 Corfee Morlot, J. (1998), *supra* note 5.

7 UNFCCC Article 13 and Kyoto Protocol Article 16 refer to a multilateral consultative process that would resolve questions of implementation. However negotiations on this issue had no concrete result. See Wang, X and G. Wiser (2002): The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol. RECIEL 11 (2) 2002. Blackwell Publishers Ltd, Oxford, UK and Malden, USA.

8 'Possible elements of a Protocol or Another Legal Instrument – Institutional Issues', FCCC/AGBM/1996/4, 13 February 1996.

9 Oberthür, S. and Ott, H. (1999): '*The Kyoto Protocol: International Climate Policy for the 21st Century',* Springer-Verlag Berlin Heidelberg; Grubb, M., Vrolijk. and D. Brack. (1999): The Kyoto Protocol: A Guide and Assessment. Royal Institute of International Affairs and Earthscan, London.

10 Wang, X and G. Wiser (2002), *supra* note 7.

11 Unlike other Marrakesh Accord decisions, 24/CP.7 was not replicated in draft COP/MOP decision form.

12 Werksman, J (2005): The Negotiation of a Kyoto Compliance System. In: Stokke, O., Hovi, J. and G. Ulfstein (eds.) (2005): *Implementing the climate change regime: International Compliance*. Earthscan, London, pp.17–37.

13 The ultimate goal of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) (Article 2) is the stabilization of greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system.

14 Parties must also submit national communications. National communications are reports detailing what action a party is taking to implement the convention. They also provide a way of sharing experience between parties of tackling climate change.

15 Parties' national communications are also subject to review.

16 The state is eligible if: it is a party to the Kyoto Protocol; its assigned amount has been calculated and recorded; it has in place its national system; it has in place its national registry (see note 17); it has submitted annually the most recent required inventory; it submits certain supplementary information on its assigned amount.

17 Parties must establish a national registry (an electronic database) to account for their emissions trading units. Parties must keep a minimum level of units in the registry (know as the 'commitment period reserve') to prevent them from 'over-selling'. The secretariat will run an independent transaction log to ensure the integrity of transactions by checking them against the trading conditions set out under the protocol.

18 The Kyoto Protocol contains a selection of other procedures for the provision of financial assistance and technology transfer to developing countries.

19 Difficulties in assessing compliance are most likely to occur over the quality and appropriateness of methodologies used by parties in emissions estimates rather than uncertainty in emissions estimates.

20 A question of implementation is a problem pertaining to language of mandatory nature in the relevant UNFCCC guidelines influencing the fulfilment of commitments.

21 The report should contain, among other information, a complete inventory of emissions from the base year to the most recent year available and the calculation of its assigned amount, and a description of the national system and registry.

22 Hagem, C., Kallbekken, S., Maestad, O. and H. Westskog (2003): Tough justice for small nations: How strategic behaviour can influence the enforcement of the Kyoto Protocol, *Center for International Climate and Environmental Research – Oslo (CICERO) Working Paper*, 2003:01; Hagem, C. and H. Westskog (2005): Effective Enforcement and Double-edged Deterrents: How the Impacts of Sanctions also Affect Complying Parties. In: Stokke, O., Hovi, J. and G. Ulfstein (eds.) (2005): *Implementing the climate change regime: International Compliance*. Earthscan, London, pp.107–120.

23 Wiser, G., and D. Goldberg (2000): Restoring the Balance: Using Remedial Measures to Avoid and Cure Non-Compliance under the Kyoto Protocol. Report prepared for the World Wildlife Fund; Wang, X and G. Wiser (2002) *supra* note 7; Barrett, S. (2003): *Environment and Statecraft*. Oxford University Press.

24 In 1993 the Court established a seven member chamber to deal with any environmental cases falling within its jurisdiction. The chamber has yet to have a case brought before it.

25 Wang, X and G. Wiser (2002): *supra* note 7; Grubb, M., Vrolijk. and D. Brack. (1999): *supra* note 9; Ehrmann, M (2002): Procedures of Compliance Control in International Environmental Treaties. *13 COLO. J. INT'L L. & POL'Y, No. 2*.

26 Some treaties such as the Montreal Protocol and CITES provide for trade measures on certain substances and species that are covered by the respective treaties. However, integrating trade measures or sanctions into the climate change regime, though not impossible, may be more complex due to the large number of types of products that might be considered eligible for control. Trade measures could be applied externally to the treaty, either unilaterally or by a coalition of states, to enforce compliance or deter non-participation, although their compatibility with General Agreement of Tariffs and Trade (GATT) and World Trade Organization (WTO) rules may come under scrutiny. Indeed, WTO compatibility for trade measures within MEAs is still moot question. (Hovi, J. (2005): The Pros and Cons of External Enforcement. In: Stokke, O., Hovi, J and G. Ulfstein (eds.) (2005): *Implementing the climate change regime: International Compliance*. Earthscan, London, pp.129–145; Stokke, O. (2005): Trade Measures, WTO and Climate Compliance. In: Stokke, O., Hovi, J. and G. Ulfstein (eds.) (2005): *Implementing the climate change regime: International Compliance*. Earthscan, London, pp. 147-165; OECD (2000): Trade Measures in Multilateral Environmental Agreements. OECD Industry, Services & Trade, 2000, Vol. 1999, No. 26; Morlot, J. (1998): *supra* note 5; Swedish National Board of Trade (2004): Climate and Trade Rules – harmony or conflict? www.kommers.se/binaries/attachments/3430_Climate%20and%20Trade%20Rules.pdf

