COMPLIANCE INSTITUTIONS FOR THE KYOTO PROTOCOL: A JOINT CIEL/WWF PROPOSAL

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I. INTRODUCTION

Compliance with the commitments of the Kyoto Protocol[1] is crucial to begin the downward trend of greenhouse gas emissions that cause climate change. Consequently, designing an effective compliance system should be one of the top priorities for Parties and observers of the climate change negotiations over the next thirteen months leading up to COP-6.

The institutional structure of that system will greatly shape its ability to promote compliance and discourage non-compliance. It must therefore be designed with great care and diligence, guided by the overarching principle of achieving the emission reduction targets in the Protocol, i.e., making the environment whole.

The Kyoto Protocol includes different levels and types of commitments for both Annex B and non-Annex B countries. Parties should create compliance institutions that perform a number of functions: adequately identify questions of implementation, provide adequate opportunities for the Party to clarify, shepherd issues to the most appropriate body for further consideration, transparently assess questions at hand and automatically apply consequences when appropriate.

In our view, two different but complementary bodies are necessary to address the full range of commitments in the Protocol and the various circumstances under which implementation issues are likely to arise. One body should be facilitative, assisting all Parties with questions and providing technical know-how and resources. The other body should be enforcement oriented, addressing questions of compliance with Annex B commitments and those articles of the Protocol that relate to Article 3 targets. A screening committee with representation from both the facilitative and enforcement bodies will direct matters to the appropriate body. This basic scheme is presented graphically as an attachment.

After outlining the underlying assumptions and design principles upon which the proposed institutional system are based, we discuss general issues relating to the basic scheme proposed. Subsequent sections provide more detail on the initiation of system and the mandate, structure and functions of the screening committee, the facilitative body, and the enforcement body. While we have attempted to present a complete proposal, it is intended as a beginning point for discussion and a means to highlight issues that need further analysis.

[1] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Conference of the Parties, 3rd Sess., Agenda Item 5, U.N. Doc. FCCC/CP/1997/L.7/Add.1, *adopted* Dec. 10, 1997, *opened for signature* Mar. 16, 1998

II. BACKGROUND

A. UNDERLYING ASSUMPTIONS

The uncertainties created by the broad range of issues still under discussion under the Kyoto Protocol complicate the design of an institutional framework for a compliance system. As a result, the design proposed herein rests on several assumptions.

First, a compliance system must incorporate both facilitative and enforcement approaches.[2] In many instances it will be appropriate to treat implementation problems or potential cases of non-compliance in a cooperative and supportive way, hence the facilitative approach. In others, actual or potential non-compliance will necessitate a more direct and punitive response. To ensure that the environmental benefits of the Protocol are met, Parties with emission-related obligations must know that a failure to meet their targets will not be tolerated.

Second, a compliance system must include any compliance-related elements built into any of the flexibility mechanisms. Of particular importance is the relationship between any bodies (such as the executive board of the Clean Development Mechanism (CDM)) created to oversee any of the mechanisms and the compliance infrastructure.

Third, the trading system will incorporate some form of hybrid responsibility rule.[3] Where a net seller exceeds its Protocol target, the compliance consequences will depend on the responsibility rule. Hybrid responsibility refers to a shifting allocation of risk between sellers and buyers of credits. Shifting the risk necessitates certain elements within the compliance system: the ability to trigger a shift in responsibility (i.e., to assess and flag potential overages) and the ability to sort out at the end of the budget period the effects of a seller's failure to achieve its target.

Finally, the language in Article 18 requiring an amendment for any "binding consequences" under the Protocol should not act as a bar to the design of a comprehensive and complete compliance system. Naturally, binding consequences must be a part of such an overall scheme. Our view is that if the Parties can agree on the design of a comprehensive and effective compliance system, they will be able to navigate the potential roadblock imposed in Article 18.

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[2] *See generally,* Abram Chayes, Antonia Handler Chayes & Ronald B. Mitchell, *Managing Compliance: A Comparative Perspective, in* ENGAGING COUNTRIES; STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 1998); Abram Chayes & Antonia H. Chayes, THE NEW SOVEREIGNTY; COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 185 (1995); Ronald B. Mitchell, INTENTIONAL OIL POLLUTION AT SEA; ENVIRONMENTAL POLICY AND TREATY COMPLIANCE (1994).

[3] *See*, Center for International Environmental Law (CIEL) and EuroNatura, *Responsibility for Non-Compliance Under the Kyoto Protocol's Mechanisms for Cooperative Implementation* (1998).

