Chapter 8
Compliance and Enforcement in the Climate Change Regime

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Abstract This chapter tracks the work of the compliance committee under Kyoto Protocol since the operationalization of the Kyoto compliance system in 2006. The basic elements of the compliance system, including its facilitative and enforcement branches, are described. Key issues brought before the committee between 2006 and 2012 are reviewed. In particular, the effectiveness of the more active enforcement branch is assessed through the first seven issues of implementation brought before the branch. The case against Greece, the first matter considered by the branch, is considered in detailed, followed by an assessment of issues raised in the six subsequent cases. Finally, some opportunities to strengthen the Kyoto compliance system are identified.

8.1 Introduction

The Kyoto compliance system has long been recognized as a testing ground for compliance theory.[1] While compliance theorists actively debated the relative merits of self-interest and norm-building in motivating countries to meet their international

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[1] See, for example, Jutta Brunnée, "Promoting Compliance With Multilateral Environmental Agreements", in Jutta Brunnée, Meinhard Doelle and Lavanya Rajamani, *Promoting Compliance in an Evolving Climate Change Regime* (Cambridge: Cambridge University Press, 2012).

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commitments, negotiators of the Kyoto compliance system strove to develop a compliance system that would be capable of building norms and facilitating compliance while at the same time deterring parties that might be tempted make a calculated choice not to comply. The result of these negotiations was the Kyoto compliance system, including its facilitative and enforcement branches.[2]

The Kyoto compliance system is enabled in Article 18 of the Kyoto Protocol.[3] It was negotiated over a 4-year period following the signing of the Protocol. The resulting Compliance Procedures were then formally adopted by way of a decision of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (COP/MOP) at its first meeting in Montreal in 2005.[4] This was followed, after some initial experience, by Rules of Procedure developed by the compliance committee and adopted by the COP/MOP.[5]

The compliance committee established under the Compliance Procedures has functioned since 2006 in the form of a plenary, a bureau, and two branches. One branch, the facilitative branch, serves to facilitate countries efforts to comply with obligations under the Kyoto Protocol. The other branch, the enforcement branch, serves to impose consequences in case of non-compliance with specific obligations.

The plenary of compliance committee consists of the members of the facilitative and enforcement branches. The chairs and vice-chairs of the two branches constitute the bureau. Each branch is composed of one member from each of the five regional groups of the United Nations, one member representing small island States, and two members each from Annex I countries and Non-Annex I countries. An alternate is appointed for each member of the committee in case a member is unavailable. Decisions are to be made by consensus whenever possible. In case consensus is not possible, a majority of three-quarters is required for any decision of the committee or one of its branches. In addition, decisions by the EB require the support of a majority of both Annex I and non-Annex I members.

See also Jutta Brunnée, "A Fine Balance: Facilitation and Enforcement in the Design of a Compliance for the *Kyoto Protocol*", 13 *Tulane Environmental Law Journal* (2000), 223; Meinhard Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Carswell, 2005); Peggy Rodgers Kalas and Alexia Herwig, "Dispute Resolution under the *Kyoto Protocol*", 27 *Ecology Law Quarterly* (2000), 53; and David G. Victor, "Enforcing International Law: Implications for an Effective Global Warming Regime", 10 *Duke Environmental Law and Policy* (1999), 147.

[2] Sebastian Oberthür and René Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited After Four Years Of Experience", 1 *Climate Law* (2010), 133. See also René Lefeber and Sebastian Oberthür, "Key Features of the Kyoto Protocol's Compliance System" in Jutta Brunnée, Meinhard Doelle & Lavanya Rajamani, *Promoting Compliance in an Evolving Climate Change Regime* (Cambridge: Cambridge University Press, 2012).

[3] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, UN Doc. FCCC/CP/1997/L.7/add. 1, 37 *International Legal Materials* (1998), 22, Art. 18.

[4] Annex to Decision 27/CMP.1 on Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, 92, UN Doc. FCCC/KP/CMP/2005/8/Add.3, 30 March 2006.

[5] See Annexes to Decisions 4/CMP.2 and 4/CMP.4 on the Compliance Committee, UN Doc. FCCC/KP/CMP/2006/Add.1, 2 March 2007, 17, and UN Doc. FCCC/KP/CMP/2008/11/Add.1, 19 March 2009, 14.

The plenary is responsible for reporting to the COP, and for the overall administration of the compliance process. The bureau receives and reviews questions of implementation brought to the compliance committee and determines which branch of the compliance committee is responsible for responding to the issues raised. The facilitative branch is generally responsible for assisting Parties in their efforts to meet their commitments under the Kyoto Protocol. This includes providing advice, and otherwise facilitating compliance with respect to Articles 5 and 7 of the Protocol.

With respect to Articles 5 and 7, the mandate of the facilitative branch overlaps with that of the enforcement branch, which has a mandate to determine compliance and impose consequences of non-compliance with these provisions. In addition to providing advice on Articles 5 and 7, the facilitative branch has the exclusive mandate to address questions of implementation with respect to supplementarity under Articles 6, 12, and 17, Article 3.14 dealing with effects of mitigation measures on developing countries, and reporting on demonstrable progress under Article 3.2.

The jurisdiction of the enforcement branch is limited to provisions that have a clear link to the emissions reduction target under Article 3.1. In addition to the emission reduction obligation itself, this includes accounting and reporting obligations necessary to determine a Party's emissions and mitigation efforts, and the eligibility to participate in emissions trading, joint implementation and the clean development mechanism. All other commitments under the Kyoto Protocol are subject to facilitation, but not subject to enforcement.

Decisions of the enforcement branch regarding compliance with Article 3.1 will generally follow the review of the final reports submitted by a Party under Article 8 at the end of the commitment period, which are expected to be concluded in 2014.[6] Before a determination of noncompliance is made at this point, Parties will be provided with an opportunity to come into compliance by purchasing the necessary credits from another Party. Under Part XIII of the compliance annex, a Party may purchase credits for compliance purposes up to 100 days after the expert review process for the commitment period under Article 8 is declared by the conference of the Parties to be concluded.[7]

The importance of the distinction between the two branches becomes apparent in light of the consequences applied by each of the branches. The facilitative branch, under part XIV of the Annex on compliance, can apply the following consequences:

- Provision of advice and facilitation of assistance;
- Facilitation of financial and technical assistance, including technology transfer and capacity building;
- Formulation of recommendations to a Party on what could be done to address concerns about a Party's ability to comply with its obligations.[8]

[6] Until the end of the first commitment period, the focus of the enforcement branch will be on compliance with accounting and reporting rules under Articles 5 and 7.

[7] Compliance Procedures, supra, note 4, Part XIII, Additional Period for Fulfilling Commitments at 74.

[8] Ibid., in particular Part XIV, Consequences Applied by the Facilitative Branch at 75.

