Introduction

As states take on more comprehensive and stricter obligations in multilateral environmental agreements (MEAs), increasing focus is being given to the effective implementation of these obligations. When the world’s environment ministers met in Malmo in 2000 they stated that there is an ‘alarming discrepancy between commitments and action’ and referred to ‘the central importance of environmental compliance, enforcement and liability’ in correcting that discrepancy. The United Nations Environment Programme (UNEP)’s Governing Council called in 2001 for ‘speedy implementation of the legal commitments contained in the multilateral environmental agreements’ and requested UNEP’s Executive Director to continue the work with the ‘draft guidelines on compliance with multilateral environmental agreements’.

Following up on this mandate, a special session of UNEP’s Governing Council adopted a set of guidelines on compliance with and enforcement of MEAs. These guidelines recognize, however, that the parties to each treaty have the primary responsibility for designing effective mechanisms and procedures to ensure implementation.

Many MEAs call for parties to report on their implementation and a few have established specialized bodies and procedures tailor-made to deal with any cases of non-compliance that may arise (see also Chapter 10 by Wettestad). A number of advantages of using such internal non-compliance mechanisms, rather than more traditional dispute settlement procedures, have been highlighted in the literature. First, questions of compliance with MEA commitments are multilateral in character and may affect all parties, rather than any particular party specifically. Non-traditional non-compliance mechanisms allow compliance issues to be addressed in a multilateral context, rather than through bilateral disputes resolved through third party arbitration or adjudication. Second, non-compliance procedures can be designed to head off potential non-compliance, rather than waiting for a formal case of breach to be established. Finally, non-compliance procedures may promote the resolution of compliance problems in a cooperative, rather than adversarial, manner through procedures designed to facilitate rather than enforce compliance. It has, however, been questioned whether such non-confrontational, managerial approaches
can be equally effective for those MEAs that impose environmental obligations with heavier economic and social costs.

In the Kyoto Protocol context, the Marrakesh Accords have established a Compliance Committee with both a Facilitative Branch and an Enforcement Branch to address compliance with the substantive commitments. We will address both branches of the Compliance Committee. The emphasis will, however, be on the ‘hard’ elements of Kyoto’s compliance system, i.e. the sanctions or enforcement consequences applied in cases of breaches of obligations, and the procedures that will determine and apply such consequences.

As has been described in Chapter 1, the agreement by negotiators to strengthen the consequences that would attach to non-compliance was reached through the inclusion of institutional and procedural elements designed to promote due process. The concept of due process may be considered to reflect elements of both effectiveness and fairness. Due process describes procedures and institutions that are appropriate to the task at hand and that ensure, for example, that the decision-making body has access to the information, expertise and authority necessary to take the decisions assigned to it. More often, the concept of due process is used to describe the treatment that interested parties, and in particular the party concerned, are entitled to receive as a matter of fairness and justice. Fairness is both an absolute and a relative standard, as the party concerned will assess its own treatment in comparison to the way in which other parties in comparable positions have been treated.

These two aspects of due process – effectiveness and fairness – can come into tension in any compliance system. However, in the international context, where sovereigns remain strong and techniques for enforcement are weak, it is all the more important that parties found to be in non-compliance perceive that they have been treated fairly and objectively, so that arguments about the illegitimacy of the institutions and procedures are removed as an excuse for ignoring decisions taken against them. Perceptions of fairness based, for example, on the geographical balance of the membership of a decision-making body can be as important in this regard as the actual even-handedness of the decision makers.

This chapter provides a detailed analysis of the institutions, procedures and consequences designed for the Kyoto compliance system, with a particular focus on whether the negotiators succeeded in building an enforcement regime that combines fairness and effectiveness in a manner that is likely to deliver due process. Given the uniqueness of the climate change regime, this assessment is specific to that context. Precedents within other international and domestic systems, however, inevitably influence our perceptions of appropriate standards of due process. At the international level, our main points of comparison are those regimes that most directly influenced the Kyoto negotiators: the Montreal Protocol’s non-compliance procedure, the World Trade Organization (WTO)’s dispute settlement system, and the rules and procedures of the International Court of Justice (ICJ). Domestic analogues to the Kyoto system are more difficult to construct. The Kyoto system is non-adversarial, and focuses on technical determinations of compliance rather than criminal guilt or civil liability. In this sense it resembles an administrative, rather than a criminal or civil procedure. On the other hand, the compliance system’s enforcement measures and its due process guarantees are comparable to those applied by judicial bodies.

As with most administrative procedures, due process under Kyoto’s Enforcement Branch is focused primarily on ensuring that decisions are based on accurate and unbiased information, follow rational procedures, and are shielded from inappropriate political influence. The procedural guarantees necessary to achieve these goals will depend in large part on the nature of the specific decisions that are being taken and, in particular, the degree of discretion left to the decision makers with regard to the facts and the law before them. As was discussed in Chapter 1, this issue was characterized by the Kyoto system’s negotiators as striking a balance between automaticity and discretion.

Some delegations argued that due process would be better served through the certainty of an automatic process, whereby predetermined consequences would be triggered by pre-defined categories of breaches. Such an automatic process requires that precisely drafted rules be applied to uncontested information about a party’s performance. This places the burden on negotiators to design a system that all parties perceive as fair, in which both absolute and relative fairness are achieved because all parties in comparable situations are treated identically. In this model, the goals of due process are achieved through the absence of process, which is rendered unnecessary by an automatic application of the rules.

Others argued that fairness could only be achieved through a case-by-case examination of the ‘type, degree and causes’ of non-compliance of the party concerned, as is suggested in the language of Article 18 of the Protocol. This view was informed, in part, by an assessment that it was unlikely that negotiators had the prescience to design rules with sufficient precision to obviate the need for case-by-case judgements. Fairness would require the exercise of a degree of flexibility and discretion, and the application of experience learned in the operation of the treaty.

The enforcement process ultimately agreed in Marrakesh combines elements of automaticity and discretion, depending on the nature of the decision being taken, and the institution and procedure entrusted with taking that decision.

The next section provides a general overview of the institutional set-up of the compliance system established by the Marrakesh Accords, including the role of the Expert Review Teams (ERTs), the Compliance Committee and its Facilitative Branch. We then describe in more detail the composition, mandate and procedures that will govern the operation of the Enforcement Branch. Finally, we turn to the nature of the enforcement-related decisions entrusted to the Enforcement Branch, to assess the manner in which the text has balanced automaticity and discretion, fairness and effectiveness, in providing due process to the climate change regime.