B. DESIGN PRINCIPLES

The institutional structure proposed here is designed to meet certain basic principles that must guide the development of any compliance structure for the Kyoto Protocol. All of these principles have been mentioned by one or more Parties in written submissions and interventions relating to compliance. However, the discussion should be guided by a couple of overarching principles. First, the compliance system should strive to "make the environment whole." Parties should explore all means to create incentives to meet the targets inscribed in the Protocol – fulfilling commitments to avoid dangerous climate change. Creating expectations that if commitments are not met, consequences will be applied, will also assist. The compliance system should also strive to build confidence in the climate regime as a whole so that it can move forward. Through utilization of both facilitative and enforcement approaches, Parties must slowly trust that the compliance system will operate effectively as they either deepen their commitments or take on new commitments in the future.

In regards to the more specific principles, an emerging consensus on most of the design principles seems to be developing. Many, therefore, will not require much further discussion. Those principles that should be applied throughout the various stages of the system include:

Automatic – To create certainty and increase efficiency the system must have a strong automatic foundation.

Common but Differentiated – While the Protocol does build this principle in through both the level and timing of obligations, further flexibility may be needed. For example, some questions of implementation may necessitate a more facilitative approach while others a more enforcement-style approach. The institutional structure should reflect this.

Comprehensive – The system should be able to address all types of questions of implementation, and have the institutional capacity to consider each issue.

Credible – Parties must believe that if there is a non-compliance case, some type of consequence will occur. This will provide additional pressure to comply fully with commitments.

Due Process – Parties must feel that they have been given adequate opportunity to clarify their situation throughout the non-compliance process.

Efficient – The system should not be bogged down with unnecessary, bureaucratic steps. Parties should build a system that moves as quickly and effectively as possible.

Fairness – A system must be created whereby Parties believe that both the process and the outcome of questions of implementation are handled in a fair manner, that is without prejudice.

Flexible – Questions of non-compliance should be handled where best addressed at the time. As, however, the case changes, the system should be flexible enough to place it where it is most likely come to a sound resolution.

Predictable – The system should provide as much certainty as possible for both Parties and private entities. They should know what will occur if they do not comply.

Preventative – How can the system help Parties avoid non-compliance in the first place? A good system will assess this question and build upon this principle.

Proportional – A certain level of infraction should receive a similar level of response.

Simple – Parties must be able to easily understand how to use the system to assist themselves and how the system will react if they do not comply.

Strong – In order to make the environment whole, the system must be viewed by Parties, private entities and NGOs as sound and robust. This is another means to create incentives to comply.

Transparent – Proceedings and reports should be open to the public. NGOs should, where appropriate, be active participants.

Unified – The institutions and procedures must work well with the other mechanisms and processes of the Protocol.

C. THE BASIC SCHEME

Article 8 of the Protocol describes the basic outline of a compliance structure that involves the Article 8 review teams, the Secretariat, and COP/MOP. The SBI and SBSTA may also play a role in the process envisioned by Article 8. Although not mentioned in Article 8, there are likely to be several other bodies involved in compliance related matters, including for instance, the executive board of the CDM and any other mechanism oversight bodies.

In our view, the Article 8 outline must be complemented by two additional bodies, both of which are contemplated in the structure of the Protocol — specifically in Articles 16 and 18.[4] Given wide acceptance of the two aspects of a compliance system, a facilitative approach and an enforcement approach, the structure proposed here is based on the addition of two primary entities to address the full range of implementation and enforcement issues

[4] Other international agreements have found it necessary to create additional bodies to adequately address issues of non-compliance. For example, the parties to the Convention on Long-Range Transboundary Air Pollution (LRTAP), Nov. 13, 1979, 18 I.L.M. 1442 (1979), the Constitution of the International Labor Organization, Oct. 9, 1946, 15 U.N.T.S. 35 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 999 U.N.T.S. 3 have created separate standing committees to address cases of non-compliance. *See generally*, Wiser and Goldberg, COMPLIANCE SYSTEMS UNDER MULTILATERAL AGREEMENTS: *A Survey for the Benefit of Kyoto Protocol Policy Makers*, October 1999 [hereinafter Compliance Systems].

under the Kyoto Protocol. Separate bodies (or sub-bodies) [5] are desirable because facilitation and enforcement involve fundamentally different approaches. The Facilitative Body would be modeled on the "existing" Multi-lateral Consultative Process (MCP). The other body, the Non-compliance Body, would be responsible for the enforcement functions. In addition, a small joint Screening Committee, composed of representatives from both the Facilitative Body and Non-compliance Body, would be tasked with routing questions of implementation to the proper body.