The enforcement branch has the power to apply the following consequences:

- Declaration of noncompliance;
  - Requiring a Party to submit a compliance action plan, which would include an analysis of the causes of non-compliance, measures to be taken to return to compliance, and a timetable for implementing the measures;
    - Suspending a Party's eligibility to use the mechanisms, if a Party is found not to meet one of the eligibility requirements;
- In case of failure to meet its emissions reduction target under Article 3.1, deducting from the Party's assigned amount for the second commitment period 1.3 times the amount of excess emissions from the first commitment period.[9]

The most substantive consequence of not meeting the first commitment period target, therefore, is the reduction of the assigned amount in the second commitment period.[10]

The compliance process is generally initiated by referring questions of implementation to the bureau for a determination of which branch has jurisdiction. There are three ways issues can come before the compliance committee: as a result of a review of a country's submissions by an expert review team under Articles 5 and 7, at the initiative of a Party that realizes it requires assistance in meeting one of its obligations, or at the request of another Party that questions compliance of a Party with one of its obligations.[11]

The process described is generally open to the public and reasonably transparent. However, there are provisions in the compliance agreement[12] that can reduce or eliminate the transparency of the process to a point where it risks losing its credibility. There are broad powers, for example, to prevent information from being made public until after the conclusion of the process. Similarly, there is provision for the hearings of the enforcement branch to take place in private. These powers have generally not been exercised to date except for deliberations of the committee, which have generally been held in private.

The agreement provides for an appeal process, but grounds for appeal are limited to due process issues. The Conference of the Parties (COP) serves as the appeal body, and decisions being appealed stand pending the appeal. This is designed to ensure that the appeal process, which can take some time given that the COP generally only meets once a year, is not used as a way to delay application of consequences of non-compliance.[13]

[9] Ibid., Part XV, Consequences Applied by the Enforcement Branch at 75.

[10] Also referred to as borrowing or restoration.

[11] Compliance Procedures, supra, note 4, para. 3, at 70.

[12] Ibid., paras. 4–6 at 70; Ibid., Part IX, Procedures for the Enforcement Branch, para. 2 at 71; Ibid., Part X, Expedited Procedures for the Enforcement Branch, para. 1 at 72.

[13] The appeal process has been utilized once to date, in a case involving Croatia discussed below.

In summary, the Kyoto compliance system operates through its facilitative and enforcement branches, a plenary, and a bureau. Compliance issues can be referred either by a party or by an Expert Review Team (ERT). Matters referred are to be allocated by the bureau to the appropriate branch. The compliance procedures include detailed rules on the composition and functions of the two branches, the bureau, and the plenary. The compliance procedures furthermore outline the general process to be followed, and the powers of each branch. The rules of procedure, supplemented by working arrangements adopted by the plenary, detail the process implemented to give effect to the compliance procedures.[14]

The entry into force of the Kyoto Protocol was delayed until 2005.[15] As a result, the work of the compliance committee did not get underway until 2006, only 2 years before the start of the first commitment period.[16] This delay had particular implications for the work of the facilitative branch (FB), given that one of its main tasks was to assist parties in preparing for a range of obligations. Many of the obligations subject to facilitation in some way related to parties' commitments to report and to reduce their greenhouse gas emissions for the first commitment period. The opportunity to actively work with parties to assist in this process was, as a result of the delay, reduced by 6 years.

It is therefore not surprising that the FB has been relatively inactive. The enforcement branch (EB), on the other hand, has been relatively busy dealing with the estimation, reporting, and verification of emissions and credits of Annex I parties. The focus of the EB initially was on compliance with rules under Articles 5 and 7 for initial eligibility to trade under the Kyoto mechanisms. It has since transitioned into the second phase of its work, the ongoing compliance with rules under Articles 5 and 7. The third phase of its work, compliance with parties' emission-reduction obligations for the first commitment period, is not expected to start until well over a year after the end of the commitment period.

When it was first negotiated in 2001, the general expectation of parties was that the Kyoto compliance system would serve the climate change regime for a long time. While this is still possible, the future of the Kyoto compliance system is very much uncertain as a result of the ongoing negotiations of the post-2012 climate change regime. At the time of writing, it is unclear to what extent the regime will continue to be built around binding emission-reduction commitments and whether or under what circumstances those commitments will be subject to international

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[14] It is worth noting that the application of the current compliance system under Kyoto is focussed on developed countries, but there are elements that could be utilized for developing-country parties in the future. An interesting question in reviewing the current system, therefore, would be what adjustments would have to be made to expand the application of this kind of compliance system to address monitoring, reporting, and verification involving developing countries.

[15] See Meinhard Doelle, "The Kyoto Protocol; Reflections on its Significance on the Occasion of its Entry into Force", 27 *Dalhousie Law Journal* (2005), 556.

[16] The first commitment period under the Kyoto Protocol started on 1 January 2008 and runs until 31 December 2012.

enforcement. It remains to be seen, therefore, how much the experience to date will be considered and built upon in the design of the compliance system of the emerging climate change regime.

The uncertainty over the future of the climate change regime also has immediate implications for the current compliance system. First, the requirement that parties make up missed emission reductions in the subsequent commitment period is an effective enforcement tool only if there are subsequent commitment periods. The closer we come to the end of the first commitment period before the post-2012 regime is finalized, the greater will be the temptation of parties at risk of missing their emission-reduction target to either reject a second commitment period altogether or to incorporate the expected consequence into their second commitment period targets. With every passing year of uncertainty, the risk of parties not taking the work of the compliance committee seriously increases. Much of the work of the EB is yet to come, and the uncertainty over the future of the climate regime is at risk of increasingly affecting its work.[17]

Regardless of the future of the Kyoto compliance system, much of its work is on issues that will continue to be important both for the climate change regime and for other multilateral environmental agreements. While it is impossible to make accurate predictions about the future of the climate change regime after 2012, it is nevertheless valuable to reflect on the experience with the Kyoto compliance system, whether for improvements to the Kyoto compliance system itself or for MEA compliance more generally.

8.2 The Facilitative Branch

Until the Kyoto compliance system was designed, facilitation had been the dominant approach to compliance in Multilateral Environmental Agreements (MEAs).[18] MEAs offer a rich experience with facilitation, though not in the context of the rigorous reporting and review requirements in Articles 5, 7, and 8 of the Kyoto Protocol.[19] One would expect the experience with facilitation under the Kyoto compliance system to offer new insights into reporting and review, as well as on the more general experiment with the combination of facilitation and enforcement.

[17] Already, Canada has withdrawn from the Kyoto Protocol and Japan has indicated that it is not going to take on a second commitment period target. Both parties are among those considered most likely to struggle to meet their first commitment period targets. The federal government in Canada, in fact, had previously declared in 2007 that it would not meet its target.

