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SECTION: ANALYSIS & PERSPECTIVE: Kyoto Protocol Packs Powerful Compliance Punch.

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TEXT:

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INTRODUCTION

Drafting an acceptable compliance regime for the Kyoto Protocol was one of the most difficult issues faced by international negotiators last year as they worked to finalize implementation rules for the pact both in Bonn and Marrakech.

Yet while the accord did not settle whether there will be "legally binding" consequences for so-called Annex I nations--that is, developed countries--failing to live up to their commitments, the Kyoto Protocol includes a compliance system that is both robust and novel.

Unlike other multilateral environmental agreements (MEAs), the protocol sets up both the procedures and institutions needed to gauge and enforce compliance, including a body that functions much like a court. It also includes real consequences for nations failing to meet their Kyoto obligations.

In fact, the protocol's compliance system includes many procedures found in trade agreements governed by World Trade Organization rules. Most MEAs, on the other hand, have far weaker compliance systems, often relying only on unenforceable reporting requirements or ad hoc procedures.

Representatives from more than 170 countries meeting in Marrakech, Morocco, Nov. 10 finalized the rules for implementing the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) after nearly five years of negotiations.

The protocol for the first time will create binding emissions targets for developed countries covering six greenhouse gases (GHGs): carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The pact calls on industrialized nations to reduce their GHG emissions collectively by 5.2 percent--based on 1990 levels--between 2008-2012.

Although the administration of U.S. President George W. Bush rejected U.S. participation in the protocol for now, key governments--including Japan, Russia, and the European Union--have announced their intention to ratify the agreement, which greatly enhances the likelihood that the treaty and its compliance system will soon carry the force of law.

OVERVIEW OF COMPLIANCE SYSTEM

Emissions Reporting

Building on obligations already contained in the UNFCCC, Annex I parties will need to monitor and report estimates of their "anthropogenic," or human-induced,

GHG emissions to the UNFCCC secretariat in Bonn. The secretariat will make the reports available to other parties to the protocol and will forward them to so-called Article 8 expert review teams, which will check the reports for accuracy. Article 8 governs review of reporting by parties under the protocol.

Unlike some other U.N. environmental agreements, the UNFCCC Secretariat--which also will serve as the Kyoto Protocol's secretariat--is not a part of the U.N. Environment Program.

The reports will include data on emissions from most industrial, transportation, and other sectors of the economy that burn fossil fuels. Net emission sources from land-use, land-use change, and forestry activities such as logging also must be reported. Countries may elect to deduct from their gross emissions some of the carbon dioxide that is sequestered in soil and plants from agriculture and other carbon "sinks."

Additionally, the protocol establishes an international emissions trading system among developed countries, as well as a trading system between developed and developing countries based on verified emissions reductions derived from specific projects.

Developed countries that want to take advantage of these market-based "flexible mechanisms" will need to set up domestic, computerized registry systems to track the holdings and trades of their companies and other "private entities" which wish to participate.

They then will need to report those transactions to a centralized data base--called a transaction log--set up by the secretariat to ensure that all emissions trades between countries are valid.

Article 8 Review Teams

While the registries should be set up under international guidelines, governments will have the discretion to select the means by which they enforce the integrity of their domestic systems. Still, while the registries will be operated solely by the individual countries involved, an emissions trade between two countries will not be deemed valid until it has cleared the transaction log.

The Subsidiary Body for Scientific and Technical Advice (SBSTA) is slated to develop the technical standards governing the registries in 2002 for approval by the Eighth Conference of the Parties (COP-8), which will meet in November 2002. Individual governments then must submit a report to the secretariat prior to Jan. 1, 2007, that includes a description of their registries.

Each country's annual emissions report will be subject to review by Article 8 "expert review teams" coordinated by the secretariat and made up of experts selected on an ad hoc basis from the UNFCCC's roster of experts.

These teams will identify any "questions of implementation"--that is, possible cases of noncompliance--which they then will refer to the protocol's Compliance Committee.

These review-team experts will not serve as representatives of any government. The secretariat is required to make "every effort" to ensure that there is a geographical balance of experts on the review teams.

