Comments on Selected Portions of the JWGC Co-Chairs' "Elements" Paper
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The Center for International Environmental Law (CIEL) is a public interest, not-for-profit environmental law firm founded in 1989 and dedicated to strengthening and developing international and comparative environmental law, policy, and management around the world. CIEL has played an active role in the development of a compliance system for the Kyoto Protocol by sponsoring and participating in compliance-related workshops, observing and monitoring the meetings of the Joint Working Group on Compliance (JWGC), and publishing an on-going series of compliance policy papers.[1]

These Comments respond to or elaborate specific issues raised by the Co-Chairs' Elements paper.[2] They are organized around the structure of that paper and generally use the same headings.

General

We agree with the JWGC Co-Chairs that the objectives, nature, and principles of the compliance system will be reflected in the design of the system. Consequently, we do not believe that a debate over these should be permitted to take precedence over or detract from development of the substantive aspects of the compliance system.

Coverage

The compliance system should apply to all Kyoto Protocol commitments. This is desirable to avoid a "balkanization" of the Protocol, in which some compliance issues are dealt with by one oversight body and set of rules and procedures, some by another, and some not at all. Within the compliance system, however, there will likely need to be different personnel or divisions to deal with different kinds of compliance matters.

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[1] The CIEL compliance series includes *Responsibility for Non-Compliance Under the Kyoto Protocol's Mechanisms for Cooperative Implementation* (Autumn 1998), *Building a Compliance Regime Under the Kyoto Protocol* (Nov. 1998), *The Compliance Fund: A New Tool for Achieving Compliance Under the Kyoto Protocol* (June 1999), *Compliance Institutions for the Kyoto Protocol: A Joint CIEL/WWF Proposal* (Oct. 1999), and *Compliance Systems Under Multilateral Agreements: A Survey for the Benefit of Kyoto Protocol Policy Makers* (Oct. 1999). All of these papers may be obtained at CIEL's web site, <www.ciel.org>.

[2] The "Elements" paper, dated November 3, 1999 and entitled "Co-Chairs' Initial Thoughts on Procedures and Mechanisms Relating to a Compliance System Under the Kyoto Protocol" was distributed to members of the Joint Working Group on Compliance at the Fifth Conference of the Parties.

For instance, participation by Parties in the Kyoto mechanisms (joint implementation, CDM, and emission trading) should be conditioned on a Party demonstrating that it has the monitoring, reporting, tracking, and domestic oversight capabilities necessary to ensure the integrity of mechanism units it may transfer or acquire. Though many of these participation rules are being developed in the Mechanisms Contact Group, they should still be administered as part of the compliance system, through the compliance system's eligibility function.

Similarly, rules governing the suspension of a Party's privilege to take part in the mechanisms, or the "liability" of buyer and/or seller under emissions trading, will originate in the Mechanisms Contact Group, but should ultimately be administered under the compliance system.

Compliance Body: Status

The nature and breadth of the compliance body's duties will necessitate it being a standing body, not an ad hoc one. This does not mean that all functions of the body will need to be staffed by full time personnel. Independent experts serving as decision-makers in cases of non-compliance will likely need to serve only rarely, and possibly not at all during the course of the first commitment period. On the other hand, the administrators of the eligibility function will probably need to serve continuously, as the requirements of their position could be constant and demanding.

Compliance Body: Size

We believe that the very different terms of reference for the facilitative, enforcement, and eligibility branches of the compliance system will require them to be comprised of different members. This is particularly so for the facilitative and enforcement branches, because each branch will have aims which could give rise to conflicts of interest were the same personnel charged with administering both.

The facilitative branch will stress cooperation, flexibility, and assistance as approaches to help a Party avoid non-compliance. Political considerations will likely play an important role in how it deals with a given situation.

In contrast, enforcement branch operations should significantly be based on automaticity, predictability and deterrence, and may tend by their very nature to be somewhat confrontational. The enforcement branch will function effectively only if it is perceived as being fair and apolitical. Because it will be more adjudicative in nature than the facilitative branch, it should be comprised of members who have specific expertise in judicial and legal processes. The facilitative branch, on the other hand, should have members whose expertise is more related to the technical skills needed for solving specific implementation problems.