[18] See Jane Bulmer, “Compliance Regimes in Multilateral Environmental Agreements”, in Jutta Brunnée, Meinhard Doelle and Lavanya Rajamani (eds.), *Promoting Compliance in an Evolving Climate Change Regime* (Cambridge: Cambridge University Press, 2012).

[19] See, for example, Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, amended at London on 29 June 1990, amended at Copenhagen on 25 November 1992, amended at Vienna in 1995, amended at Montreal on 17 September 1997, and amended at Beijing on 3 December 1999, in force 1 January 1989, 1522 *United Nations Treaty Series* (1989), 3.

The FB was expected to play an important role in the Kyoto compliance system, both as an early-warning system for compliance matters which ultimately might be subject to enforcement, and to deal with the range of commitments not subject to the jurisdiction of the EB. Whether it lived up to expectations is considered in this section.

The only substantive matter referred to the FB to date has been a submission filed by South Africa in its capacity as chair of the G-77/China bloc. The submission was filed with respect to Austria, Bulgaria, Canada, France, Germany, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Poland, Portugal, Russia, Slovenia, and the Ukraine. The focus of the submission was to bring to the attention of the FB a number of instances of late filing of reports on demonstrable progress by Annex I countries toward meeting their emission-reduction targets. The letter submitted by South Africa reads in part as follows:

> South Africa, as Chairman of the Group of 77 and China, on behalf of the Group of 77 and China, is submitting a question of implementation to the Compliance Committee, for consideration by the Facilitative Branch. … This question of implementation is raised against those Parties who have not provided their reports demonstrating progress, even after a period of nearly six months from the January 1 deadline.[20]

The submission requested the branch to investigate the alleged violations and to consider whether they were indicative of potential non-compliance with more substantive requirements, such as Article 3.1 of the Kyoto Protocol. The FB decided not to proceed against Latvia and Slovenia as both countries had submitted the required documentation by the time the branch met to consider the submission. This decision not to proceed was approved with two abstentions and one vote against.[21]

With respect to the other parties, the members of the branch could not agree on whether the submission in the form of a letter from South Africa on behalf of the Group of 77 and China properly brought the matter before the compliance committee. The dispute was over the requirement that questions of implementation be brought by a party or by an Expert Review Team. The branch was split on whether the submission by South Africa was properly filed by a party. As a result, the FB was not able to make a preliminary decision to proceed or not to proceed.

The branch failed to comply with the requirement to make a preliminary decision within 3 weeks of the referral of a question of implementation, and reported this failure to the compliance committee.[22] The Rules of Procedure approved by the

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[20] Letter submitted by South Africa: CC 2006-1-1/FB, available at http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php (last accessed on 8 April 2012).

[21] See Decision not to proceed against Slovenia CC-2006-14-2/Slovenia/FB and Decision not to proceed against Latvia CC-2006-8-3/Latvia/FB , available at http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php (last accessed on 8 April 2012).

[22] See Report to the Compliance Committee on the Deliberations in the Facilitative Branch relating to the Submission entitled "Compliance with Article 3.1 of the Kyoto Protocol" (Party concerned: Canada), CC-2006-3-3/FB, available at: http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php (last accessed on 8 April 2012).

COP/MOP in Nairobi in 2006 now clarify the process for making submissions of this kind. To date, no further referrals have been made to the FB, either by a party of by an ERT.[23]

It is noteworthy that the FB has not had any opportunity to facilitate compliance with emission-reduction targets of Annex I parties. Appling the FB process to Canada, for example, would have been an interesting test of facilitation for Annex I parties with respect to their emission-reduction targets. A possible trigger for the work of the FB with respect to Canada would have been the so-called demonstrable progress report or its national communications.[24] There might have been value in providing the FB with the opportunity to schedule a meeting or some form of consultation with a party that may be at risk of missing its target based on the demonstrable progress report filed.

In 2010, the FB branch took a modest step toward proactively facilitating compliance. The FB initiated contact with Monaco with respect to Monaco's delay in submitting its fifth national communication. In the letter, the FB offers facilitation and advice, and seeks a response from Monaco.[25] There has been some further communication between the FB and Monaco resulting from this initial letter, suggesting that Monaco has accepted the FB's role in this regard.[26]

8.3 The Enforcement Branch

The work of the enforcement branch of the Kyoto compliance system is of particular interest because it is the first time that an MEA has taken enforcement seriously. The EB has to date been confronted with seven questions of implementation related to a party's compliance with its Kyoto commitments. The cases involve Greece,

[23] The immediate concern raised by the South Africa submission was the split between Annex I and Non-Annex I parties on this issue. The broader concern is the difficulty of bringing matters before the FB. The fact that no party was willing to follow up the South Africa submission on its own is telling in this regard. It suggests a fear of reprisal by individual parties.

[24] Clare Breidenich and Daniel Bodansky, "Measurement, Reporting and Verification in a Post-2012 Climate Agreement" (2009 Pew Center on Global Climate Change), available at: http://www.pewclimate.org/docUploads/mrv-report.pdf (last accessed on 8 April 2012), at 15, where the authors discuss the difference in rigour of the reporting obligations for inventories and reporting on mitigation measures. The requirements for inventories are much more specific, making it much more likely that an ERT would trigger the compliance process for inventories than for mitigation measures including progress toward commitment-period targets. Clear standards for reporting on mitigation measures would be an essential foundation for more effective facilitation and enforcement of compliance with mitigation commitments.

[25] See report on decision to send letter to Monaco, available at: http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php (last accessed on 8 April 2012).

[26] See 10th Meeting of the FB, 11–12 October 2011, "Provisions Related to Facilitation: Advice and Facilitation", available at: http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php (last accessed on 8 April 2012).

Canada, Croatia, Bulgaria, Romania, Ukraine, and Lithuania. All cases to date have had to follow the expedited procedures in section X of the Compliance Procedures, set up to ensure the time-sensitive issue of eligibility to utilize the Kyoto mechanisms is dealt with in an expedited manner. Section X provides shorter timelines than the general procedures and establishes specific rules for the reinstatement of eligibility to participate in the mechanisms.[27]

The case against Greece is reviewed in detail, as it offered the first opportunity to observe the functioning of the EB. As such, it provides a good opportunity to illustrate the general process followed by the EB. The other six cases are drawn upon to highlight new issues they raise about the functioning of the EB. Significant changes to the process in these subsequent cases that signal an evolution of the process are also identified.[28]

8.3.1 Proceedings Against Greece

This case represents the first question of implementation brought before the EB. As noted above, a question of implementation can be brought before the compliance committee either by an ERT or by a party; the bureau determines whether it comes within the jurisdiction of the EB, the FB, or both. Once the EB receives a question of implementation from the bureau, it conducts a preliminary review of the issue raised and makes a determination on whether to proceed. If the EB decides to proceed, the party under investigation is informed of this decision. It then has the right to request a hearing and make written submissions. The party can also request under section VIII(6) of the compliance procedures that information be kept private until the conclusion of the proceedings. The EB will usually hear from the party, the ERT, any other party, as well as from any independent experts it feels are needed to resolve the issue raised. The EB can also request specific information from the party under investigation, and can consider submissions from non-parties. There are set timelines for the major steps in the process.