We envision a number of pathways for compliance related matters to be raised (Art. 8 review, self-reporting, other Parties, the Secretariat and non-governmental organizations) with different pathways receiving differential treatment.

In the Kyoto Protocol, the existing structure under Article 8 requires the COP/MOP, with appropriate assistance from the SBI and SBSTA, to "take decisions on any matter required for the implementation of this Protocol."[6] In our view, the COP/MOP is not well suited to reviewing all cases of implementation or non-compliance. The COP/MOP will presumably only meet once a year, which is not sufficiently often for expeditious consideration of such issues. Given its composition of all Parties to the Protocol and a likely preoccupation with a host of other issues, it is likely to be an unwieldy forum for consideration of the nuanced issues of implementation sure to arise. The political atmosphere that will likely prevail in the COP/MOP could also make it difficult to dispassionately assess cases of actual or potential non-compliance. In addition, the COP/MOP is unlikely to have the adequate structure or staff to effectively and fairly consider cases of non-compliance. Many of these same arguments apply with equal force to the SBI or SBSTA. Consequently, a better allocation of resources would be to create the mechanisms mentioned above, with final oversight authority reserved to the COP/MOP.[7]

As suggested above, the dual system proposed here is based on the dichotomy of facilitative and enforcement approaches to ensure compliance with international obligations. There are several other dichotomies that are also implicit in the system proposed here. As will be seen below, the system distinguishes to some degree between: Annex B and non-Annex B Parties; target-related and non-target related obligations; problems caused by a lack of capacity and resources and those not related to capacity or resources; and issues that arise during or before the commitment period and those arising at the end.

For example, the Non-compliance Body will primarily be concerned with those questions of implementation and non-compliance regarding Articles 3, 4, 5, 6, 7, 12 and 17 referred to it by the Screening Committee. Methodologies and reporting requirements in Articles 5 and 7 will provide the foundation to assess the level of implementation of the Party. The flexible mechanisms of Articles 6, 12 and 17 will enable Parties to add or subtract from their assigned amounts, therefore also directly impacting implementation of their target.

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[5] In fact, the two bodies discussed here could be entirely independent of one another, or they could be "chambers" within a single overarching compliance body. We do not have a strong opinion on how the two are setup as long as the are clearly delineated and serve the functions described below.

[6] *See* Kyoto Protocol, *supra* note 1, Article 8.6.

[7] Consistent with Kyoto Protocol, *supra* note 1, Article 13.4(h), the COP/MOP may establish such subsidiary bodies as are deemed necessary for the implementation of the Protocol. Clearly, the bodies suggested here fall into this category.

Finally, compliance assessment for those Parties participating in an agreement under Article 4 requires consideration of any alterations to the Party's target as a result.

Questions related to these articles should be treated differently than other questions of implementation, because they directly relate to complying with the assigned amount and ensuring the environmental integrity of the Protocol. In addition, the obligations under these articles lend themselves to clear standards for determining compliance and non-compliance. Singling out questions related to these obligations for heightened scrutiny will strengthen the climate regime and provide an additional incentive for Parties to comply with these provisions.

In theory a single overarching compliance institution (instead of the two we are proposing) could handle all the issues raised by the different dichotomies described above. We have chosen to present an institutional design that highlights these important distinctions based, in part, on the belief that doing so will serve to focus attention on essential elements of the compliance system.

III. THE PROPOSED SCHEME

The scheme, described is its entirety below, is structured so as to infuse the principles stated above into the institutional make-up of the compliance system. This will assist in building a system that both utilizes the foundational elements of the UNFCCC and the Kyoto Protocol, yet also creates new institutions when necessary. The scheme includes four elements: Initiating the process, the Screening Committee, the Facilitative Body and the Non-compliance Body. Each is discussed in detail below.

A. INITIATING THE PROCESS

One of the fundamental questions to be answered is how an issue of implementation or non-compliance enters into the compliance system. Given the differing nature of the obligations contained in the Protocol, we suggest different trigger mechanisms for Annex B and non-Annex B Parties.