The institutional framework

As is described in other chapters in this volume, there are two main institutional arrangements involved in the identification of non-compliance by Annex I parties: the Compliance Committee and the ERTs, which are tasked with conducting a ‘thorough and comprehensive technical assessment’ of the performance of each Annex I party to the Protocol.
The size, composition, capacity and competence of these bodies are essential determinants of due process. Size matters, because the larger the body the more representative and knowledgeable it can be of the circumstances of a wide range of parties. However, if a body is too large, it can become unwieldy and bureaucratic, or it may become overly reliant on political processes to reach decisions. Smaller bodies, on the other hand, may unduly concentrate power in the hands of a limited number of individuals.

As has been described in Chapter 1, the balance in composition of the Enforcement Branch was a particularly controversial issue in the negotiations. In many UN institutions, balance in composition is assessed in terms of geographical balance among the five traditional UN groupings (Africa, Asia, Eastern Europe, Latin America and the Caribbean, and the Western European and Others Group (WEOG)). In the context of the climate change, balance is also viewed in terms of the balance between Annex I and non-Annex I parties, as well as the inclusion of parties with special interests in climate change: the particularly vulnerable small island developing countries, and countries with economies particularly dependent on the export of fossil fuels. Some delegations raised due process concerns with respect to Enforcement Branch composition, suggesting that individuals from non-Annex I parties, which do not have quantified commitments under the Protocol, should not sit in judgement of Annex I party performance. These arguments were sometimes justified on the basis of analogies to the common law jury system, which, in some circumstances, entitles defendants to a jury of their peers. From a legal perspective, the analogy is weak for a number of reasons. Members of the ERTs and the Compliance Committee are acting as experts making technical judgements, not as citizens asked to apply common sense to test the veracity of facts and witnesses. Furthermore, even jury systems do not select peers by including only members that are under the same legal obligations as the accused; a doctor accused of medical negligence is not guaranteed a jury of fellow physicians. Indeed, loading juries in such a way might have the effect of biasing judgments towards the interests of the accused, and neglecting the interests of the victims. The analogy, however weak in a legal sense, is nonetheless relevant, as it does reflect some delegations’ political perceptions of unfairness, which, as has been indicated, could affect the acceptance and enforceability of decisions.

‘Capacity’ refers to the capacity in which members of the body are expected to serve: either personal and professional, or as the representatives of governments or groupings of governments, acting upon political instructions. Ensuring that members act in their personal capacities can help to make more palatable the political flavour given to a body through an insistence on geographical balance. If members act in a personal capacity, it is important that they have a clear understanding that although they may be filling a particular geographical quota, they have been appointed to provide a particular perspective, rather than to advocate on behalf of a particular geographical grouping.

The competence of a body will depend upon the professional qualifications demanded of its members. Such qualifications must be tailored to the task at hand, but be sufficiently flexible so as to ensure that professional, cultural and educational biases do not act to undermine a body’s representativeness. As will be seen, given the complexity of the climate change issue, the range of expertise that could be seen as relevant to assessing compliance with the Protocol is wide, spanning the natural sciences, economics, political science and law.

Finally, the means by which the criteria of composition, capacity and competence are applied is important. If the selection of candidates for these posts is turned over to a purely political process, agreed criteria could simply be ignored. One issue of concern is the tendency for the individual delegates who have designed these Protocol institutions to seek appointment to them as members. For example, many of the members of the Executive Board of the Kyoto Protocol’s Clean Development Mechanism (CDM), who are expected to act on the board in their personal capacity, also participated in its design, and continue to represent their governments in the ongoing negotiations on the design of the CDM and in other aspects of the Protocol. While these individuals are undoubtedly experts in the texts they themselves designed, it is open to question whether it is reasonable to expect them to wear both hats, of independent decision maker and diplomatic representative, comfortably.

**Expert Review Teams**

ERTs will play an innovative and important part in the enforcement of the climate change commitments, building on the experience of the use of In-Depth Review teams under the UNFCCC. Although ERTs do not have a mandate to make determinations of non-compliance, they are called upon to identify ‘questions of implementation’ with regard to a party’s performance, by providing a ‘technical assessment’ and ‘identifying any potential problems in, and factors influencing, the fulfilment of commitments’. As will be discussed, the Kyoto compliance system also allows questions of implementation to be raised by any party with regard to any other party, and by a party with regard to itself. It is nonetheless widely anticipated that most questions presented to the Compliance Committee will be contained in the reports of the ERTs. Ensuring that the ERTs operate in an effective and unbiased manner will therefore be essential to the system’s integrity.

ERTs are to be ‘coordinated by the secretariat’ and ‘composed of experts selected from those nominated by Parties to the Convention and, as appropriate, by intergovernmental organizations.’ The Marrakesh Accords set out additional details on the composition, qualifications and work of the ERTs. The credibility of the ERTs lies first of all in their composition as a team of independent experts. A neutral organ, the UNFCCC Secretariat, composes each team, which is selected from a list of experts nominated by the parties. While such nominations may not necessarily secure the best and the most independently minded persons, giving the parties a say in the composition of the ERTs may also contribute to the parties’ trust in the process.

Experts are required to serve in their personal capacity and ‘refrain from making any political judgement’. Furthermore, to promote the political and financial independence of any ERT, the experts selected to review a particular country’s implementation ‘shall neither be nationals of the Party under review, nor be nominated or funded by that Party’. The requirement that there shall be a ‘balance between experts from Annex I and non-Annex I Parties in the overall composition of the Expert Review Teams’ was intended to secure the involvement and support of
non-Annex I parties in the review process. This effort at balance recognizes that there is relevant expertise in many developing countries, and that the involvement of non-Annex I experts can help further develop such expertise. These arguments helped overcome objections based on the jury analogy that would have dropped any requirement to include experts from parties that had not undertaken specific commitments.

With regard to the ERT’s competence, experts shall have ‘recognized competence in the areas to be reviewed’ under the relevant guidelines. Training, and subsequent assessment of qualifications, shall be provided in accordance with decisions from the Conference of the Parties (COP) and the Conference of the Parties serving as the Meeting of the Parties (COP/MOP).” It might be asked, to what extent do the ERTs have competence to point out any potential problems without the inclusion of experts on international law? The parties may have decided not to expressly request competence in this field because conclusions from such experts might prove embarrassing for parties under review, and prevent their cooperation. This decision could also be defended on the basis that ERTs are only to identify potential problems, and not determine whether Protocol commitments are violated.