After the hearing, the EB makes a preliminary finding as to whether the party is in compliance. The party has an opportunity to comment on the preliminary finding. If it does not, the preliminary finding stands as the final decision of the EB. If the party submits comments on the preliminary finding, the EB issues a final decision in light of the comments filed. The EB has to give reasons for its decisions. A finding of non-compliance will result in a range of consequences depending on

[27] The expedited procedures can take a maximum of 17 weeks, whereas the general procedures can take up to 36 weeks.

[28] For a more detailed assessment of the first four cases before the EB, see Meinard Doelle, "Experience with the Kyoto Compliance System", in Jutta Brunnée, Meinhard Doelle and Lavanya Rajamani, *Promoting Compliance in an Evolving Climate Change Regime* (Cambridge: Cambridge University Press, 2012).

the nature of the violation. A key part of the process is the preparation of a compliance plan within 3 months of the determination of non-compliance, with regular updates thereafter on the implementation of the compliance plan. Key substantive requirements for the compliance plan are set out in Section XV (2) of the Compliance Procedures.

The case against Greece was the first opportunity to test this process. It resulted from the ERT's review of the initial report filed by Greece and from the ERT's in-country review of Greece's national system for the estimation of emissions and the preparation of information required under Article 7 of the Kyoto Protocol.[29] The ERT summed up the situation as follows:

> The ERT concludes from the information contained in the initial report and the additional information received during and after the in-country review that the national system of Greece does not fully comply with the guidelines for national systems under Article 5, paragraph 1 of the Kyoto Protocol (decision 19/CMP.1) and the guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol (decision 15/CMP.1). In particular, the ERT concludes that the maintenance of the institutional and procedural arrangements; the arrangements for the technical competence of the staff; and the capacity for timely performance of Greece's national system is an unresolved problem, and therefore lists it as a question of implementation.[30]

The ERT report was received by the compliance committee on 31 December 2007. It was allocated by the bureau to the enforcement branch on 7 January 2008. On 22 January 2008, the EB decided unanimously, by way of an electronic system for taking decisions outside of a conventional meeting, to proceed with the case against Greece.[31] A number of steps followed in short order. Greece was informed of the decision to proceed. It requested a hearing and filed a written submission in February 2008.[32] The EB requested expert advice from members of the ERT and from independent experts. The request for expert advice included a list of specific questions to be addressed by the experts.

A hearing of the EB was held in March of that year, followed by a preliminary finding of non-compliance.[33] Greece filed further written submissions in response to the preliminary finding. At a further meeting of the EB in April, the preliminary finding was confirmed. No submissions were filed by non-parties. Once the EB

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[29] Kyoto Protocol, supra, note 3, Arts. 5, 7.

[30] See Report of the Review of the Initial Report of Greece: CC-2007-1-1/Greece/EB, 8 January 2008, par. 244, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012). See also par. 5–10 of the ERT Report, including table 1.

[31] Decision on Preliminary Examination: CC-2007-1-2/Greece/EB, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012).

[32] Written Submission of Greece: CC-2007-1-5/Greece/EB, 26 February 2008, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012).

[33] See Preliminary Finding: CC-2007-1-6/Greece/EB, 6 March 2008, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012).

made its finding of non-compliance, the process shifted to the consequences of non-compliance and Greece's efforts to remedy the problems identified. Greece filed two successive compliance plans and made a formal request to the EB for eligibility to use the Kyoto mechanisms. This process took until November 2008, when the EB decided that Greece had come into compliance.

The key steps in this process are now considered in more detail.

8.3.1.1 First Hearing Regarding Greece

The third meeting of the EB served as the first hearing in the case against Greece.[34] It was held on 4 and 5 March 2008, in accordance with Rule 9 of the Rules of Procedure. Most of the meeting was held in public, but the deliberations on the preliminary finding were held in private. The public portions of the hearing are accessible by webcast. Greece did not seek to prevent disclosure of information to the public, nor did the EB.

Substantively, the focus of the question of implementation raised by the ERT was on the transition of the role of "technical consultant" from the National Observatory of Athens (NOA) to the National Technical University of Athens (NTUA). Greece appears to have relied heavily on the NOA in establishing its national system. While the ERT had no concerns with the work done by the NOA, the heavy reliance on an outside consultant raised concerns about the capacity of the government officials responsible for the national system. It also raised concerns about the decision to switch consultants from the NOA to the NTUA. Throughout the EB proceedings, there was disagreement over the actual extent of the responsibility of the technical consultant. At least some of the ERT members were of the view that the consultant had overall responsibility for Greece's national system and that government officials lacked the capacity to oversee the work of the consultant.[35] Greece took the position that the responsibility throughout rested with the responsible Ministry, not with either the old or the new technical consultant.

Knowledge transfer was a central concern for the ERT, both with respect to the transfer from the NOA to the NTUA and for possible future transfers of responsibility. A key problem appears to have been that the description of the organizational structure, and the role of the consultant in maintaining Greece's national system ignored the fact that the consultant's responsibility was to be transferred from NOA to NTUA. Greece's response appears to have been that it would ensure the transition would take place properly, but without providing the detail necessary to satisfy the ERT with respect to knowledge transfer.[36]

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[34] The meeting was held on 4–5 March 2008 in Bonn. The webcast is available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012).

[35] See webcast of 4–5 March 2008 meetings in Bonn. The webcast is available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012).

[36] The capacity of the new responsible entity was an issue at least in principle, in that the ERT was not able to verify its capacity during the in-country review.

The new system was first explained by Greece in its written submission to the EB. The experts invited to the March 2008 meeting of the EB, some of whom were members of the original ERT, seemed pleased with the new system as described by Greece, but felt that the capacity of the new Greek team (consisting of new Ministerial staff and the NTUA) could not be assessed based on the submission. The invited experts, including the ERT members, felt that a further in-country review was required to confirm the capacity of the new team.

The timing of the transition of responsibility had not enabled the ERT members to meet with the NTUA who had taken over responsibility for the maintenance of the national GHG inventory system after the ERT's in country visit. Therefore, the ERT members felt that they could not conclude that the maintenance of Greece's national system was in good hands with the NTUA. The concern appeared in part to be a result of discussions with the original technical consultant involved, the NOA, during the in-country review. NOA staff had indicated that they had not been engaged in any knowledge transfer to NTUA.