Annex B Trigger. The primary trigger of the compliance machinery with respect to Annex B Parties will be the Article 8 review process. Review teams are charged with the task of conducting comprehensive technical assessments of Annex B Parties' implementation of their obligations under the Protocol.[8] The review teams will conduct annual reviews of the Article 7 inventory and national plan submissions from the Parties as well as more thorough reviews of the periodic national communications as called for under Article 12 of the Convention. Both the inventory data and national communications will include any supplemental information necessary to demonstrate compliance with the Protocol's

[8] Kyoto Protocol, *supra* note 1, at Article 8.3.

obligations.[9] Guidelines will delineate precisely the content and format of the national inventories and plan and national communications.[10]

As envisioned in Article 8, the review teams will prepare reports on a Party's implementation efforts and flag "potential problems in, and factors influencing, the fulfillment of commitments."[11] As part of their review, the Article 8 teams should be required to clarify directly with the relevant Party any problems with respect to implementation. Consequently, the review process itself provides the first opportunity for Parties to address potential problems before any further steps are taken in the compliance process. In particular, they may be able to cure any simple and easily rectifiable problems without recourse to any further steps in the compliance system.

In our view, the nature of the "potential problems" identified in the Article 8 process ought to determine what will happen next. If questions of implementation are raised, the review teams should have guidance where automatically to refer each type of question. For example, issues raised with respect to the target-related obligations should be dealt with initially by a Screening Committee (comprised of representatives of both the Non-compliance Body and the Facilitative Body).[12] By providing review teams with guidelines that include an automatic referral of questions regarding target-related issues to the Screening Committee, review teams will be removed from making a judgment as to where a question should be managed. Removing certain decision-making powers from the teams in this manner will assist in keeping them objective and independent from political influence. All non-target issues should be sent directly to the Facilitative Body.

In addition to the Article 8 review teams, there must be at least the following additional triggers: self-reporting by a Party directly to the Facilitative Body[13] and an opportunity for other Parties, the Secretariat, and non-governmental organizations[14] to raise questions of implementation. Questions raised by other Parties and the Secretariat would go directly to the Article 8 review teams for consideration as part of their evaluation of implementation and if borne out would be referred to the Facilitative Body or Screening Committee as appropriate for further consideration.[15]

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[9] Kyoto Protocol, *supra* note 1, at Article 7.1 and 7.2.

[10] For example, information should be presented on acquisitions and transfers under Articles 6 and 17, credits generated under Article 12, indicators and perhaps domestic monitoring and enforcement systems.

[11] *See* Kyoto Protocol, *supra* note 1, at Article 8.3. Our understanding of the "potential problems" language in Article 8 is that it includes circumstances that indicate *potential* non-compliance, such as combined emissions and net transfers that suggest a Party is on course to exceed its assigned amount. We use the term "implementation" in the broadest sense, to include both cases of non-compliance and potential non-compliance with all of the obligations under the Protocol.

[12] The screening committee process is described in more detail below.

[13] The Montreal Protocol includes the provision that a Party may report *itself* to the Secretariat if, despite "its best, bona fide efforts, it believes it will be unable to fully comply with its obligations." *See Report on the Work of the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance with the Montreal Protocol*, appendix, ¶ 4, UNEP/OzL.Pro/WG.4/1/3 (1998), *adopted in Report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, decision X/10, UNEP/OzL.Pro1.10/9 (1998).

[14] A number of agreements include the opportunity for NGO involvement either in triggering an inquiry or verifying information. *See* Constitution of the International Labor Organization, Oct. 9, 1946, 15 U.N.T.S. 35; International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 19666, 999 U.N.T.S. 3.

[15] Alternatively, issues raised by Parties, the Secretariat, or non-governmental organizations could go directly to the Screening Committee instead of to the Article 8 review team. The Screening Committee would then evaluate the issues raised and take one of three actions. If the Committee decides that there is insufficient information to

Questions raised by non-governmental organizations would be directed to the Secretariat and be subject to a screening process to ensure that legitimate questions of implementation were being raised.[16] The Parties have recognized the role that non-governmental organizations can play in implementing the Protocol by empowering the COP/MOP "to seek and utilize, as appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies."[17] In addition, non-governmental organizations play a prominent role in either triggering an inquiry or providing and verifying information under a number of international agreements.[18]

Non-Annex B Trigger. Given the nature of non-Annex B commitments, non-Annex B Parties will likely only be subject to the Facilitative Body. Non-Annex B communications are not subject to the Article 8 review process, thus questions of implementation will not be raised by this mechanism. However, to ensure accountability, the other trigger mechanisms mentioned above could apply. Parties always have the option of self-referral to the Facilitative Body. Other Parties and the Secretariat could be able to refer questions with respect to a particular Party directly to the Facilitative Body. Non-governmental organizations could also be able to raise such questions, with the same requirement that such questions are passed through the Secretariat.