The responsibilities of the eligibility branch will include evaluating information submitted by Parties that demonstrates they have the technical and administrative capacity to ensure that their domestic monitoring, reporting, tracking, and oversight

systems will operate adequately to preserve the integrity of the mechanisms. Much of these evaluation tasks might be performed by the secretariat; if not, they could be performed by a technical staff dedicated to that purpose. To the extent it would be desirable for decisions of the staff to be subject to higher review (e.g., if a Party wishes to contest an administrative ruling that it has not satisfied the eligibility criteria), such review could be provided by the enforcement branch.

Compliance Body: Capacity in Which Members Act

As indicated above, the effectiveness of the various branches of the compliance body will depend to a large degree on the expertise—rather than political affiliation—of their members. Accordingly, we believe that members of all the branches should be recognized experts in their respective fields, and should serve in their personal capacities, not as representatives of their national governments. This is especially important for the enforcement branch, which should be removed from the political process as far as possible.

Initiation of the Process

Parties must ensure that the procedure for initiating or triggering the compliance process is both independent of political considerations and open to civil society. Civil society and Parties should be able to submit on their own initiative any relevant information to the review teams. Upon completion of their reviews, expert review teams should submit all reports to the compliance body, and forward a copy to the secretariat. Reports should be in a standardized format that clearly identifies potential compliance problems. The compliance body should then make a determination as to whether a compliance action should proceed.

Functions

As discussed above, we advocate a compliance system that incorporates facilitative, enforcement and eligibility functions.

Sources of Information

There may be situations in which some Parties are reluctant to supply information that calls into question their compliance with their obligations. Consequently, civil society and Parties should be able to submit on their own initiative any information relevant to a Party's compliance directly to the compliance body. After evaluating such information, the compliance body should be able to instruct review teams to return and investigate the issues raised.

Procedure

The process of developing the climate change treaty system has, to a dramatic degree, been driven by the participation and influence of civil society. The continuing oversight of civil society will help ensure that the compliance system is predictable, responsive, reliable, and fair. Parties should welcome the constructive participation of civil society, because it will serve to augment the compliance system, and thereby enable the system to better supply Parties with assurance that their compliance efforts will not be undercut by those who fail to honor their commitments.

Unlike the closed procedures of the World Trade Organization, which have helped create an unprecedented degree of public distrust in that institution, the procedures of the Kyoto Protocol compliance system should reflect the precepts of transparency, openness, and accessibility. Except for specific and narrowly defined instances in which a Party's confidentiality must be protected, all formal meetings of the compliance body should be open to the public. There should be advance notice given for all meetings. Minutes of such meetings, and all compliance submissions and decisions made, should be available to the public.

Role of the COP/MOP

After adopting the framework of rules by which the compliance system will be created and operate, the COP/MOP's role in the compliance procedure should be one primarily of oversight and policy direction, not management. The COP/MOP's oversight role should include adopting the decisions of the compliance body. Decisions should be adopted by negative supermajority; in other words, they should be considered adopted unless a supermajority (e.g., two-thirds or three-fourths) of the COP/MOP votes not to adopt them. If the decision to adopt could only be made upon consensus of the COP/MOP, any Party—including the Party who was subject to an adverse compliance ruling—could block it.[3] We believe a negative supermajority rule would prevent this scenario, while still providing the procedural safeguards needed in the event the compliance body made a manifestly improper or unjust decision.[4]

Possible Outcomes or Consequences of Non-Compliance

CIEL supports the inclusion in the rules of a full range of potential responses to non-compliance. We appreciate that, at this early date in the Protocol's development, some Parties may be reluctant to commit to strong responses, because they are not yet confident of their ability to implement their commitments, nor are they confident yet of the ability of the regime as a whole to function effectively. Consequently, we support the inclusion of a suite of responses that are designed to (1) facilitate a Party's compliance and enable it to avoid non-compliance, (2) "make the climate whole" by assuring that any GHGs emitted in excess of a Party's assigned amount are effectively removed from the atmosphere, and (3) assure Parties that their timely efforts to comply with their commitments will not be undercut by Parties who fail to honor theirs.

Subtraction of Tonnes

We believe "borrowing," or "subtraction of tonnes," does not satisfy these requirements. Borrowing purports to address the problem of a Party's overage by allowing the Party to

[3] This situation would be similar to the pre-WTO GATT, in which the losing country in a GATT dispute could block adoption of a panel decision. The result of this arrangement was that GATT panel decisions were routinely not adopted. The WTO responded to this problem by adopting negative consensus as its adoption rule, so that the decisions of WTO dispute panels are now adopted as a matter of course.