The contract between the Ministry for the Environment, Physical Planning and Public Works of the Government of Greece and NOA ended in April 2007. An agreement between the Ministry and the NTUA to take over as technical consultant was not reached until December 2007. In the interim, the Ministry had sole responsibility for the maintenance of the national system. During the course of the EB hearings, Greece indicated that it had increased the capacity of the Ministry by hiring six new staff, that the new technical consultant would play a less prominent role than the previous consultant, and that a workshop would be held to ensure knowledge transfer from NOA to NTUA.

The key issue in the end seemed to be whether another full in-country review or some other process (such as a modified in-country review, a centralized review, or a desk review) was needed to ensure that there was now capacity to manage the inventory going forward. In this regard, Greece pointed out that if the transition had happened after a successful initial in-country review, the transition would have triggered a desk review, not another in-country review. This raised the question for the EB whether in light of the ERT's findings (including the finding that the NOA process had been adequate and that the problem really had to do with the transition), there was still a need for an in-country review of the national GHG inventory system.

In-session documents, including working drafts of reports and decisions were not available from the UNFCCC website, and requests for these documents were denied, making it difficult at times to follow the work of the EB in detail through the webcasts.[37] Electronic communications among members of the EB were also not available, even though the EB did conduct some of its formal business electronically to reduce travel time and cost.[38] No observers registered to attend the March 2008 meeting of the EB.[39]

[37] E-mail communication requesting these documents is on file with the author.

[38] Such as the preliminary decision to proceed made on 22 January 2008.

[39] The author was the first registered observer at the April 2008 meeting of the EB.

The process used by the EB is not an adversarial process with both sides represented and the EB playing the role of judge. Neither the UNFCCC secretariat not the ERT is playing the role of prosecutor. This suggests that members of the EB need to take a pro-active role in bringing out and exploring critical issues. It is clear from the webcast that some members of the EB were more comfortable with this role than others.

8.3.1.2 Preliminary Finding

After the public hearing, the EB went into a private session for its deliberations. The result was a preliminary finding of non-compliance. Reasons for the decision are somewhat limited. The following are the key provisions of the preliminary finding:

16. The information submitted and presented has not been sufficient for the enforcement branch to conclude that the question of implementation has now been fully resolved. Additional information is required that specifically addresses whether and how the national system is maintained through transitions. The enforcement branch agrees with the expert advice provided that a further in-country review of Greece's new national system, in conjunction with a review of an annual inventory report generated by this national system, is required for the enforcement branch to assess present compliance with the guidelines.
17. The enforcement branch determines that Greece is not in compliance with the guidelines for national systems under Article 5, paragraph 1, of the Kyoto Protocol (decision 19/CMP.1) and the guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol (decision 15/CMP.1). Hence, Greece does not yet meet the eligibility requirement under Articles 6, 12 and 17 of the Kyoto Protocol to have in place a national system in accordance with Article 5, paragraph 1, of the Kyoto Protocol and the requirements in the guidelines decided thereunder.
18. In accordance with section XV, the enforcement branch applies the following consequences:
    (a) Greece is declared to be in non-compliance.
    (b) Greece shall develop a plan referred to in paragraph 1 of section XV and submit it within 3 months to the enforcement branch in accordance with paragraph 2 of section XV. The plan should demonstrate measures to ensure the maintenance of the national system through transitions and include appropriate administrative arrangements to support an in-country review by the expert review team of the new national system of Greece, coordinated by the secretariat in conjunction with a review of an annual inventory report generated by this national system.

(c) Greece is not eligible to participate in the mechanisms under Articles 6, 12 and 17 of the Protocol pending the resolution of the question of implementation.

19. These findings and consequences take effect upon confirmation by a final decision of the enforcement branch.[40]

8.3.1.3 Written Submissions

On 8 April 2008, Greece filed a written submission in response to the preliminary finding of the EB.[41] The main point made in the submission is that regardless of the difficulties at the time of the ERT review, the transition in Greece was complete as of the date of the 8 April submission. According to the submission, the Ministry had improved its capacity, the new technical consultant had been hired, and the workshop between the NOA and NTUA had been held. Greece stated, moreover, that it had submitted its new inventory. Greece took the position that the quality of the new inventory should answer any question about its national system and that in these circumstances it would be inappropriate to hold up its access to the Kyoto mechanisms for the purpose of conducting an in-country review.

The submission filed by Greece also raised a question about the consistency in ERTs' approaches to referrals to the EB. The submission made the point that many of the issues raised regarding Greece had been raised by other ERTs in other initial reviews conducted for other parties without raising questions of implementation. Greece argued that as a matter of consistency, therefore, these issues should not delay Greece's eligibility to use the mechanisms.

8.3.1.4 Further Hearing

The main purpose of the second hearing on 16 and 17 April was to review the preliminary finding in light of the comments from the party.[42] The EB considered whether Greece's submissions warranted any change to the preliminary decision or whether it should be adopted as final. The Chair clarified at the outset that Greece was not yet required to comply with the terms of the preliminary decision. Specifically, Greece was not yet required to submit a compliance action plan on how Greece would bring its national system into compliance. Greece was required to act only if the preliminary finding of non-compliance were affirmed through a final decision.

At the April 16 hearing, the EB went through Greece's April 2008 submission in detail to consider whether the submission warranted a change to the preliminary finding.

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[40] See Preliminary Finding: CC-2007-1-6/Greece/EB, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012).

[41] Further Written Submission of Greece: CC-2007-1-7/Greece/EB, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012).

[42] The meeting was held on 16–17 April 2008 in Bonn. The webcast is available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/3785.php (last accessed on 8 April 2012).

Concerns raised by EB members focused on the fact that there was no information on how Greece would better prepare for the eventuality of another transition in the future, and that experts at the April hearing continued to take the position that some form of in-country review would be needed to confirm that the new team (consisting of the new Ministry staff and NTUA) had the capacity and had effected the transfer of the relevant knowledge to properly maintain the national system.

8.3.1.5 Final Decision

The final decision of the EB, released on 17 April 2008, confirms the preliminary finding of non-compliance as well as the consequences identified in the preliminary finding.[43] As of the date of the final decision, Greece was declared to be in non-compliance, was required to submit a compliance plan within 3 months, and was declared ineligible to participate in the mechanisms.

The decision was not unanimous. Unfortunately, there are no reasons given for the one dissenting vote. At the October 2008 meeting of the compliance committee, the plenary clarified that, in the future, members of either branch who cast a dissenting vote will be able to provide an explanation in the report of the meeting, but that that explanation will not be part of the decision. It remains to be seen whether members will avail themselves of this opportunity in a meaningful way.

8.3.1.6 Greece's Compliance Plan

In accordance with the 17 April decision of the EB, Greece filed its compliance plan on 16 July 2008.[44] The plan contemplated an in-country review to take place in September 2008, and otherwise indicated that Greece's current system was adequate to address the concerns expressed by the EB in the 17 April decision.

