

Sustainable Development Law & Policy

Volume 2
Issue 1 *Winter 2002: International and
Comparative Environmental Law*

Article 1

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Recommended Citation

Wisner, Glenn (2010) "Implementing Kyoto," *Sustainable Development Law & Policy*. Vol. 2 : Iss. 1 , Article 1.
Available at: <https://digitalcommons.wcl.american.edu/sdlp/vol2/iss1/1>

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Implementing Kyoto *

by Glenn Wiser **

I. Introduction

On November 10 in Marrakech, Morocco, representatives from over 170 countries meeting, as the Seventh Conference of the Parties to the UN Framework Convention on Climate Change (FCCC), finalized rules for implementing the Kyoto Protocol. Upon its entry into force, the Protocol will require developed country Parties to limit their emissions of six greenhouse gases to specific, quantified amounts. These binding emissions targets will be enforced through a compliance system that will represent a new and important development in international environmental law. Though the Bush Administration has rejected U.S. participation in the Protocol for now, key governments, including Japan, Russia, and the European Union, have announced their intention to ratify, thereby greatly enhancing the likelihood that the treaty and its compliance system will soon carry the force of law.

II. Introduction to the Compliance System

A. Monitoring, Reporting and Review

Building on obligations already contained in the existing Climate Convention, developed country (“Annex I”) Parties will need to monitor and report estimates of their “anthropogenic,” or human-induced, greenhouse gas emissions. These will include emissions from most industrial, transport, and other sectors of the economy that burn fossil fuels. Net emissions sources from “sinks” activities such as logging must also be counted. Countries may elect to deduct from their gross emissions some of the carbon dioxide that is sequestered in soil and plants from agriculture and other sinks activities.

Additionally, the Protocol establishes an international emissions trading system between developed countries, as well as a trading system between developed and developing countries based on verified emissions reductions derived from specific projects. Developed countries that want to take advantage of these market-based “flexibility mechanisms” will need to set up domestic, computerized registry systems capable of tracking the holdings and trades of their companies and other “private entities” who wish to participate. They will then need to report those transactions to a centralized database. While the registries must be set up so they conform to international guidelines, governments will have the discretion to select the means by which they enforce the integrity of their domestic systems.

* A shorter version of this article appeared in the January 16, 2002 issue of BNA’s *International Environment Reporter*.

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Each country's annual emissions report will be subject to review by "Article 8" expert review teams. These teams will identify any "questions of implementation" (potential cases of non-compliance) which, in turn, they will refer to the Protocol's Compliance Committee.¹

B. Procedures and Mechanisms Relating to Compliance

The Compliance Committee will consist of two branches. A facilitative branch will be available to assist all Parties in their implementation of the Protocol. A judicial-like enforcement branch will determine whether an Annex I Party has (1) met its emissions target, (2) complied with its monitoring and reporting requirements and (3) met the eligibility tests for participating in the flexibility mechanisms. When the enforcement branch finds that a Party has failed to comply with one of these obligations, it will have the power to apply the appropriate consequence(s) for the Party.

The membership of both the facilitative and enforcement branches will be based upon equitable geographical representation.² Winning this composition rule was a dramatic victory for the G-77 and China. Members of the Umbrella Group had insisted that Annex I Parties should have an outright majority on the enforcement branch, because only they will be subject to enforcement branch proceedings. The equitable geographical representation rule for the enforcement branch has made some Umbrella Group members more resistant to accepting the mandatory nature of the compliance regime as a whole.

Both branches will take decisions by double majority voting. Under this rule, a decision can only be adopted if majorities from each bloc of branch members—Annex I and non-Annex I—approve it. The safeguard of double majority voting should allay the concerns of some Annex I Parties that enforcement branch membership based upon equitable geographical representation could somehow mean they might be subject to unfair or politically motivated decisions by that branch.

The enforcement branch will apply specific consequences when an Annex I Party fails to meet its emissions target: (1) For every tonne of emissions by which a Party exceeds its target, 1.3 tonnes will be deducted from its emissions allocation ("assigned amount") for the subsequent compliance period. (2) The Party will prepare a detailed plan explaining how it will meet its reduced target for the subsequent compliance period. The enforcement branch will have the power to review the plan and assess whether or not it is likely to work. (3) The Party will not be able to use international emissions trading to sell parts of its emissions allocation until it has demonstrated that it will be able to comply with its current target.

There will be procedures for reinstatement when a Party has been found ineligible to participate in the Protocol's three flexibility mechanisms. These procedures will help ensure that the enforcement branch applies specific criteria when deciding whether or not to reinstate the Party's

¹ Questions of implementation can also be raised by a Party in respect to itself and by a Party in respect to a third Party if supported by corroborating information.