[4] We advocate a negative supermajority instead of negative consensus rule. Were the compliance body to make a decision that most Parties believed was unfair or wrong, the negative consensus rule would allow any single Party to block the COP/MOP from overturning the decision. A negative supermajority vote would make it difficult to overturn a compliance body decision, but not impossible if the decision was clearly unjust.

defer some of its obligation to reduce its emissions until a future commitment period. Its deterrent value is low because it lets the non-complier off the hook financially, allowing it to delay payback until the end of the next commitment period (if at all). Accordingly, it rewards the Party that delays the financial sacrifices necessary for compliance, and harms Parties that face up to their obligations in a timely fashion.

In addition, borrowing could induce Parties to negotiate inflated budgets for subsequent commitment periods in order to ensure themselves enough assigned amount to cover any excess from the previous period. Thus, the "payback with penalty" that borrowing promises could be illusory. Furthermore, borrowing could be extended indefinitely into future commitment periods (borrowing from the second period to pay off the first, the third period to pay off the second, and so on). Eventually, this process would have to terminate, but by then the environmental harm could be beyond repair. In reality, borrowing all but ensures that the GHG debt will never fully be repaid and that overage will become a permanent addition to total atmospheric accumulations.

Compliance Fund

Instead of borrowing, we support the creation of a Compliance Fund. The Compliance Fund can serve both to help Annex B Parties maintain compliance with their commitment period obligations, and to provide a means by which those who have gone into non-compliance can return to compliance after the commitment period has closed.

While domestic action should be at the core of Annex B Parties' compliance strategies for the first commitment period and beyond, at the close of a commitment period the opportunity for a Party to accomplish further domestic reductions for that period will no longer be available. Many Parties assume they will be able to eliminate any overage they have at the end of the commitment period by purchasing Kyoto mechanism credits. But there may not be sufficient credits available during this "true-up" period to satisfy demand. In that event, Parties can pay into the Compliance Fund and avoid being out of compliance when the true-up period ends.

After the true-up is over, Parties that failed to balance their ledgers will be out of compliance with their Article 3 commitments. For these Parties, the Compliance Fund can provide a means of returning to compliance. The Protocol currently contains no mechanism for such Parties to cure their non-compliance retroactively. The Compliance Fund can do this by issuing Parties credits that bring them back into compliance. Parties make payments to the Fund that underwrite highly reliable projects that will reduce emissions in an amount equal or greater to their overage. Payment to the Fund ensures that needed reductions or removals will occur, and removes any economic advantage non-complying Parties might have enjoyed by not making more timely reductions. The Compliance Fund can thus strengthen the environmental integrity of the Protocol and assure other Parties that their own efforts will not be undercut by "free riders."

Fees collected by the Fund are used to underwrite highly reliable GHG mitigation projects throughout the world. The Fund sets fees on the basis of actual estimated mitigation costs, plus a surcharge to account for administrative costs, the risk of project

failure, and other factors.[5] The surcharge also serves to make the price of Fund credits high enough to dissuade Parties from relying upon them as a first choice for their commitment period implementation strategies. Upon payment of the fee, the Party receives emissions credits equivalent to the amount of its overage. The Party adds the credits to its assigned amount, thereby ensuring that its aggregate emissions no longer exceed the amount and that it is in compliance with its substantive Article 3 obligations.

We believe it is important that the Fund be independent from the control of any individual Party, and that it *not* be administered by a Party that is making payments to it. Similarly, the decision of where projects underwritten by the Fund will be located should be made solely by the Fund administrator, under any guidelines provided by the COP/MOP. The key strengths of the Fund are that it will facilitate a Party with overage to make the climate whole, and provide assurance to other Parties that the effort and expense necessary to address overage will not be delayed until an indefinite time. For a Party facing overage during the true up, purchasing Compliance Fund units in a timely fashion will demonstrate its good faith. Because administration of the Fund will not be in that Party's hands, other Parties will not be asked to trust that the problem will somehow be corrected in the future.

Financial Penalties

Financial penalties, or fines, can serve as a deterrent to non-compliance, and (if paid) could eliminate any economic benefit a non-complying Party had enjoyed by failing to implement its treaty commitments in a timely manner. However, in and of themselves, they cannot "make the climate whole" by removing a Party's overage from the atmosphere. Consequently, we support the authorization of fines for cases of non-compliance to the extent that they are characterized as assessments payable to the Compliance Fund, and monies collected are used to underwrite emissions reduction or removals projects.