The basis for the ERTs’ assessment of the parties’ implementation will be reports from the parties and in-country visits. In addition, ERTs ‘may put questions to, or request additional or clarifying information from’ the parties regarding any potential problem identified by the team. 19 Parties ‘should’ provide the ERTs with ‘access to information necessary to substantiate and clarify the implementation of their commitments’, and ‘make every reasonable effort to respond to all questions and requests from the Expert Review Teams for additional clarifying information’. 20 Although ‘should’ is usually taken only to refer to a non-binding commitment, a political commitment is at least indicated through this agreed language. It would also seem that since the ERTs are under an obligation to provide a ‘thorough and comprehensive’ technical assessment, they must use all information available, including information from sources other than the relevant party. The ERTs shall, in their report, indicate the sources of information used. 21

The Facilitative Branch

Ten of the 20 members of the Compliance Committee will comprise the Facilitative Branch of the Committee, elected by the COP/MOP. 26 The Facilitative Branch consists of one member from each of the five regional groups of the United Nations, one member from the Small Island Developing States (SIDS), two members from Annex I parties, and two members from non-Annex I parties. 27 All members serve in their individual capacities. 28 The arrangements for the Facilitative Branch’s election, composition and capacity are similar to those for the Enforcement Branch, which are further discussed below.

The expertise required by the members of the Facilitative Branch is ‘recognized competence relating to climate change and in relevant fields such as the scientific, technical, socio-economic or legal fields’. 29 These different competences shall be sought to be reflected in a ‘balanced manner’ within the Facilitative Branch. Unlike the Enforcement Branch, there is no mandatory requirement of legal expertise among all members, as the task of this branch is facilitation rather than enforcement.

The Facilitative Branch is responsible for providing ‘advice and facilitation to parties in implementing the Protocol, and for promoting compliance with Protocol commitments’, taking into account ‘the principle of common but differentiated responsibilities and respective capabilities and relevant circumstances pertaining to the question before it’. The Facilitative Branch does not make legally binding determinations of non-compliance.

The Facilitative Branch is also expressly responsible for questions of implementation, falling outside the mandate of the Enforcement Branch, which relate to the minimization of adverse effects on developing countries by developed countries’ implementation of their Protocol commitments, 30 and that relate to information provided on the use by Annex I parties of the flexibility mechanisms as supplementary to domestic action.

Finally, in order to promote compliance and provide for ‘early warning of potential non-compliance’, the Facilitative Branch is tasked to address questions concerning the quantified emissions limitation and reduction commitments of Annex I parties prior to and during the commitment period, and the establishment of national systems for the estimation of emissions of greenhouse gases by sources and removal by sinks prior to the first commitment period, and commitments on the reporting of supplementary information prior to the beginning of implementation to either the Facilitative Branch or the Enforcement Branch.

While the decision to allocate may appear to be significant, the discretion of the Bureau is, in fact, limited by the respective mandates of each Branch. When read together, these mandates make clear that the Enforcement Branch has exclusive jurisdiction over questions of implementation relating to targets that arise after the end of the first commitment period, and, with respect to methodological, reporting and eligibility requirements for participation in the flexibility mechanisms, after the beginning of the first commitment period. All other questions of implementation fall within the jurisdiction of the Facilitative Branch. Thus the timing and the substantive content of the commitment should render the process of allocation automatic.
the first commitment period. These responsibilities are designed not to overlap with the responsibilities of the Enforcement Branch. It is of particular importance that the Facilitative Branch will not deal with non-compliance concerning the parties’ implementation of emission limitation or reduction commitments after the end of the commitment period.

In reaching decisions, the procedural requirements of the Facilitative Branch are the same as those used by the Compliance Committee, i.e. to try to reach consensus, but if that proves impossible, to adopt decisions by a majority of at least three-quarters of the members present and voting. Unlike the Enforcement Branch, there is no requirement of a double majority among Annex I and non-Annex I parties.

The Facilitative Branch may decide upon the application of one or more of a prescribed list of consequences, taking into account the principle of common but differentiated responsibilities and respective capabilities. These consequences consist of advice and facilitated assistance, facilitation of financial and technical assistance, and the formulation of recommendation.

The Enforcement Branch

Composition and mandate

Like the Facilitative Branch, the Enforcement Branch consists of ten members of the 20-member Compliance Committee. This size reflects a negotiated compromise between concerns for having an effective smaller body on the one hand, and a desire for a bigger, more representative but perhaps less effective body on the other. The limited number of members means in itself that not every party will be represented, which serves to increase the body's independence in practice.

Only once before has the UNFCCC established a standing body of limited membership — the Bureau of the Conference of the Parties to the Convention. The Bureau proved, in the end, to be one of the models on which the Enforcement Branch (and the Compliance Committee as a whole) was based. Under the rules of procedure for the COP, each of the five regional groups is represented on the Bureau by two members, and one Bureau member represents the SIDS. The Bureau’s composition, based on geographical spread, is not without precedent in dispute settlement bodies. The United Nations regional groups are also used, for example, in electing judges to the ICJ, though the permanent members of the Security Council in practice each will have a judge of their nationality. The Montreal Protocol Implementation Committee consists of ten parties “based on equitable geographical distribution”. Similarly, the WTO Appellate Body membership is to be broadly representative of membership in the WTO.

In the end, in creating the Enforcement Branch, delegations agreed on a single formula for composition that applied to all of the bodies of limited size created by the Protocol as follows:

1. One member from each of the five regional groups of the United Nations and one member from the SIDS, taking into account the interest groups as reflected by the current practice in the Bureau of the COP;
2. two members from parties included in Annex I; and
3. two members from parties not included in Annex I.

The reference to the 'current practice in the Bureau' indicates that an effort should be made to ensure that at any time, one of the seats held by a developing country regional group should be occupied by a developing country whose economy is highly dependent on income generated from the production, processing and export of fossil fuels.

The formula yields the following division between Annex I parties, which are subject to the Enforcement Branch's jurisdiction, and non-Annex I parties, which are not:

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<tr>
<td>Non-Annex I</td>
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<td>African Group</td>
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<td>Asia Pacific Group</td>
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<td>Eastern European Group</td>
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<td>Group of Latin America and the Caribbean (GRULAC)</td>
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<td>Small Island Developing States (SIDS)</td>
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<td>Western European and Others Group (WEOG)</td>
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Enforcement Branch members, like all other members of the Compliance Committee, are to 'serve in their individual capacities'. This formal independence from instruction by their country of nationality — or any other bond — is intended to strengthen the Enforcement Branch's credibility. However, unlike the ERTs, which are selected by the apolitical secretariat, the members of the Enforcement Branch are elected by the COP/MOP. This opens the possibility for taking non-professional factors, especially political factors, into account. Elections by political organs are known both in national courts and in international tribunals; for example, the ICJ, the Montreal Protocol and the WTO Appellate Body all elect judges through the political organs of the international body.