² All members of the compliance committee will serve in their individual capacities and not as representatives of Parties. Nevertheless, because most Parties believe committee members may decide cases in a way that reflects the interests of their home countries or regions, the composition question has been an important one throughout the negotiations.

eligibility after it has been suspended, and they will help guarantee that only those Parties that are truly eligible to participate will be allowed to do so. Umbrella Group countries fought very hard in Marrakech for these reinstatement procedures, demonstrating that they anticipate being fully bound by the Protocol's compliance system.

After the enforcement branch determines that a Party has exceeded its target, the Party will have the right to appeal the decision to the supreme body of the Protocol, the "Conference of the Parties serving as the meeting of the Parties" (COP/MOP). An appeal will be accepted only on the grounds that the Party was denied due process during the enforcement proceeding. The enforcement branch's decision will stand pending an appeal, and it may be overturned only by a 3/4 majority vote of the COP/MOP. The appeal provision was a significant concession to the G-77 and China, who wanted assurances that decisions of the enforcement branch could not be made completely independently from COP/MOP oversight.

Finally, there will be potentially significant opportunities for public participation in compliance proceedings. Intergovernmental and nongovernmental organizations will be entitled to submit technical and factual information to the relevant branch. Subject to limited exceptions, all information considered in a proceeding will be publicly available and any compliance hearings will be open to the public.

III. The Question of "Legally Binding Consequences"

While all Parties at Marrakech consented to these compliance rules, they were unable to agree what precise legal nature of the non-compliance consequences will be. The question of whether there will be "legally binding consequences" is thus among the most important compliance-related issues left for the COP/MOP to resolve.

The last sentence of Article 18 of the Kyoto Protocol provides that "binding consequences" of non-compliance may be adopted only by a Protocol amendment. That requirement reflects the inability of negotiators to agree upon the issue of non-compliance consequences during the talks leading to adoption of the Protocol in 1997 at Kyoto. It also suggests that governments may be politically, but not necessarily legally, bound to respect the decisions and consequences ordered by the enforcement branch if the Protocol's first compliance period begins before the Article 18 amendment has entered into force.

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

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

First, they won language in the decision, or political, portion of the compliance text stating that it is the “prerogative” of the COP/MOP “to decide on the legal form of the procedures and mechanisms relating to compliance.”³ This language, which does little more than paraphrase parts of Article 18 of the Protocol, suggests that the COP will not concentrate on the questions of whether, when, or how an Article 18 legal instrument might be adopted, but will instead leave those questions primarily to the COP/MOP. However, the language leaves open the opportunity for the COP promptly to begin the preparatory work for establishing the compliance system’s institutions and for further developing its procedures. Such preparatory work would, of course, be subject to final approval by the COP/MOP.

Second, the rules in the texts for the Kyoto flexibility mechanisms now require all Parties to accept the authority of the enforcement branch to verify whether they satisfy certain eligibility criteria for participating in joint implementation (art. 6), the Clean Development Mechanism (art. 12), or emissions trading (art. 17). These are important provisions. Yet they were adopted at the price of the Umbrella Group successfully diluting the earlier, preliminary mechanisms eligibility requirement that a Party would have to be subject to all of the compliance rules or have accepted an Article 18 legal instrument before it could begin trading. The environmental integrity of the mechanisms—and their potential for instilling confidence in the markets—will be significantly predicated on the ability of the Kyoto regime to ensure that its members comply with their emissions reduction targets. To accomplish that, Parties will eventually need to agree that every mechanisms participant must be subject to all of the Protocol’s compliance rules.

Nevertheless, our view, shared by many compliance experts, is that we should not become too preoccupied at this time with whether the non-compliance consequences are “legally binding” in the Article 18 amendment sense, or whether they are in fact binding in a political sense. Under international law, the extent to which something is “legally binding” depends primarily upon the expression of political will by the states party to international agreements like the Kyoto Protocol. There is no realistic way to *force* Parties who exceed their targets to remedy the problem. While trade sanctions have sometimes been used to attempt to compel compliance with international obligations, they are not contemplated for the Kyoto regime at this time.

In sum, the issue of “legally binding” consequences for non-compliance is not yet resolved. An amendment or other formally ratified legal instrument would provide the highest possible expression of the intent of Parties to respect the results of an enforcement branch proceeding. But the accords agreed upon and adopted in Marrakech by all participating states establish the procedures and institutions for the compliance system as well as the consequences for an Annex I Party’s failure to honor its obligations, including its emissions target. That is a politically potent accomplishment that makes the Protocol’s compliance system the most robust ever adopted for a multilateral environmental agreement.

³ The reader is reminded that the Conference of the Parties (COP) is the supreme governing body of the Convention, while the COP/MOP will be the governing body of the Protocol. Although the Protocol’s text gives the COP an advisory role in the development of many of its rules, with very limited exceptions it reserves the power to make final decisions on those rules exclusively for the COP/MOP.