27 For instance, a Member of the European Parliament (MEP) recently argued that by refusing to ratify the Kyoto Protocol the USA is shielding its exporters from the costs of averting climate change, effectively handing them a state subsidy. The MEP called on the European Commission (EC) to raise the issue at the WTO at the earliest opportunity and to demand authorisation to impose countervailing duties or border taxes on USA imports into the European Union (EU). However, the EC said it currently had no intention of imposing trade measures or raising trade distorting effects of Kyoto Protocol compliance at the WTO. On the other hand, the European Parliament Environment Committee in a recent draft motion for a resolution included a call for participants in the climate change talks held in May 2005 to explore the scope for imposition of WTO compatible trade sanctions against non-Parties to the Kyoto Protocol. Following this, the European Parliament adopted a resolution which included a call on the EC to take into account in any cost-benefit analyses of climate change policies the possibility to adopt border adjustment measures on trade in order to offset any competitive advantage producers in industrialized countries without carbon constraints might have (News Release from MEP Caroline Lucas, 9 March 2004; European Parliament Committee on the Environment, Public Health and Food Safety (2005): Amendments 1-20, Draft motion for a resolution. The Seminar of Governmental Experts on Climate Change, PE 375.672v01-00, (PE 357.580v01-00); European Parliament (2005): Resolution on the Seminar of Governmental Experts on Climate Change, P6_TA-PROV(2005)0177, PE 357.354.).

28 Grubb, M., Vrolijk. and D. Brack. (1999): *supra* note 9.

29 Stokke, O., Hovi, J. and G. Ulfstein (2005): Introduction and Main Findings. In: Stokke, O., Hovi, J. and G. Ulfstein (eds.) (2005): *Implementing the climate change regime: International Compliance.* Earthscan, London, pp. 1–14. www.unfccc.int.

30 Decision 24/CP.7, 'Procedures and mechanisms relating to compliance under the Kyoto Protocol', FCCC/CP/2001/13/Add.3. www.unfccc.int.

31 'Proposal from Saudi Arabia to amend the Kyoto Protocol. Note by the secretariat', FCCC/KP/CMP/2005/2, 26 May 2005.

32 See Ulfstein, G. and J. Werksman (2005): The Kyoto Protocol Compliance System: Towards Hard Enforcement. In: Stokke, O., Hovi, J. and G. Ulfstein (eds.) (2005): *Implementing the climate change regime: International Compliance*. Earthscan, London, pp.39–62.

33 Draft Articles on Responsibility for Internationally Wrongful Acts, in *Report of the International Law Commission Fifty Third Session,* GA 56th Session, Supp. No.10 (A/56/10) (2001) at www.un.org/law/ilc/reports/2001/2001report.htm

34 See Crossen, T (2003): *supra* note 5; Peel, J (2001): New State Responsibility Rules and Compliance with Multilateral Environmental Obligations: Some Case Studies of How the New Rules Might Apply in the International Environmental Context: RECEIL 10 (1) 2001, Blackwell Publishers Oxford and USA; Koskenniemi, M. (1992): Breach of Treaty of Non-Compliance? Reflections on the Enforcement of the Montreal Protocol, *3 Y.B. INT'L ENV. L.*; Werksman, J (1998): Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime. *9 Y.B. INT'L ENV. L.*; Ehrmann, M (2002): *supra* note 25.

Design and production
Richard Jones

Printer
Linkway CCP, London

About this paper

This *Brief* examines the implications, both practical and legal, of the options for adoption of the procedures and mechanisms relating to compliance under the 1997 Kyoto Protocol. The options are by COP/MOP decision, amendment to the protocol or by some other approach. It is possible that the options can be combined.

Larry MacFaul argues that the most judicious way forward is for the procedures and mechanisms to be adopted by COP/MOP decision at COP/MOP 1. A process for adoption by amendment may also be initiated but the potential consequences of this course of action, as outlined in this paper, will need to be carefully evaluated. Consideration should also be given to the possibility of including this issue in the negotiations on the post-2012 regime. Adoption could be included in a legal instrument or amendment which establishes commitments for the post-2012 regime. Again this should be additional to adoption by COP/MOP decision at COP/MOP 1.

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VERTIC is grateful to the Esmée Fairbairn Foundation for funding this *Brief* and our work on verification issues in the climate change regime.

Other VERTIC funders Weapons of Mass Destruction Commission, Foreign Affairs Canada, Global Opportunities Fund of the UK Foreign and Commonwealth Office, John D. and Catherine T. MacArthur Foundation, Joseph Rowntree Charitable Trust, Ploughshares Fund, Polden-Puckham Charitable Trust, United Nations Institute for Disarmament Research (UNIDIR).

ISSN: 1740-8083