While the members of the Compliance Committee shall have 'recognized competence relating to climate change and in relevant fields such as the scientific, technical, socio-economic or legal fields', the members of the Enforcement Branch are additionally to have 'legal experience'. Such legal expertise is consistent with the function of the Enforcement Branch in 'determining' cases of non-compliance. However, the level of this legal expertise was left intentionally broad to permit the COP to allow non-lawyers to serve as members. Comparison can be made to the ICJ...
where the judges shall possess 'the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law'), and to the WTO Appellate Body (which requires 'persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'). In contrast, panels established under the WTO Dispute Settlement Understanding may consist of non-lawyers, and the decision establishing the Montreal Protocol Implementation Committee does not require any particular expertise of its members, who are referred to as 'parties', suggesting that they serve in a diplomatic and political capacity rather than in an individual capacity.

As already discussed, the mandate of the Enforcement Branch includes questions of implementation of the emissions targets by Annex I parties after the end of the first commitment period, and methodological, reporting and eligibility requirements regarding the flexibility mechanisms after the beginning of the first commitment period. This mandate is designed to cover the most central elements of the Kyoto Protocol, and avoid overlap with the mandate of the Facilitative Branch.

Box 2.1 Mandate of the Enforcement Branch

1. **The Enforcement Branch shall determine whether a party is in non-compliance with:**
   - Its quantified emission limitation or reduction commitment under Article 3, paragraph 1, of the Protocol, at the end of the first commitment period.
   - The methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Protocol, after the beginning of the first commitment period.
   - The eligibility requirements for participation in the flexibility mechanisms under Articles 6, 12 and 17 of the Protocol, after the beginning of the first commitment period.

2. **The Enforcement Branch shall also resolve disagreements between an ERT and the party concerned with respect to:**
   - Adjustments to that party's national inventory, under Article 5, paragraph 2, of the Protocol that have been proposed by the ERT.
   - Corrections to a party's compilation and accounting database concerning the validity of a transaction under the Protocol's flexibility mechanisms, which have been proposed by the ERT.

Under the Kyoto compliance system, the information that may be used by the two branches is formally limited. The branches 'shall' base their deliberations on any relevant information from reports of ERTs, the party concerned, and reports from the COP, the COP/MOP and the subsidiary bodies of the Convention and the Protocol. 'Competent' intergovernmental organizations (IGOs) and non-governmental organizations (NGOs) 'may' also submit relevant factual and technical information. This means that the branch is required to rely upon information from 'official' sources, but reliable information submitted by competent IGOs or NGOs will also be available for consideration. Although the branches are unlikely to actively seek information in the same manner as the ERTs, they are authorized to seek expert advice. This will serve to ensure that the branches also have access to competence on matters of fact.

**Procedures**

The compliance system's procedures are designed to promote effectiveness in decision making and afford due process protections to concerned parties. As already indicated, due process guarantees have been strengthened when hard enforcement consequences are involved. The Marrakesh Accord's compliance procedures, set out in Sections VII, VIII and IX of Decision 24/CP.7, seek to guarantee due process by:

1. setting time limits for decisions;
2. requiring a preliminary examination of the question of implementation;
3. requiring preliminary findings to be communicated to the party concerned for comment;
4. requiring notification to the party at different stages of the process;
5. making information available to the party;
6. allowing the party to designate persons to represent it;
7. allowing comments from the party;
8. allowing the concerned party to request a hearing; and
9. requiring decisions to include conclusions and reasons.

More restrictive time limits are set in Section X on expedited procedures in cases of suspension of eligibility to use the flexibility mechanisms in Articles 6, 12 and 17. These stricter time limits are designed to protect parties' interests in returning to the market as quickly as possible.

A significant difference between the compliance system under the Kyoto Protocol and that employed by several international courts is that there is no particular arrangement within the Protocol's process to address situations in which a member of the Enforcement Branch is of the nationality of a party involved in a compliance proceeding, or where there are other *prima facie* reasons for questioning a member's objectivity. The ICJ provides, for example, for the appointment of an *ad hoc* judge to allow both parties to a dispute to be represented on the bench. In contrast, in disputes before the WTO, citizens of Member States whose governments are parties to a dispute are excluded from WTO Panels unless the parties to the dispute agree otherwise. The failure of the compliance system to deal with this issue might be seen as a weakness of the Enforcement Branch. On the other hand, it may reflect the implicit trust that the designers have placed in the independent status of the members of the two branches, or the fact that the Enforcement Branch was not considered to be the equivalent of a court or an arbitral panel.

The voting regulations present a special feature of the Compliance Committee's procedure, and particularly the Enforcement Branch's regulations. The Committee is required to make all efforts to reach consensus, but if this fails, decisions may be made by a three-quarters majority of the members present and voting. The fact that
substantive decisions may be taken by majority voting rather than by consensus contributes to effective decision making, and is itself remarkable, considering the continuing impasse over majority voting on substantive issues in the Rules of the Procedure in the climate change regime. However, a decision by the Enforcement Branch requires also a double majority, i.e., a majority among both Annex I and non-Annex I parties. This system seeks to accommodate the concern that Annex I parties should not be judged by the non-Annex I parties’ majority in the Enforcement Branch. It may, however, be argued that the double majority requirement will not provide a fully satisfactory guarantee for Annex I parties: while they may be able to block a decision of non-compliance, the shaming effect of a three-quarters majority remains.

It could be asked whether a party accused of non-compliance should benefit from the principle afforded to individuals under penal procedure: that guilt must be proven beyond reasonable doubt. Although no such requirement is explicitly articulated in the Marrakesh procedures, nevertheless, much the same burden of proof has been structured to provide protections for a party accused of non-compliance, through provisions on self-reporting, review by ERTs and the Compliance Committee’s due process guarantees, though the double majority voting requirement stops short of requiring complete consensus. Regardless, the decisions of the Enforcement Branch are not formal decisions of guilt.