At the meeting of the EB on 6 and 7 October 2008, Greece's compliance plan was reviewed and found to be inadequate in addressing the issues raised in the April decision and the requirements in Section IV(2) of the Compliance Procedures. In particular, the branch noted that the document contained no plan on how to improve future transitions of responsibility for components of its national system. The report was also found to be inadequate in its form, in that it did not specifically respond to each of the issues raised in the April decision. Furthermore, the EB clearly did not accept Greece's position that everything was in order and that the in-country review was the only event that stood in the way of having its eligibility reinstated.

[43] See Final Decision: CC-2007-1-8/Greece/EB, 17 April 2008, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012).

[44] See Plan Pursuant to Final Decision CC-2007-1-9/Greece/EB, 16 July 2008, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php (last accessed on 8 April 2012).

The EB confirmed that it could not make a final decision about Greece's state of compliance without access to the written report from the ERT on its follow-up in-country review of Greece's national system in September. There was some discussion at the EB's October 2008 meeting about the time-delay in reviewing the compliance plan submitted by Greece, and there was general agreement that in the future the EB should endeavour to respond within 4 weeks. The EB noted that the Rules of Procedure with respect to the review of compliance plans were inadequate, and proposed amendments.[45]

8.3.1.7 Final Resolution

Greece filed a revised compliance plan on 27 October 2008. The matter was resolved on 13 November 2008, when the EB, on a request by Greece, decided to grant it eligibility to participate in the mechanisms. The decision is based on the written report of the ERT following its in-country review in September 2008 and the revised compliance plan. The ERT report concluded that Greece had made considerable improvements in the implementation of its national system, and that it had addressed the EB's and ERT's concerns about future transitions in responsibility for maintaining its national system. The revised compliance plan was found to be in compliance with the formal requirements set out in the EB's 17 April decision. On this basis, Greece was found to be in compliance and it was declared eligible to use the Kyoto mechanisms.

8.3.2 Subsequent Proceedings Before the EB

There have been six further questions of implementation brought before the EB, one against Canada and five against eastern European countries. All seven cases have followed the same basic process, though subsequent cases have benefitted from the rules of procedures developed in 2007 and more generally from the experience gained by the enforcement branch over time. Key issues that arose out of the subsequent six cases are briefly outlined in this section of the chapter.

8.3.2.1 Canada

At the heart of the question of implementation before the EB with respect to Canada was a delay in establishing Canada's national registry. A national registry is a computerized system used to track holdings of greenhouse gas credits, and is a

[45] See Compliance Committee 2008 Annual Report, UN Doc. FCCC/KP/CMP/2008/5, Annex I, available at: http://unfccc.int/kyoto_protocol/compliance/plenary/items/3788.php (last accessed on 8 April 2012)

requirement for all Annex I parties. The question of implementation did not extend to any actual accounting of emissions. Canada's declared intention not to meet its emission reduction target by the end of 2012 was not before the EB.[46]

Canada's approach in its written and oral submissions was not to dispute the question of implementation raised, but to point out that the problem had been addressed and that the registry was now in place. Canada took the position that it was in compliance at the time of the hearing, and that there was therefore no point in the EB proceeding further with the question of implementation raised. The EB agreed not to proceed, but to Canada's displeasure made a point of noting Canada's past non-compliance.

The key new issue raised by the proceedings against Canada was whether it is appropriate for the EB to make reference to past non-compliance of a party or whether, in the instant case, it should have simply found Canada to be in compliance because the registry was established by the time the hearings were held. It seems clear that if the EB is to serve its role of motivating parties to comply by bringing instances of non-compliance to the attention of the public, being able to bring attention to past non-compliance may be a valuable tool.

8.3.2.2 Croatia

In this case the issues raised by the ERT centered on an attempt by Croatia to add 3.5 megatonnes of CO_2 eq. to its assigned amount. The ERT concluded that the 3.5 Mt enlargement was not in accordance with modalities established under decision 13/CMP.1 and raised this as an issue of implementation. Croatia claimed this amount based on a recognition of Croatia's special circumstances by the COP prior to Croatia joining the Kyoto Protocol.

The EB concluded that the flexibility provided for in Articles 4.6 of the UNFCCC and 3.5 of the Protocol does not extend to additions to the assigned amount. Furthermore, the recognition of Croatia's special circumstances in 7/CP.12 was made by the UNFCCC's COP, and not by the Protocol's COP/MOP. Thus the EB concluded that there was no basis on which Croatia could claim special treatment for the determination of its assigned amount under the rules of the Protocol.[47]

The EB essentially decided that any recognition of special circumstances under the UNFCCC had to be confirmed by the COP/MOP to be applicable to Croatia's Kyoto obligations. The EB also concluded that the flexibility for EITs under the Kyoto Protocol is limited to the choice of base year. Decision 7/CP.12 is based on the Convention, which allows for more flexibility with respect to EITs. Essentially, the EB acknowledged Croatia's special circumstances, but concluded that it was up to the COP/MOP to consider these circumstances and take appropriate action in light of the more limited flexibility under the Kyoto Protocol.

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[46] See Oberthür, "Holding Countries to Account", supra, note 2, at 154.

[47] See Final Decision: CC-2009-1-8/Croatia/EB, 26 November 2009, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5456.php (last accessed on 8 April 2012).

The decision of the EB was appealed by Croatia, representing the first time the compliance mechanism's appeal provisions have been used. Croatia's Notice of Appeal includes the following grounds: violation of Article 31, paragraphs 1, 2, and 3(b), as well as Article 32 of the Vienna Convention on the Law of Treaties; improper application of Article 3, paragraph 5, of the Kyoto Protocol; violation of COP and COP/MOP decisions and provisions of the Kyoto Protocol; violation of the equal-treatment principle; and violation of the procedures and mechanisms relating to compliance, in particular: indication of information relevant to the decision; the right to respond; and the independence, impartiality, and conflict-of-interest principles.[48] Croatia withdrew its appeal in 2011, before a final decision from the COP/MOP.

8.3.2.3 Bulgaria

The case against Bulgaria was triggered as a result of a question of implementation raised in the 2009 ERT report on Bulgaria.[49] In this case, the ERT concluded that Bulgaria's national system did not operate in accordance with the Guidelines for National Systems for the Estimation of Emissions by Sources and Removals by sinks under Article 5, paragraph 1, of the Kyoto Protocol.[50] The ERT was also not satisfied with institutional arrangements and arrangements for technical competence of staff within the national system involved in the inventory-development process.[51]

The problems identified were not new; nevertheless, in-country and desk reviews carried out in previous years had not resulted in issues of implementation with respect to these ongoing problems. The ERTs had, of course, fulfilled their role in facilitating compliance by making recommendations for improvements to Bulgaria's national system, but had chosen not to engage the compliance committee until 2010.