B. THE SCREENING COMMITTEE

The decisions as to whether the target-related issues raised by the review teams require further action by the Protocol's compliance system and if so, which of the two approaches (facilitative or enforcement) is most appropriate in a particular case, will depend on the circumstances and are likely to be politically sensitive. As discussed above, the COP/MOP and SBI may not be well suited to making such determinations in an expeditious manner. Consequently, we propose that such issues be first sent to a Screening Committee comprised of two representatives from both the Facilitative Body and the Non-compliance Body.[19] The Screening Committee provides an expedited and efficient mechanism to direct issues raised in the review process and thus avoids potential political pressure on the review process.

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assess the issue, it could refer the matter to the review teams for consideration. Given sufficient information on the issue, the Committee could either decide a) that no real issue exists and take no further action or b) that issues of implementation are properly raised and forward the matter for consideration to the Facilitative Body or Non-compliance Body.

[16] The Secretariat could conduct a procedural screen of such referrals to ensure that they are legitimate and well founded. A precedent for such a screening process can be found in Article 14 of the Agreement on Environmental Cooperation negotiated as a complement to the North American Free Trade Agreement. *See* North American Agreement on Environmental Cooperation (NAAEC), Sept. 14, 1993, 32 I.L.M. 1480 (1993).

[17] *See* Kyoto Protocol, *supra* note 6, at Article 13.4(j).

[18] *See* Wiser, October 1999 *see* Compliance Systems, *supra* note 4; International Covenant of Economic, Social and Cultural Rights, *supra* note 12; Constitution of the International Labor Organization, *supra* note 12.

[19] While we propose equal representation from both the Facilitative Body and Non-compliance Body in order to ensure balance between the two approaches, we recognize that this creates a possibility that the Screening Committee might be evenly split on which of the two options would be more appropriate in a given case. Under such circumstances, our preference would be that the matter be sent to the Non-compliance Body, which is likely to represent the stronger of the two approaches. In any event, both the Facilitative Body and Non-compliance Body could be given the power to refer a matter to the other body upon a determination that it would provide a more appropriate forum.

The Screening Committee would determine the most effective way to address questions raised by the Article 8 review process with respect to implementation of target related obligations. It would evaluate the Article 8 findings and any submission from the Party involved and determine whether legitimate compliance related issues have been raised. If not, the matter would end. If so, then the screening committee makes a determination as to which body is the most appropriate forum for dealing with the issues.[20] In general, if an issue relates to a lack of in-country capacity or resources, the Facilitative Body would be the appropriate forum. Otherwise, issues would be referred to the Non-compliance Body.

Issues related to projected or potential non-compliance with Article 3 targets[21] represent a special case, because "non-compliance" can not technically occur until the end of the commitment period. Nevertheless, in the interest of avoiding non-compliance and ensuring the environmental integrity of the Protocol, the compliance machinery must be able to address such instances. In our view, such cases should be referred initially to the Facilitative Body with the possibility that, if unresolved there, they would be forwarded to the Non-Compliance Body for further action.

The Article 8 review process may identify implementation issues that a Party has already identified and referred itself to the Facilitative Body to address. Such a circumstance ought not preclude the Screening Body from deciding that the issue is more appropriately dealt with in the Non-compliance Body, in effect transferring jurisdiction from the Facilitative Body.

Upon referral of a compliance related issue to either the Facilitative Body or the Non-compliance Body for further action, a “yellow light” would automatically be illuminated for the Party in question.[22] In a hybrid responsibility trading regime, the yellow light indicates to potential trading partners that the Party in question has implementation issues and puts buyers on notice that any transfers under the yellow light are at their own risk.[23] At the end of the commitment period, parts of assigned amounts purchased under a yellow light could be rendered valueless or discounted if the selling Party exceeds its target. The yellow light would remain on until the issues are resolved in the Non-compliance Body or the Facilitative Body. Given that we propose both bodies meet quarterly, this process should occur within three months of the initial yellow light. The compliance advantage of the hybrid responsibility system is that it harnesses the power of the market by creating additional incentives for Parties to fully implement their Protocol commitments.

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[20] The screening committee would presumably apply guidance adopted by the COP/MOP in making this important determination. Such guidance could include, for example, a principle that all issues identified after the end of the first budget period are referred to the Non-compliance Body or a principle that issues relating to a lack of financial capacity be referred to the Facilitative Body.