In addition, there is a limited possibility for appeal to the COP/MOP against final decisions of the Enforcement Branch on due process grounds, where these decisions relate to Article 3 (1) of the Kyoto Protocol, i.e., the provision on quantified limitation and reduction of greenhouse gas emissions. Only aspects relating to denial of due process may be appealed, which suggests that the assessment of the factual evidence, the legal interpretation applied to that evidence or the consequences applied, are not all subject to challenge. Finally, a three-quarters majority in the COP/MOP is required to override a decision of the Enforcement Branch, and the COP/MOP may only refer the case back to the Enforcement Branch. It may not make its own decision on whether non-compliance has occurred, and what may be the relevant consequences.7

Although it might be argued that a broader scope for appeal would provide additional due process guarantees, this is only the case if such appeals are addressed to a competent judicial body, rather than to a political body such as the COP/MOP. The reduction of the political role of the COP/MOP is thus itself a guarantee of due process. The limitation on the scope for appeal and the requirement of the super-majority will in practice allow the COP/MOP a very limited role in individual cases of non-compliance. The requirement of a large qualified majority in order to overturn decisions of the Enforcement Branch has similarities to the WTO process, where decisions of a Panel (if they are not appealed) and of the Appellate Body will stand, unless overturned by a consensus of the WTO membership.

Determining non-compliance

The Enforcement Branch has two main sets of tasks: determining whether a party is in non-compliance with certain obligations, and resolving disagreements between an ERT and a party over inconsistencies in its greenhouse gas inventories, or in its system for accounting for transactions in the use of the flexibility mechanisms.

We will analyse the most serious of these tasks from a due process perspective: the assessment of whether a party has met its target by remaining within its assigned amount. This assessment by the Enforcement Branch of whether a target has been achieved can, by definition, only take place after the end of the commitment period. The first commitment period runs from 2008 to 2012, but the parties are allowed a certain grace period after the end of the commitment period, where they are allowed to acquire and transfer emission quotas in order to fulfill their targets.57 However, the reporting requirements that will provide the basis for assessing compliance with a party’s commitments will be assessed regularly throughout the commitment period. Incentives to comply with these reporting requirements are provided through the links between the reporting requirements and the eligibility of a party to participate in the Protocol’s flexibility mechanisms. This should mean that by 2012-14, when compliance with targets is first assessed, the Enforcement Branch will have already acquired a good deal of experience in assessing and incentivizing a party’s performance.

At first glance, the task of assessing compliance with a party’s target appears to be straightforward. Each Annex I party will have had established, before the start of the commitment period, an Assigned Amount, expressed in terms of tonnes of carbon dioxide equivalent.58 Emissions will be recorded and submitted by the party to an ERT for review on an annual basis. At the end of the commitment period, and following the additional grace period, a party’s total emissions will be compared against its Assigned Amount and any additions or reductions to the party’s national registry, which records transactions in emission reduction units (ERUs) from joint implementation projects, certified emission reductions (CERs) from the Clean Development Mechanism, assigned amount units (AAUs) from emissions trading, and removal units (RMUs) from afforestation, reforestation and deforestation-related activities. If the total reported emissions of regulated greenhouse gases exceed the party’s Assigned Amount, plus or minus any transactions in ERUs, AAUs, CERs and RMUs, the party is in non-compliance.

It is difficult to anticipate what aspects of this calculus will come into dispute in the context of any particular case. The main enforcement consequence that applies to a failure to reach the agreed emission target is the application of a multiplier that yields a stiffer penalty relative to the size of the excess tonnes of emissions. There will be incentives for a party to contend every aspect of this calculus. National inventories of emissions and national registries of transactions that are self-reported by each party are checked annually by ERTs, with adjustments and corrections proposed by the ERTs. If a party disagrees with an adjustment or correction proposed by the ERT, the disagreement is to be resolved by the Enforcement Branch. Therefore, in theory, each Annex I party should arrive at the end of the commitment period with an uncontestable inventory, which can be compared against an uncontestable registry.

But the simplicity of this calculus, which suggests a high degree of automaticity, and the limited degree of discretion in the Enforcement Branch’s decision making, masks an exercise that will require considerable judgment and discretion, particularly

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50 The Kyoto Compliance Regime: Emergence and Design
51 The Kyoto Compliance System: Towards Hard Enforcement
with regard to the calculation, assessment and adjustment of national inventories of emissions (see Chapter 3 by Mitchell and Chapter 4 by Berntsen and associates). Assessments made by an ERT, and reviewed by the Enforcement Branch, will not be on the basis of end-of-pipe measurements, but rather will be based on whether a party has followed good practice in applying formulae that estimate and extrapolate emissions from input and output data.

The guidelines for adjustments indicate that they shall be applied by the ERT:

only when inventory data submitted by parties included in Annex I are found to be incomplete and/or are prepared in a way that is not consistent with the Revised 1996 IPCC Guidelines for National Greenhouse Gas Inventories as elaborated by the IPCC good practice guidance and any good practice guidance adopted by the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol.

Good practice, in turn, is a subjective judgement of whether a party's greenhouse gas inventories are:

accurate in the sense that they are systematically neither over- nor underestimated as far as can be judged, and that uncertainties are reduced as far as possible. Good practice covers choice of estimation methods appropriate to national circumstances, quality assurance and quality control at the national level, quantification of uncertainties, and data archiving and reporting to promote transparency.

The enforcement procedures concentrate both power and discretion in the ERTs and the Enforcement Branch. While any party can raise a question of implementation with regard to the compliance of any Annex I party with its target, it is anticipated that most enforcement procedures will be triggered by a question raised by an ERT. Even if a party does trigger the procedure directly against another party, it is likely that the reports of the ERT will be extremely influential in determining the outcome. As has been described, if a party contests the findings of an ERT, the disagreements will be resolved by the Enforcement Branch. In practice, this appears to mean that by the time a party reaches the final reckoning of its compliance, any interim objections it may have raised along the way will have already been resolved by the same body, the Enforcement Branch, that is now assessing the overall results.

In adversarial procedures, such as cases before the ICJ and (to a lesser extent) the WTO, due process is provided by balancing the arguments of the respondent against those of a claimant, through procedures moderated by rules relating to burdens of proof and admissibility of evidence. The Kyoto procedure is, however, essentially non-adversarial. Although the ERT will likely raise the initial question of implementation, its mandate precludes it from making any judgements as to non-compliance, and it does not have a role in prosecuting the case once the procedure has been triggered. This suggests that the party's main interlocutor will be the Enforcement Branch itself. This is very similar to the dynamic of the Montreal Protocol's Implementation Committee.