The matter was referred to the EB, which followed the same general process established in previous cases. Bulgaria filed a detailed submission prior to the EB's preliminary finding of non-compliance. After a hearing on 10 May 2010, the EB issued its preliminary finding, essentially confirming the findings of the ERT with respect to Bulgaria's inventories of emissions and sinks, particularly with respect to institutional arrangements and staff. The conclusions of the EB were confirmed in its final decision rendered at the conclusion of the meeting of the EB on 28 June 2010. The focus of the decision was the requirement of a compliance plan, regular updates, and a further in-country review. Compliance with the decision of the EB took Bulgaria until February, 2011, when its eligibility to use the Kyoto mechanisms was re-instated.

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[48] See Notice of Appeal filed by Croatia, available online at http://unfccc.int/resource/docs/2010/cmp6/eng/02.pdf (last accessed on 8 April 2012).

[49] See Report of the Review of the Initial Report of Bulgaria, UN Doc. FCCC/ARR/2009/BGR, available at: http://unfccc.int/kyoto_protocol/compliance/questions_of_implementation/items/5538.php (last accessed on 8 April 2012).

[50] Decision 19/CMP.1, Guidelines for national systems under Article 5, paragraph 1, of the Kyoto Protocol, UN Doc. FCCC/KP/CMP/2005/8/Add.3, 30 March 2006.

[51] Bulgaria ERT Report, supra, note 49, at para. 194.

The extent of Bulgaria's difficulties and the length of time it has already taken to try to resolve them are perhaps the key aspects of this case. The fact that this matter had not previously come before either the FB or the EB must be considered a shortcoming of the process, even if ERTs have been diligent in working with Bulgaria to resolve these issues. This is a case where both branches could have been engaged. The EB in its findings limited itself more or less to a finding of non-compliance and to identifying a process of determining when Bulgaria has come into compliance. While this is entirely appropriate for the EB, it would seem that Bulgaria is in need of more detailed advice on the steps it needs to take. The EB could have referred the matter to the FB to fill this gap.

This case also serves to illustrate the problem of triggering primarily through ERT referral. It seems clear that ERTs reviewing Bulgaria's inventory system have had concerns and have identified problems for some time, but decided, until 2010, not to raise them as questions of implementation. The first in-country review likely should have resulted in referral to the FB or perhaps even the EB. If the FB had the responsibility to review each ERT report and the power to initiate proceedings on its own, it would seem likely that this would have led to a pro-active approach to this matter years earlier. The end result is that this ongoing problem first came before the EB with only 2 years left before the end of the commitment period.

8.3.2.4 Romania, Ukraine and Lithuania

The three most recent cases involving Romania, Ukraine and Lithuania arise out of the ERT reviews of the parties' 2010 annual submission. As a result of these reviews, the ERT raised questions of implementation regarding the national system of each of these parties. The process followed in each case was similar to the one used in previous cases. Romania, Ukraine and Lithuania were each found to be in non-compliance and were asked to submit a compliance plan.

At the time of writing, only Ukraine had submitted its compliance plan and had completed the implementation of the compliance plan to the satisfaction of the EB. As a result, Ukraine had its eligibility re-instated in March, 2012. With respect to Romania, the EB had accepted the compliance plan submitted by Romania, and was awaiting a second update on its implementation. Lithuania had not yet filed its compliance plan.

8.4 Observations on the Experience to Date

Overall, the Kyoto compliance system has performed remarkably well given the circumstances, particularly with respect to the requirements for initial eligibility and the establishment of national systems and inventories by Annex I parties. Considerable facilitation appears to have occurred at the ERT level with respect to

the requirements of Articles 5, 7, and 8. It seems that the threat of formal proceedings before the compliance committee has been an effective motivator for parties to cooperate with ERTs.

A few key shortcomings of the Kyoto compliance system can nevertheless be identified based on the experience to date. They are discussed below. The most obvious is that the triggers for proceedings before the two branches have proven to be inadequate. The adequacy of the "consequences" has also been brought in doubt, largely by Canada's declared intention not to work toward its emission-reduction target, but also, as explained below, by the inactivity of the FB. Transparency is a third key area. The role of key actors in the compliance system is also briefly discussed.[52]

8.4.1 Triggering

Triggering is perhaps the most obvious shortcoming of the current system. The compliance system allows self-triggering by parties, party to party triggering, and triggering by ERTs. The self-trigger has not been used. The party-to-party trigger was attempted once and failed. The limitation of self-triggering and party-to-party triggering was, of course, recognized in the design of the system. Triggering by ERTs was offered as the solution. This solution will likely prove adequate with respect to the emission-reduction obligations at the end of the first commitment period. It is less clear that it has been adequate in allowing the compliance committee to act early to encourage compliance in a pro-active, preventative manner.

The ERT process has not been an adequate triggering process to date. In particular, the triggering of proceedings before the FB has been practically non-existent, in spite of clear evidence of numerous concerns and violations under the jurisdiction of the FB. The most notable example is the inability of either branch of the compliance system to take any action in response to Canada's declared intention as early as 2007 not to meet its emission-reduction target. The stakes for the compliance system were particularly high with respect to Canada, as its position struck at the core of the Kyoto Protocol. Yet, the compliance committee could not act, and had to rely on the threat of the ultimate consequences to be applied in 2015 as the only tool within the system to encourage Canada to change its position.[53]

[52] For a more detailed discussion on the lessons learned from the Kyoto compliance system, see Meinhard Doelle, Jutta Brunnee and Lavanya Rajamani, "Conclusion: Promoting Compliance in An Evolving Climate Regime", in Jutta Brunnee, Meinhard Doelle and Lavanya Rajamani, *Promoting Compliance in an Evolving Climate Regime* (Cambridge: Cambridge University Press, 2012).

[53] In light of Canada's recent decision to withdraw from the Kyoto Protocol altogether, one might be inclined to take the view that even with an appropriate trigger, there was nothing the compliance committee could have done to convince an unwilling party to change its position. In the end, however, this is an unanswered question. Would proceedings before the compliance committee have an impact on the position of the Canadian government? Would it affect its relationship to other parties? Would it affect the credibility of the government domestically? Would it affect the domestic debate on this issue?

8.4.2 Consequences

On the enforcement side, the main question regarding consequences is whether the experience to date warrants a reconsideration of the adequacy of the ultimate consequences of non-compliance. Leaving aside the immediate problem of the uncertain future of the Kyoto Protocol and the fact that targets for a second commitment period are uncertain as a result, what could be done to increase the likelihood that parties acting out of short-term self-interest are nevertheless motivated to comply with their obligations?