[21] Clearly both the Article 8 review teams and the Screening Body should be given clear guidance from the Parties as to what circumstances constitute projected or potential non-compliance with Article 3 during the commitment period. That guidance could take the form of a tracking system that tallies emissions and net transfers and compares the sum to a Party's assigned amount.

[22] *See* CIEL and EuroNatura, *Responsibility for Non-Compliance Under the Kyoto Protocol's Mechanisms for Cooperative Implementation* (1998).

[23] If the Parties adopt some form of a tracking system during the commitment period, the yellow light could also be illuminated when a Party is a certain percentage over its assigned amount due to either overselling or increased domestic emissions. *See* Greenpeace Analysis of the Kyoto Protocol, Greenpeace Briefing Paper, UNFCCC, Bonn, June 2-12 1998, at 35-37.

C. FACILITATION: THE FACILITATIVE BODY

1. Introduction

The Facilitative Body will help build confidence in the climate regime by ensuring that Parties needing help or implementation advice will receive it. Parties should look to the discussions surrounding the Multi-lateral Consultative Process (MCP) under the Convention to inform this debate. Including a Facilitative Body as one of the bodies of the compliance system will ensure that Parties are treated fairly and proportionately. Indeed, the existence of this body recognizes the principle of common but differentiated responsibilities. The mandate, structure and participation and functions of the body are outlined below.

2. Mandate

The inclusion of a Facilitative Body is a critical component of the compliance structure for the Protocol. The Facilitative Body could be designed to help Parties meet their obligations where the cause of problems involves a lack of capacity or resources. The Facilitative Body would seek cooperative, facilitative ways to assist Parties to implement fully their obligations under the Protocol. Such an approach is critical to building the confidence of Parties that they will be able to meet their commitments and may be more effective under some circumstances than a more punitive response from the enforcement machinery.

3. Structure and Participation

The Facilitative Body could draw upon the model of the MCP under the Convention as contemplated in Article 16 of the Protocol. One of the major outstanding issues in the development of the MCP is the number of the experts designated to serve on the committee. In our view, the operations of the Facilitative Body ought to be conducted by a committee of 15 experts in relevant fields.

Initially, the Facilitative Body could meet two times a year to ensure an expeditious response to the matters that come before the Body. The Parties may want to consider adjusting the frequency of Facilitative Body meetings in light of future experience. In order to assist the Facilitative Body (and Non-compliance Body as well) on narrow technical questions a roster of technical specialists would be maintained by the Secretariat. Both the Facilitative Body and the Non-compliance Body would be able to draw upon these specialists to evaluate particular technical questions, as they deem necessary. This would allow the Facilitative Body and the Non-compliance Body to operate more efficiently and with less standing bureaucracy.

4. Functions

The Facilitative Body would clarify and resolve questions regarding implementation of the Protocol and provide advice on: technical and financial matters (including helping to arrange technical and financial assistance); the compilation and communication of information; and strategies to manage greenhouse gas emissions and removals.

The Facilitative Body would have the authority to refer any matters under its jurisdiction to the Non-compliance Body if it felt that action should more appropriately be taken under that body or if the case has not been resolved in the Facilitative Body for a long

period of time. Likewise, the Facilitative Body could receive matters from the Non-compliance Body if the Non-compliance Body decided during deliberations that a matter would be more appropriately dealt with in a facilitative manner.

The Facilitative Body's first task would be to design its own rules of procedure, which could include the designation of teams of committee members and outside experts (as necessary) to monitor and consult on an ongoing basis with the Parties subject to Facilitative Body jurisdiction. Such teams would allow the Facilitative Body to handle a number of cases simultaneously and efficiently. The Facilitative Body would issue periodic updates on the status of matters within its jurisdiction, at a minimum by providing the Non-compliance Body, SBI and COP/MOP with biannual reports. In addition, with respect to any matters referred by the Screening Committee or the Non-compliance Body, the Facilitative Body would issue an initial report within three months of the referral, and provide quarterly updates on an ongoing basis until the matter is resolved or referred back to the Non-compliance Body.