A party's case will first be weighed after a question of implementation is allocated to the Enforcement Branch. Any question of implementation regarding compliance with targets would be allocated to the Enforcement Branch. The Branch must then undertake a 'preliminary examination of the question before it' and ensure that the question is supported by sufficient information, whether the question is de minimis or ill-founded, and whether it is based on the provisions of the Protocol.

The Enforcement Branch must, therefore make a positive determination that the question does have a basis in fact and in law, suggesting that the burden of establishing a prima facie case lies with the ERT or the party that has raised the question. There is no guidance in this or other agreed text as to what constitutes 'sufficient information' or what would fall below a de minimis threshold of non-compliance. While a party concerned may comment on all information relevant to the question raised against it, it does not appear to have the opportunity to interven"
sion, should consensus fail, will be governed by the double majority rule described above. Once again, two Annex I members (and any combination of three members) can block a determination of non-compliance.

The final due process protection offered to a party that has been found to have exceeded its assigned amount is the right to appeal. As has been noted, the grounds for an appeal are limited to decisions made by the Enforcement Branch in circumstances in which the party feels it has been 'denied due process'. The provision does not indicate by what standard of review the Enforcement Branch's decision will be reviewed, but the procedural requirement that it can only be overturned by a three-quarters majority of the COP suggests a very high degree of deference will be accorded to the Branch's judgements.

### Table 2.2 Enforcement consequences

<table>
<thead>
<tr>
<th>If the Enforcement Branch has determined that a party is not in compliance with...</th>
<th>...the Enforcement Branch shall apply the following consequence to that party:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Its quantified emission limitation or reduction commitment under Article 3, paragraph 1, of the Protocol</td>
<td>deduction from the party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions; development of a Compliance Action Plan; and suspension of the eligibility to make transfers under the emissions trading provisions of the Protocol, until the eligibility is reinstated.</td>
</tr>
<tr>
<td>The methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Protocol</td>
<td>declaration of non-compliance; and development of a compliance plan.</td>
</tr>
<tr>
<td>The eligibility requirements for participation in the flexibility mechanisms under Articles 6, 12 and 17 of the Protocol</td>
<td>suspension of eligibility under relevant mechanism, until eligibility is reinstated.</td>
</tr>
</tbody>
</table>

### The legal character of the enforcement consequences

As has been indicated, during the negotiations on the design of the compliance system, reaching agreement on the availability of enforcement consequences in response to non-compliance depended upon a tight and predictable relationship between identifiable categories of non-compliance, and the consequence that would be associated with that category of non-compliance. This relationship is reflected in the text on the mandate and on the consequences to be applied by the Enforcement Branch.

The Enforcement Branch shall be responsible for 'determining' whether an Annex I party is in non-compliance with the listed commitments. This corresponds with Article 18 of the Kyoto Protocol, which states that the relevant procedures and mechanisms shall 'determine and address' cases of non-compliance. The use of 'determine' suggests that the finding of the Enforcement Branch is final, unless overturned on appeal. But, were decision of the Enforcement Branch to be raised in the forum of another tribunal, such as the ICJ, the question could arise as to whether it would be considered *res judicata*. Although the Enforcement Branch has similarities with an international court, the decisions of the branch may not be considered to have the legal effects similar to those of an international court. Furthermore, the fact that the decisions of the Enforcement Branch are final does not necessarily mean that the concomitant consequences are legally binding. The meaning of 'binding' in this respect will be further examined below.

If the Enforcement Branch determines that there has been a violation of the listed commitments, Section XV of Decision 24/CP.7 of the Marrakesh Accords defines which consequences shall be applied in relation to each of the three groups of commitments. By using the word 'shall', the Enforcement Branch has no discretion in selecting the consequences it may find most suitable. While this lack of discretion- ary powers may promote foreseeability and prevent abuse of powers, the disadvantage is obviously that there is little possibility to design the consequences appropriate to the circumstances of each individual case.

### Non-compliance with Article 5 (1) and (2) and Article 7 (1) and (4)

Article 5 (1) of the Kyoto Protocol establishes an obligation for Annex I parties to have in place a national system for the 'estimation of anthropogenic emissions by sources and removal by sinks' of the greenhouse gases covered by the Protocol. The inventory shall be based on the methodologies and adjustments provided in accordance with Article 5 (2). Article 7 establishes that Annex I parties shall incorporate in their annual inventory of emission by sources and removal by sinks the 'necessary supplementary information for the purposes of ensuring compliance with Article 3, to be determined in accordance with paragraph 4 below'.

It is established that the Enforcement Branch shall, when it has determined that a party is in non-compliance with these provisions, issue a declaration of non-compliance and require that the party submit a plan that includes an analysis of the causes of non-compliance, measures that the party intends to implement to remedy the non-compliance, and a timetable for implementing such measures. The party shall also submit progress reports on the implementation of the plan (XV (1), (2) and (3)). It is, however, provided that the consequences shall be applied 'taking into account the cause, type, degree and frequency of the non-compliance of that party'. This is consistent with Article 18 of the Kyoto Protocol, which also refers to the 'cause, type, degree and frequency of non-compliance'. The Enforcement Branch is thus left with discretion, not to decide on other kinds of consequences, but to design the designated consequences to the case at hand. It may even be questioned to what ex-
tent the use of these consequences is mandatory at all. The possibility for the Enforcement Branch to ‘at any time, refer a question of implementation to the Facilitative Branch for consideration’ may be pointed out.

The Enforcement Branch’s issuing of a declaration of non-compliance is a typical soft sanction, in the sense that it is the shaming of the relevant party. Such a finding should be considered binding, but not necessarily binding in the sense of the Kyoto Protocol, Article 18, requiring an amendment to the Protocol (see below). A declaration of non-compliance does not in itself establish new obligations on the party. While the requirement to develop a plan to remedy the non-compliance is also a relatively soft sanction, it has the legal effect of imposing a new obligation on the party. The same may be said for the requirement to submit progress reports.

Non-compliance with the eligibility requirements under Articles 6, 12 and 17

If the Enforcement Branch finds that an Annex I party does not meet one or more of the eligibility requirements of the flexibility requirements of Article 6, 12 and 17, it shall ‘suspend the eligibility of that Party in accordance with the relevant provisions under those articles’ (XV (4)). This must mean that all uses of the flexibility mechanisms are prevented, be they transfer or acquisition of quotas, or use of joint implementation or the CDM. However, the presumption must be that loss of eligibility only refers to the particular kind of flexibility mechanism with which eligibility requirements are not fulfilled. Unlike non-compliance with Article 5 (1) and (2) and Article 7 (1) and (4), there is no discretion to take into account ‘cause, type, degree and frequency of non-compliance’. At the request of the party, the eligibility may be reinstated under the procedure in section X (2), but the decision lies with the Enforcement Branch.