Protocol Compliance Committee

The Compliance Committee, which was created under the protocol, will be charged with promoting compliance, providing advice and assistance to signatory parties, determining cases of noncompliance, and applying appropriate consequences for noncompliance. The secretariat in Bonn also will serve as the secretariat of the Compliance Committee.

The procedures and mechanisms for the Compliance Committee represent an important development in the law of international environmental compliance. They will move MEAs beyond the realm of unenforceable reporting requirements or ad

hoc compliance measures to a regime in which formally constituted bodies using fixed procedures may make legally binding determinations of a country's compliance or noncompliance and then apply specific, appropriate consequences.

The committee will be comprised of both a facilitative branch available to assist all parties in their implementation of the protocol and a judicial-like enforcement branch functioning much like a court.

The enforcement branch will determine whether an Annex I party has (1) met its emissions target, (2) complied with its monitoring and reporting requirements, and (3) met the eligibility tests for participating in the flexible mechanisms.

When the enforcement branch finds that a party has failed to comply with one of these obligations, it will have the authority to apply the appropriate consequences to that noncompliant party. Annex I nations failing to meet the emissions reduction targets, monitoring and reporting requirements, or eligibility tests could face an array of consequences ranging from a declaration of noncompliance to loss of the privilege of participating in the protocol's various flexible mechanisms.

Rules of Procedure

There will be potentially significant opportunities for public participation in compliance proceedings. Inter-governmental and nongovernmental organizations will be entitled to submit technical and factual information to the committee's relevant branch, that is, either the facilitative or enforcement branch.

Subject to limited exceptions, compliance hearings held by the enforcement branch will be open to the public. Information considered in an enforcement proceeding will be made publicly available by the secretariat in Bonn.

If the enforcement branch determines that a party has exceeded its emissions target, the party will have the right to appeal the decision to the supreme body of the protocol, the "Conference of the Parties serving as the meeting of the Parties" (COP/MOP), which will meet annually.

Currently, no date has been set for negotiating the rules of procedure governing this process. However, preliminary negotiations are likely to begin within the next two years. The rules of procedure will be developed by the Compliance Committee, and those rules then must be approved by the COP/MOP.

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

Many of these types of legal procedures can be found in trade agreements, such as those governed by the WTO. However, they have not been found in MEAs, which often have no compliance system other than unenforceable reporting requirements. This makes the Kyoto Protocol compliance system more robust than those of other MEAs.

LEGAL OR POLITICAL CONSEQUENCES?

Specific Consequences for Noncompliance

The enforcement branch will apply specific consequences when an Annex I party fails to meet its emissions target:

- o (1) For every metric ton of emissions by which a party exceeds its target, 1.3 tons will be deducted from its emissions allocation--the assigned amount a nation is permitted to release--for the subsequent compliance period.

- o (2) The party will prepare a detailed plan explaining how it will meet its reduced target for the subsequent compliance period. The enforcement branch will

have the power to review the plan and assess whether or not it is likely to work.

o (3) The party will not be able to use international emissions trading to sell parts of its emissions allocation until it has demonstrated that it will be able to comply with its current target.

Carrot and Stick

Despite the unanimous adoption of these rules, parties at Marrakech were unable to agree on what their precise legal nature will be. The question of whether these consequences will be "legally binding" is thus among the most important compliance-related issues remaining for the COP/MOP to resolve.

The last sentence of the Kyoto Protocol's Article 18, which deals with compliance rules and procedures, provides that "binding consequences" for noncompliance may be adopted only by an amendment to the protocol.

That requirement reflects the inability of negotiators to agree upon the issue of consequences for noncompliance during the talks leading to adoption of the protocol at Kyoto in 1997.

It also suggests that governments will be politically, but not necessarily legally, bound to respect the decisions and consequences ordered by the enforcement branch if the protocol's first compliance period begins before any Article 18 amendment has entered into force.

Thus, while it is not yet settled whether a noncompliant party will be subject to legally binding consequences for failure to live up to its Kyoto commitments, such a country could well suffer political consequences, such as having its international reputation damaged or facing a great deal of criticism from other nations. Most nations--especially liberal democracies--do not want to be seen as treaty violators because it can be politically damaging both at home and abroad.