D. ENFORCEMENT: THE NON-COMPLIANCE BODY

1. Introduction

The Non-compliance Body will boost the credibility and effectiveness of the Kyoto Protocol by assuring each Party that all others will meet their Protocol commitments. As outlined below, the Non-compliance Body would provide efficient, comprehensive, proportional and predictable treatment of questions of implementation and non-compliance. A wide range of international agreements include separate implementation or non-compliance bodies to provide adequate institutional and expert support for a fair, transparent and strong compliance system.[24]

2. Mandate

The Non-compliance Body will be required to decide if a party is in non-compliance and apply consequences accordingly.[25] Given that the screening process will refer target-related issues involving a lack of capacity and resources to the Facilitative Body, the questions passed on to the Non-compliance Body are likely to pose more difficult cases of failure to implement Protocol obligations. Such cases are thus more likely to involve either questions involving divergent interpretations of the Protocol's requirements or instances where a Party refuses to implement fully the Protocol. Ensuring that all such questions are treated in the enforcement branch of the compliance system will lead to consistent and predictable results – particularly to the extent that the Non-compliance Body is able to draw on a clearly defined matrix of automatic consequences.

3. Structure and Participation

[24] *See supra* note 4 and accompanying text.

[25] As discussed above, the Non-compliance Body may also consider cases of projected or potential non-compliance that are forwarded from the Facilitative Body. *See supra* note 21 and accompanying text.

In order to ensure an efficient, fair system, we foresee a two-step process in the Non-compliance Body. The first step would consist of full consideration by a three member panel of the factual and legal issues raised by a case. The second step would be an optional appeal from the panel's legal (but not factual) conclusions to the Non-compliance Body sitting as a whole.

The Non-compliance Body would be made up of fifteen independent legal and technical experts serving in their personal capacity.[26] They would serve for a set amount of time, with their terms staggered to ensure continuity. By having independent experts, rather than governmental representatives, serving on the Non-compliance Body, there should be less pressure on the Body to react to political concerns at the expense of the substantive issues before the Non-compliance Body. Again, the greatest effort must be made to keep the compliance process as straightforward, simple and non-political as possible.

Having fifteen members of the Non-compliance Body would allow for an efficient system and, coupled with access to the same list of specialists on specific technical issues as the Facilitative Body, will allow the Non-compliance Body to resolve all issues raised before it. The list of specialists would be maintained by the Secretariat and ensure the Non-compliance Body access to the full range of expertise required to address the complex issues that may arise under the Protocol.

The full Non-compliance Body could meet two times a year to consider questions of implementation. Depending on the number of cases it receives, the Non-compliance Body could meet more or less frequently. Given the importance of ensuring compliance at the end of the commitment period, additional meetings may be warranted at that time. The Non-compliance Body's first task would be to design its own rules of procedure. These procedures should be based upon the principles of transparency, fairness and automaticity.

Ultimately, all cases decided within the Non-compliance Body would be subject to review by the COP/MOP. To ensure smooth operation of the system and to prevent its politicization, the COP/MOP would adopt the Non-compliance Body decision unless rejected by consensus (or by a some form of super-majority, if voting rules are adopted).[27]

4. Functions

Parties should clearly identify the functions of the Non-compliance Body. This will help lend transparency and certainty to the system. The functions of the Non-compliance Body will be highly dependent on the effective functioning of other aspects of the Protocol (i.e. inventories, review teams, trading rules); therefore, close cooperation should occur amongst the institutions responsible for these functions.

One of the chief challenges in developing the structure of the Non-compliance Body is to ensure that it supports the principles of automaticity and due process. To accomplish this, the two-step process mentioned above should be adopted in the Non-compliance Body.

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[26] This is consistent with practice in the International Labor Organization, the Humans Rights Committee under the International Covenant on Civil and Political Rights and the World Trade Organization among others. *See generally* Compliance Systems, *supra* note 4.

[27] This is similar to the appellate procedure of the World Trade Organization. Agreement Establishing the World Trade Organization, *in* LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND, Apr. 15, 1994, 33 I.L.M. 1125, annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 16.

Step One: Full Hearing and Information Sources. Once a Party is referred to the Non-compliance Body by the Screening Committee, the Non-compliance Body should convene a panel of three of the members of the Non-compliance Body to conduct an inquiry, gather information, and make a determination. Having these smaller panels would allow the Non-compliance Body to assess a number of cases simultaneously and avoid over-burdening the full Non-compliance Body. To ensure the perception of impartiality, the Non-compliance Body ought not allow a national of the Party in question to serve on the panel.

To ensure full consideration of the issues, the Non-compliance Body panel should solicit and accept a broad range of information to assist it to make a fair, transparent and informed decision. That information could consist of:

- the review team's report, which would include the questions and responses that the review team sent to the Party in question before referring it to the Non-compliance Body,
- a full response from the Party in question to the case at hand. This would be facilitated by providing the Party with a list of questions or clarifications from the Non-compliance Body panel to which the Party can respond. The Party can also submit any additional information it deems relevant,
- submissions by other Parties that are relevant to the issues in question (This could be especially important if the question is tied to a particular interpretation of the commitments of the Kyoto Protocol), and
- information provided by inter-governmental organizations and non-governmental organizations.