One step forward would be a safeguard against using the compliance process to continuously borrow from future commitment periods. Parties could be prevented from borrowing in two sequential commitment periods, and instead be required to pay a financial penalty. The 1.3 rate could be increased in case of repeated failure to meet emission-reduction targets. The compliance action plan could be made subject to more rigorous international review and approval for repeat offenders. An international compliance fund could be reconsidered as a means of preventing repeated borrowing, particularly in light of the need to finance mitigation and adaptation in developing countries.[54] Such a compliance fund could, for example, require payment for each ton of carbon missed at a rate equal to or higher than the cost of achieving the reductions during the commitment period, and make the funds available to non-Annex I parties for mitigation or adaptation purposes.

On the facilitative side, the main issue regarding consequences is whether the FB should have access to concrete tools and resources to assist parties in their effort to meet commitments, particularly with respect to tracking of emissions, sinks, credits, and reporting. The FB should be able to offer help in the form of funding and expertise, certainly in the context of EITs. In situations where facilitation extends to developing countries, this becomes even more important. Providing the FB with such tools may encourage less developed parties that experience compliance difficulties to self-report to the branch.

8.4.3 Transparency of the Process

When the compliance system was negotiated, there were legitimate concerns that transparency had been weakened in the late stages of the negotiations with the inclusion of section VIII(6), which allows information to be kept from the public until the conclusion of the proceedings on request by the party being investigated at the discretion of the EB.[55] It is encouraging that this mechanism has not been used, and

[54] For a discussion of the consideration of a compliance fund in the negotiations of the Kyoto compliance system, see Doelle, *From Hot Air to Action*, supra, note 1, at 60.

[55] See Doelle, *From Hot Air to Action*, supra, note 1, at 136.

that the committee and its two branches have made considerable efforts toward transparency. Examples include webcasting proceedings other than deliberations on decisions, a straightforward mechanism for observers to attend public meetings, and full access to all key documents on the UNFCCC website.[56] Nevertheless, a few transparency issues have arisen from the experience to date.

One limitation of the current process is that public proceedings frequently make reference to working documents that are not publicly accessible, making it difficult to follow the discussions taking place. In order for the webcasts to truly create transparency, working documents that are the subject of discussion should be provided, unless there is an overriding reason why they cannot be made available to the public.

A second issue relates to the increasing use of electronic means of communication, in place of meetings. While this practice should be encouraged, exchanges by electronic means that otherwise would be public should be made publicly available. In essence, e-mail exchanges should be treated like in-person meetings—they should be public unless there is a reason to keep them confidential. Currently, the form instead of the substance of communication dictates whether information is accessible.

A third issue relates to the level of detail offered in annual reports and decisions of the committee and its branches. The EB has gradually provided more detail in its decisions, and this trend should be encouraged and continued. More detailed reasons can help fill in some of the gaps left by the inaccessibility of working documents and e-mails.

8.4.4 Roles of Key Actors

The ERT process generally appears to be working well. It is, however, not consistently bringing issues of implementation before the compliance committee. This has been a concern from the time of the first case against Greece. The case against Bulgaria would seem to reinforce the point. Consistency is clearly an issue for the ERT process. Whether the review by ERTs, in particular through in-country reviews, is sufficiently detailed and frequent for the credibility and integrity of the reporting system is unclear based on the experience to date. It may be worth considering complementary ways to review and verify emissions and credits, such as through direct engagement of civil society in reporting methodological issues.[57]

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[56] Surprisingly, to date no submission has been made by civil society, and there have only been very few registered observers.

[57] For example, there could be a formal process through which civil society could be encouraged to register to review and publically comment on ERT reports. These comments could then be considered by the appropriate branch, and could potentially even feed into a branch-based triggering process.

As a group, the members of the compliance committee appear to have served the process reasonably well. There are few indications of voting along party lines.[58] The expertise of members appears to vary, resulting in some members being very engaged while others seeming to limit their involvement to a narrow range of issues. It is noteworthy that some members appear to have technical expertise, whereas others seem to have legal expertise. To deal with technical issues, the EB has made extensive use of outside experts, being careful to draw on ERT members and independent experts. Legal issues, however, have not been resolved through the use of outside experts. This may need to be rethought if legal disagreements continue to arise within the EB.[59] One solution would be to provide the compliance committee with access to independent legal advice.

The COP/MOP has to date been relatively unengaged with the work of the compliance committee. This may be partly due to its focus on the post-2012 negotiations. As a general rule, this may be a good thing, as it will limit political interference in the work of the committee. In defining an appropriate role for the COP/MOP, timing, the number of parties, and the political nature of the COP/MOP all need to be taken into consideration. Its role as the ultimate overseer of the process without much direct involvement generally seems appropriate.

The role of secretariat has been the subject of some discussion within the EB. The secretariat has been resistant to requests from members of the EB to provide preliminary analysis of cases that come before it. The impartiality of the secretariat and the independence of the compliance committee appear to be the main reasons. On balance, it would seem that the secretariat's approach has generally been appropriate. Limits in the capacity, resources, and expertise of members of the branches should be addressed directly, rather than blurring the line between the secretariat and the members of the compliance committee. However, a review of ERT reports for consistency by the secretariat would seem appropriate.

8.5 Conclusion

Much of the focus of the work of the compliance committee to date has been on developing and testing its basic rules of procedure. The seven cases before the EB, and the case brought by South Africa on behalf of the G-77/China before the FB, stand out as the main sources of experience with the Kyoto compliance system to date. These are early days for the Kyoto compliance system, and one would be well

[58] The South Africa submission to the FB on behalf of the G-77, and the one abstention on the final decision in the Croatia case are perhaps worth noting here. One issue to watch in this regard are the voting rules, which can serve to encourage block voting along Annex I/non-Annex I lines.

[59] One prominent example was a discussion of the Plenary in 2007 on an issue related to the timing of early eligibility. The webcast of the October 2007 annual meeting is available at http://unfccc.int/kyoto_protocol/compliance/plenary/items/3788.php (last accessed on 8 April 2012).

advised not draw firm conclusions about the effectiveness of the compliance system based on this limited experience. Nevertheless, it is clear that the EB is off to a promising start. At the same time, the experience does suggest that the compliance system is underutilized. A number of issues, ranging from delays in reporting to methodological issues and Canada's decision to abandon its emission-reduction obligation, have either not come before the branches or have not done so in a timely manner.

Overall, the Kyoto experiment to combine facilitation and enforcement shows considerable promise. The main task ahead is to encourage more and better facilitation, and to adjust the consequences as needed. The good news is that the experience to date suggests that enforcement can and does encourage constructive facilitation, even if the facilitation to date has been carried out by ERTs rather than the FB. On the enforcement side, the process seems to be reasonably effective, efficient, and fair. There are still details to be worked out, but the current system offers a strong basis to work from.