The suspension of eligibility may be of considerable economic and political importance for the party concerned, and should thus be considered a hard sanction. The sanction is binding in the sense that such a decision prevents the party from being credited with transactions under the flexibility mechanisms in meeting its obligations under Article 3 (1). However, it will be further discussed below whether this consequence is binding in the sense that amendment under the Kyoto Protocol is required.

Non-compliance with the emission commitment under Article 3 (1)

As has been discussed, if the Enforcement Branch determines that the emissions of a party have exceeded the amount assigned to it in Article 3 (1) of the Kyoto Protocol, it shall declare that the party is in non-compliance with this provision, and shall apply the following consequences (XV (5)):

1. deduction from the party’s assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions;
2. development of a Compliance Action Plan in accordance with certain requirements (paragraphs 6 and 7) in order to re-achieve a status of non-compliance; and
3. suspension of the eligibility to make transfer as part of emissions trading under Article 17 of the Protocol, until the party is reinstated by the Enforcement Branch in accordance with the procedures in Section X (3) or (4).

The party shall submit a progress report on the implementation of the Compliance Action Plan on an annual basis (paragraph 7).

The soft, hard and/or binding character of the declaration on non-compliance, the development of a Compliance Action Plan and the submission of progress reports have been touched upon above. The new elements are the deduction of tonnes of emissions for subsequent years at a penalty rate, and suspension of the eligibility to make transfers under Article 17. It should be mentioned that the Marrakesh Accords distinguish between transfers and acquisitions of quotas. Accordingly, parties are only prohibited from selling, not buying quotas in cases of non-compliance.

It has already been argued that suspensions of eligibility to make transfers reflect hard enforcement consequences. They are also binding in the sense that any tonnes transferred in violation of the suspension are not valid, and thus the party will in practice have nothing to sell. The deduction of tonnes is obviously also a hard sanction; the legal question is whether this and the other consequences should be considered binding in the sense that they may require an amendment of the Kyoto Protocol under its Article 18.

But let us first consider the appropriateness of using fixed consequences rather than leaving the choice to the Enforcement Branch. It has already been stated that fixed consequences have the benefit of promoting predictability and preventing abuse of powers. It may furthermore be argued that at a general level, the consequences chosen are well designed as reactions to the relevant violations. But the use of fixed consequences prevents the choice of consequences designed to the specifics of each individual case.

Given the composition and the due process guarantees of the Enforcement Branch, there is good reason to argue that this branch should have been entrusted with the discretion to choose the appropriate consequences, rather than establishing certain mandatory consequences. It may also be asked whether the use of fixed consequences is consistent with Article 18 of the Kyoto Protocol, requiring an ‘indicative list’ of consequences, ‘taking into account the cause, type, degree and frequency of non-compliance’.

The legal status of the enforcement consequences

As has been described in detail in Chapter 1, delegations debated heatedly whether, and, if so, how, to provide the enforcement consequences with legally binding force. The legal character of these consequences was directly linked to the form by which they were to be adopted by the parties. This link is made by the terms of Article 18, which provide that ‘any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol’. The link is enforced by basic principles of international law, which generally require that a state must consent, in advance, to any international rule that can be considered to be binding on it. Although, by ratifying the Protocol, each party consents generally to the responsibilities that arise from its breach, it is far from clear that these, as a
matter of treaty or custom, would necessarily and automatically equate to the enforcement consequences included in the Marrakesh Accords.

Delegations that supported legally binding consequences tried to find a way around Article 18’s amendment provision, as this would have led to complex ratification procedures, and to the possible delayed and uneven application of the compliance system to those parties that were slow or chose not to ratify the amendment. The Marrakesh Accords leave both the issue of the legal character of the consequences, and the form by which they will be adopted, unresolved, agreeing instead that it is the prerogative of the COP/MOP ‘to decide on the legal form of the procedures and mechanisms relating to compliance’.

It was clear from the deliberations that those who opposed the adoption of legally binding consequences viewed the language in Article 18 as a procedural guarantee that no party can be bound by enforcement consequences without the opportunity to consent, through ratification, to any procedure that might lead to those consequences. If this position prevails at COP/MOP 1 the result may be a two-track approach, whereby the COP/MOP adopts the compliance system by decision, and simultaneously adopts an amendment that will be open for ratification. The compliance system would become immediately operational, but the risk would remain that at the end of the commitment period, an Annex I party might be found to be in non-compliance but to have not yet ratified the amendment.

The implications of this remaining legal ambiguity may be different for each of the enforcement consequences. It should first be stated that the determination of non-compliance, although being a legal determination and having a shaming effect, does not in itself entail any consequences. Hence, it is less relevant to its effectiveness if this consequence is considered binding.

The suspension of eligibility to participate in the mechanisms raises different issues. The availability of the use of flexibility mechanisms may, for example, be regarded as a privilege granted by the treaty organs rather than a right flowing from the treaty itself. It may be argued that the relevant organs of the climate change regime should have similar powers to those enjoyed by organs of IGOs, particularly so-called ‘implied powers’. If so, it might be said that it is within the discretion of these organs whether or not to grant such privileges, and to suspend them if the necessary conditions are not fulfilled. The requirements to adopt a Compliance Action Plan and submit progress reports on implementation may also be within the implied powers of the Kyoto Protocol’s organs.

If assigned amounts for a second commitment period have been agreed by the time a penalty rate is applied to a party that has been found to have exceeded its assigned amount, the resulting removal of tonnes from that second assigned amount will be a new and real burden for a party. The ongoing integrity of the Kyoto regime depends upon that additional burden being viewed as a binding element of that second commitment period cap. Although the deduction in tonnes from the second commitment period may be considered internally binding for organs established under the Protocol, including the COP/MOP, parties that have withheld their consent Marrakesh consequences may have a legal basis for arguing that they are not bound by these deductions. The Language of Article 18 may provide a last bulwark of due process for those parties that have felt hard done by the Enforcement Branch.

Conclusions

We have seen that the Marrakesh Accords — despite political controversy — have included enforcement consequences that should be considered to be of a hard character in cases of non-compliance. While also including soft elements, the Accords combine the facilitative approach and the enforcement approach to the implementation of international commitments. The inclusion of hard enforcement consequences may be explained by the stringency of the commitments, both in economic and political terms.