We caution, however, that fixed financial penalties can serve as a "price cap" that may provide a disincentive to some Parties to honor their emissions targets. If the penalty is levied at a per-tonne of overage rate, and that rate is known in advance (during or before the commitment period), then Parties may compare the rate to the cost of making domestic reductions, and opt for the penalty if they believe their domestic reductions rate will be more. Similarly, they will be willing to pay no more than the penalty rate for emissions trading, JI and CDM units. This could depress the price of mechanisms units if the penalty rate is too low.

To avoid allowing this scenario to happen, any financial penalties should not be set at a fixed, per-tonne rate before the commitment period begins. Instead, they should be tied

[5] Unlike a fixed per-tonne fee (which can function as a price cap), Compliance Fund units should be dynamically priced. Such units should be priced according to a fixed *formula.* The most important factor of the formula— the base price—should be determined by the per-tonne cost during the latter part of the commitment period of reduction or removal projects of the highest reliability. By using a dynamic instead of fixed price, the existence of the Compliance Fund will not depress the market for domestic reductions and emissions trading, JI, and CDM units.

to the cost of Compliance Fund units, which will be dynamically priced, based upon the cost of actual emissions reduction projects at the close of the commitment period.

Suspension of Privileges to Participate in the Mechanisms

The careful regulation of emissions trading, JI, and CDM privileges will be essential to guaranteeing the integrity of the mechanisms and the integrity of the Protocol as a whole. As discussed earlier, we suggest that an eligibility branch of the compliance system be responsible for determining whether a Party has the necessary technical and institutional capacity to participate in the mechanisms. The eligibility branch should also be tasked with administering the automatic suspension of a Party's mechanisms privileges, should the Party fail to maintain its eligibility by not fully complying with Articles 5 or 7, or should the Party allow its emissions to exceed a given proportion of its assigned amount during the course of the commitment period.

We have developed this proposal more fully in the US Climate Action Network (USCAN) submission made in response to the Note by the Chairman of the Contact Group on Mechanisms, which may be found posted on the UNFCCC's website.

Relationship with Article 19

The compliance system and Article 19's settlement of disputes provisions should serve very different purposes. The compliance system should be charged with facilitating and enforcing each Party's implementation of its commitments under the Protocol. Those commitments will not entail direct obligations on behalf of one Party towards another specific, named Party. Rather, the commitments will represent a Party's obligations to the world's family of nations, as represented by the FCCC and the Protocol's COP/MOP. Even if a compliance action against a Party is initiated or triggered by another Party, the initiating Party will be doing so on behalf of the treaty institution as a whole; it will not be seeking compensation through the compliance system for damages inflicted upon it by the non-complying Party.

Like the dispute settlement provisions in other multilateral environmental agreements (MEAs), Article 19 (through its incorporation of FCCC Art. 14) instructs Parties to use whatever peaceful means they wish to settle their disagreements. Failing that, they may voluntarily submit their claims to the International Court of Justice and/or formal arbitration. If the dispute remains unsettled, any one of the disputants may submit its claim to an ad hoc conciliation commission, which is empowered to make "recommendatory" awards.

The similar dispute settlement provisions that appear in other MEAs have never been used. Their bilateral and adversarial nature, reliance on institutions outside of the treaty regime, and availability only after a party has breached an obligation render these kinds of reparations-oriented procedures inadequate for rectifying environmental damage once it has occurred.

Accordingly, Parties to the Kyoto Protocol should ensure that Article 19 not be considered a substitute for any part of a fully developed compliance system. The rules

should provide that in no event may a Party's resort to the Article 19 procedure preclude the applicability of procedures or mechanisms established under the compliance system, should any aspect of the dispute raise a question of compliance with the Protocol.

Instead, to the extent Article 19 will serve any purpose, it should be reserved for situations in which a Party has a specific claim against another Party alleging that the latter Party's behavior has harmed it in a directly attributable way, and that it is entitled to damages as a result. Such actions would tend to be analogous to negligence or breach of contract claims.

Grace or True Up Period

Most commentators are in agreement that there will need to be a short time at the end of the commitment period during which Parties balance their national emissions ledgers. Estimates of the necessary time range from one to several months, depending on the extent to which the true up period includes review and/or verification by third parties. Regardless of precisely how the period is structured, it should be adopted under, and administered as part of, the compliance system, and not under the auspices of the mechanisms. This is so because it will need to apply to all Annex B Parties, not simply those who take part in the mechanisms.

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