Many nations hope that an amendment to Article 18 will be negotiated at the first COP/MOP meeting, which will be held after the Kyoto Protocol has been ratified and enters into force. If an amendment to Article 18 is adopted, it would have to be ratified by participating countries just like any other treaty. It would not enter into force until 90 days after three-fourths of the parties submit their notices of acceptance and ratification, and it would bind only the parties ratifying or acceding to the amendment.

Umbrella Group

Japan, Russia, and Australia have long resisted the efforts of most other parties to adopt "legally binding" consequences. Before the U.S. administration renounced the protocol in March 2001, the United States was among the strongest proponents of a binding, enforceable compliance system. Absent U.S. leadership, these three countries became much more aggressive in their calls for a less rigorous system.

In Marrakech, these members of the "Umbrella Group," supported by Canada and now assisted by the U.S. administration, continued to try to alter the compliance text and compliance-related linkages in other texts to strengthen their argument that the UNFCCC Conference of the Parties (COP) and the preliminary rules it had agreed upon earlier in Bonn, Germany, were neutral on the question of legally binding consequences. While most of their efforts were rebuffed, they succeeded in two important areas.

First, they won language in the political portion of the compliance text stating that it is the "prerogative" of the COP/MOP "to decide on the legal form of the procedures and mechanisms relating to compliance."

The COP is the supreme governing body of the convention, and the COP/MOP will be the governing body of the protocol. Under most parts of the protocol, the COP

is limited to an advisory role, while the COP/MOP has the authority to make final decisions.

This language, which does little more than paraphrase parts of Article 18 of the protocol, suggests that the COP will not concentrate on the questions of whether, when, or how an Article 18 legal instrument dealing with binding consequences might be adopted; instead, it leaves those questions primarily to the COP/MOP.

However, the language leaves open the opportunity for the COP promptly to begin the preparatory work for establishing the compliance system's institutions and for further developing its procedures. Such preparatory work would be subject to final approval by the COP/MOP.

Diluted Provisions

Second, the rules in the texts for the Kyoto Protocol's flexible mechanisms now require all parties to accept the authority of the enforcement branch to verify whether they satisfy certain eligibility criteria for participating in joint implementation (governed by Article 6), the Clean Development Mechanism (Article 12), or emissions trading (Article 17).

These are important provisions, yet they were adopted at the price of the Umbrella Group's successfully diluting the earlier, preliminary mechanisms eligibility rule. That rule would have required a party to be subject to all of the compliance rules or to have accepted an Article 18 legal instrument before it could begin trading.

The environmental integrity of the mechanisms and their potential for instilling confidence in the emissions trading markets will be significantly predicated on the ability of the Kyoto regime to ensure that its members comply with their emissions reduction targets. To accomplish that, parties eventually will need to agree that every participating country must be subject to all of the protocol's compliance rules.

Compliance Tools Potent

Nevertheless, this is not the time to become too preoccupied with whether the noncompliance consequences are "legally binding" in the Article 18 amendment sense, or whether they are in fact binding in a political sense.

Under international law, the extent to which a multilateral agreement like the Kyoto Protocol is "legally binding" depends primarily on the expression of political will by the states party to the agreement.

There is no realistic way to force parties who exceed their emissions targets to remedy the problem. Trade sanctions have sometimes been used to attempt to compel action, but that route is not being considered in the Kyoto regime at this time.

In sum, the issue of "legally binding" consequences for noncompliance is not yet resolved. An amendment or other formally ratified legal instrument would provide the highest possible expression of the intent of parties to respect the results of an enforcement branch proceeding.

However, the accords agreed upon and adopted in Marrakech by all participating states establish the procedures and institutions for the compliance system as well as the consequences for an Annex I party's failure to honor its obligations, including failure to meet its emissions target.

That is a politically potent accomplishment that makes the protocol's compliance system the most robust ever adopted for a multilateral environmental agreement.

The Kyoto pact's compliance system includes a venue for an independent, quasi-judicial forum through the Compliance Committee's enforcement branch,

which will have the authority to declare publicly and formally that a country has violated its treaty obligations by exceeding its emissions target.

Even without the other consequences of noncompliance, the deterrent value of such public "shaming" in the international arena should not be underestimated.

Additional information about the Kyoto Protocol's compliance regime is available from the UNFCCC at <http://www.unfccc.de> and at the Center for International Environmental Law at <http://www.ciel.org>.