Whereas the determination by the Enforcement Branch of a party’s non-compliance should be considered binding, an important unresolved issue is the legal status of the enforcement consequences. Suspension of eligibility to use the flexibility mechanisms may be explained by the stringency of the commitments, both in economic and political terms. Suspension of eligibility to use the flexibility mechanisms, as well as requirements to adopt a Compliance Action Plan and to submit progress reports, may be considered to be within the competence of the Enforcement Branch. It may, however, be argued that Article 18 of the Kyoto Protocol means that binding deductions of assigned amounts at a penalty rate require an amendment of the Protocol. This may be a challenge to the effectiveness of the enforcement regime. It may also be asked whether the chosen consequences will work as effective deterrents.

The Marrakesh Accords contain several safeguards to ensure due process when consequences in the form of hard enforcement consequences are being considered. The impartiality of the ERTs and the Enforcement Branch, the qualifications of the ERTs and the Enforcement Branch with respect to factual and legal information, the opportunity of the concerned party to make its voice heard, the information upon which decisions shall be made, and the fixed consequences are all well designed to give credibility and legitimacy. The Secretariat is preserved as a neutral organ, while the political organ in the form of the COP/MOP has a very limited role to play. The process is multilateral in its approach: regard is thus being had to the multilateral character of implementation of the Protocol.

We have many treaty-based organs whose task it is to control implementation of multilateral commitments, be they in other MEAs, human rights treaties or disarmament treaties. But there are probably no other treaties where such organs may decide on enforcement consequences as hard as those in the Kyoto Protocol. There is also no other treaty — except in treaties establishing international courts — where comparable requirements regarding due process may be found. In this sense, the Kyoto Protocol with its Marrakesh Accords is a unique example of a treaty combining a multilateral approach, due process and hard enforcement consequences. In fact, the Protocol system seems to be the only one in international law to apply consequences of a penal character. Maybe this is a new feature of the law of a globalized world.

Notes

Senior Government Officials Experts in Environmental Law, 23–27 October 2000, also contains a section on Implementation, Compliance and Enforcement. 3


The Declaration from the Fifth Ministerial Conference Environment for Europe, Kiev, 21–23 May 2003 also stresses that greater emphasis should be placed on compliance with and national implementation of MEAs (ECE/CEP/94/Rev 1 para 18) and the Conference endorsed the Guidelines for Strengthening Compliance with and Implementation of MEAs in the UNECE Region ‘as an important tool to strengthen compliance with and implementation of regional environmental conventions and protocols’ (para 43).

1997 Montreal Protocol on Substances that Deplete the Ozone Layer (1522 UNTS 293), 1979 UN ECE Convention on Long Range Transboundary Air Pollution (TIAS No 10, 541, 1302 LINTS 217) and 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (38 ILM 517 (1999)).


See, about the managerial and enforcement models, Chayes and Handler Chayes, 1995; Danish, 1996–97; Raustiala and Slaughter, 2002; and Brunee and Toope, forthcoming. It has been pointed out that ‘[t]he 1987 Montreal Protocol, the 1994 Second Sulphur Protocol and the 1997 Kyoto Protocol suggest a new cycle of strengthening compliance systems gradually, and in step with the strengthening of commitments’ (Fitzmaurice and Redgwell, 2000, p43). Wang and Wiser, 2002, p184, claim that ‘the strictness and comprehensiveness of a compliance regime under an MEA depends to a significant extent on the nature of the commitment embodied in the agreement’.

Marauhn, 1996, p696 points to ‘the need to develop a procedural structure and procedural safeguards for compliance control’.

The parties also failed to agree upon the composition of the Multilateral Consultative Committee to be established under Art 13 of the FCCC (Oberthiir and Ott, 1999, p213).

Kyoto Protocol, Art 8(3).

Kyoto Protocol, Art 8(2).

Marrakesh Accords, Decision 23/CP.7 Guidelines for review under Art 8 of the Kyoto Protocol. Annex (FCCC/CP/2001/13/Add.3).

Id, para 23.

Id, para 21.

Id para 25.

Id, para 32.

Marauhn, 1996, p712, emphasizes the need to ‘distinguish between factual and legal evaluation’.

Marrakesh Accords, Decision 23/CP.7 Guidelines for review under Art 8 of the Kyoto Protocol. Annex, para 4.

Id, para 5.

Id, para 6.

Id, para 48 (e).

Decision 24/CP.7 Procedures and mechanisms relating to compliance under the Kyoto Protocol, Annex, Sec II, paras 1, 2 and 3.

Id, Sec III.

Id, Secs XI and XIII.

Id, Sec VII, para 1.

The Kyoto Compliance Regime: Emergence and Design

The Kyoto Compliance System: Towards Hard Enforcement

Id, Sec II, para 3.

Id, Sec IV, para 1.

Id, Sec II, para 6.

Id, Sec II, para 6.

Id, Sec IV, para 3.

Id, Sec IV, para 4.

See also Wang and Wiser, 2002, p190, footnote 72.

Decision 24/CP.7, Annex, Sec IV, para 5 (a).

Id, Sec IV, para 5 (b).

Id, Sec IV, para 6 (a).

Id, Sec IV, para 6 (b) and (c).

Id, Sec II, para 9.

Id, Sec XIV (a)–(d).

Id, Sec II, para 3.


Decision II/120 of the Montreal Protocol Meeting of the Parties, Composition of the Implementation Committee.

WTO Charter, Dispute Settlement Understanding, Art 17.

If an expert from Japan, which is the only Annex I member of the Asia Group, is elected to serve in this position, the totals would shift accordingly.

• Decision 24/CP.7, Annex, Sec II, para 6.

Id, Sec II, para 6.

Id, Sec V, para 3.

Id, Sec V, para 4.

• Art 2 of the Statute of the International Court of Justice.


Id, Sec VIII, para 4.

Id, Sec VIII, para 5.

WTO Dispute Settlement Understanding, Art 8.3.

Decision 24/CP.7, Annex, Sec II, para 9.

Id, Sec XI, para 1.

Id, Sec XI, para 3.

Id, Sec XIII.

Art 3, paragraphs 7 and 8.

See also Fitzmaurice and Redgwell, 2000, p48.

See eg Decision 18/CP.7 and Paragraph 2 in the Annex to the proposed COP/MOP decision on Art 17.

See Churchill and Ulfstein, 2000, p647.

See also Brunee, 2003, p278 on the practical effect of regarding the consequences as ‘binding’ in the Kyoto Protocol.

References

Part II

Challenges to Effective Operation of the Compliance Regime