As a matter of principle, information should be accepted from the widest possible array of sources to ensure that the Non-compliance Body panel has all relevant information before making a determination. This information should be made available to the Parties and the public, except in narrowly proscribed circumstances to protect national security or trade secrets. The Non-compliance Body panel could hold a public hearing to ensure that all those involved have adequate opportunity to respond to questions and present explanations and analysis. The public hearing serves several purposes. It provides transparency to ensure that all concerned parties know the status of the case. In addition, the prospect of an open hearing may, in itself, serve to encourage Parties to comply fully to avoid any embarrassment.

Following the hearing and its deliberations, the Non-compliance Body panel has three basic options by which to address the question of implementation. First, it could determine that the issue has been resolved and there is no longer a question of implementation or non-compliance. The yellow light is removed and the Party's status restored.

Second, it could determine that the lack of implementation is due to capacity or resource issues and therefore better handled by the Facilitative Body. The case would then be transferred to the Facilitative Body (yellow light remains) and be guided by the rules of that body. This option may not be appropriate for cases arising at the end of the commitment period, since the priority at this point would be to make the climate whole.

Third, the Non-compliance Body panel could determine that the Party is in non-compliance with a commitment (or in danger of non-compliance with the target based on the Party's emissions trend) and an automatic consequence is warranted. The panel, in this case, would utilize a pre-agreed list of automatic consequences for cases of non-compliance. This automatic list would have been adopted by the COP/MOP. It should take into account the level of non-compliance and the duration of infraction. By negotiating and agreeing to such a list beforehand, Parties will enable the Non-compliance Body to automatically respond to cases of non-compliance. This will assist greatly in providing certainty to both governments and private entities as to the consequences for non-compliance.

One special case deserves mention here. A hybrid responsibility rule in conjunction with operation of the Non-compliance Body at the end of the commitment period may pose a particular dynamic. Under the hybrid responsibility scheme, if a Party has exceeded its assigned amount, the amount of tons equivalent to the overage that were sold under a yellow light would be deducted from buying Parties' assigned amounts. These Parties would be informed how their assigned amounts had been impacted according to the overage of the selling Party and the system for assessing responsibility (last in first out, discounting of all tons, etc). If a buying Party is then itself brought above its target by its earlier purchase of now "bad tons" it would have the obligation to cure the overage (by purchasing additional tons on the market) or face an action and possible automatic consequences in the Non-compliance Body. This cycle could occur a number of times in a hybrid system until all Parties have complied with their assigned amounts. One mechanism that Parties could use to avoid the consequences of this "domino effect," particularly in cases where additional tons are not available on the market, would be to avail themselves of the Compliance Fund.[28]

Step Two. Optional Appeal to the Full Non-compliance Body. The second step of the non-compliance procedure would only occur if the Party wishes to challenge the finding and application of the consequence of the Non-compliance Body panel. If the Party agrees that the panel finding is fair and is willing to comply with it, this step would not be necessary. The appeal would be heard by the entire Non-compliance Body and would be limited to issues of law and legal interpretation and not re-enter arguments of fact. The full Non-compliance Body may uphold, modify, or reverse the legal findings and/or conclusions of the panel.

The final decision of the Non-compliance Body (and panel decisions that are not appealed) would be forwarded to the COP/MOP. Non-compliance Body decisions ought to be automatically adopted by the COP/MOP unless it decides to reject the decision by consensus or super-majority.

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[28] *See* Wiser and Goldberg, *The Compliance Fund: A New Tool for Achieving Compliance under the Kyoto Protocol* (June 1999). In short, if there are not tons available on the market a Party could pay into a fund which would then utilize the monies for implementing greenhouse gas reduction projects. The first opportunity to pay into the Fund is during the true-up period when a Party could voluntarily pay into the Fund and acquire the necessary tons to keep it from exceeding its assigned amount. The price of tons at this stage would be set slightly above the previous market price to ensure that Parties not rely on this mechanism except in rare circumstances. A second opportunity to use the Compliance Fund is after a Party has been found to be in non-compliance with its target by the Non-compliance Body. The Party can avail itself of the Compliance Fund to cure its overage in much the same way as it could during the true-up period. The chief difference would be an increase in the price of the tons.

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