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A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol

Jutta Brunnée*

* Associate Professor, Faculty of Law, University of British Columbia, Vancouver, Canada. From July 1998 to June 1999: legal adviser to the Canadian delegation to the meetings of parties under the UN Framework Convention on Climate Change. The author would like to thank Sue Biniaz, Ellen Hey, and Jacob Werksman for their very thoughtful comments on an earlier draft. Any errors or inaccuracies are exclusively those of the author.

The compliance process model and several other ideas developed in this article have since been adopted in the Canadian submission on procedures and mechanisms relating to compliance under the Kyoto Protocol. *See Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol*, United Nations Framework Convention on Climate Change (U.N. FCCC), Subsidiary Body for Scientific and Technological Advice, Subsidiary Body for Implementation, 12th Sess., at 28, U.N. Doc. FCCC/SB/2000/MISC.2 (prov. ed. dated Feb. 17, 2000), *available at* <http://www.unfccc.de/wnew/sbsc2wp.pdf>. However, this Article was prepared independently of the Canadian government and consequently the views expressed in this Article are personal to the author and do not necessarily correspond to the positions advocated in the abovementioned Canadian submission, nor in subsequent versions thereof.

I. INTRODUCTION

In December 1997, the third Conference of the Parties (COP-3)[1] to the United Nations Framework Convention on Climate Change (FCCC),[2] adopted the Kyoto Protocol.[3] In adopting the protocol, the

1. Hereinafter, "COP-*x*" or "MOP-*x*" will refer to the *x*th Conference of the Parties or *x*th Meeting of the Parties to a specific convention or protocol.

2. *See* United Nations Framework Convention on Climate Change, opened for signature June 4, 1992, S. TREATY DOC. NO. 102-38 (1992), 31 I.L.M. 849 (1992) [hereinafter FCCC] (entered into force Mar. 21, 1994). As of October 22, 1999, 181 states had ratified the FCCC. *See Status of Ratification of the United Nations Framework Convention on Climate Change and Its Kyoto Protocol*, U.N. FCCC, Conference of the Parties, 5th Sess., U.N. Doc. FCCC/CP/1999/INF.2 (1999) [hereinafter *Status of Ratification*].

3. *See* Kyoto Protocol to the Framework Convention on Climate Change, U.N. FCCC, Conference of the Parties, 3d Sess., U.N. Doc. FCCC/CP/1997/L.7/Add.1 (1998), 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol]. As of October 22, 1999, 84 states had signed and 16 states had ratified the Kyoto Protocol. *See Status of Ratification*, *supra* note 2. To enter into force, the Kyoto Protocol must have been ratified by not less than 55 parties to the FCCC, including Annex

parties recognized not only that more ambitious steps than the FCCC commitments to stabilize greenhouse gas emissions were required to address climate change, but also that states' commitments now needed to be legally binding and subject to a credible system for ensuring compliance. While the Kyoto Protocol is certainly a landmark agreement, much of the work to enable its entry into force and operation remains to be done.[4] No less than a third of the protocol's twenty-seven articles contain only the basic outlines of the regimes that the parties envisage, leaving it to the "Conference of the Parties, serving as the meeting of the Parties to the Protocol" (COP/MOP) to approve the rules, guidelines, modalities or procedures that put the flesh on the protocol bones.[5] Only once these provisions are elaborated will states be in a position to decide whether or not to ratify the protocol, and will the broad concepts it contains be transformed into regimes that are sufficiently detailed to allow implementation. Therefore, the Conference of the Parties to the convention (COP) is now working, under the auspices of the Buenos Aires Plan of Action,[6] to develop draft decisions in time for COP-6 and to recommend these decisions' adoption by the COP/MOP at its first session.[7] Among the items that are being pursued in this fashion is the requirement, in Article 18 of the protocol, that parties "approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance . . . ."[8]

The development of a noncompliance regime is a challenge in any multilateral environmental agreement (MEA) negotiation. Concerns about ensuring the achievement of a MEA's environmental

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I parties accounting for at least 55% of the 1990 carbon dioxide emissions for these parties. *See* Kyoto Protocol, *supra*, art. 25.1.

4. *See* Henry D. Jacoby et al., *Kyoto's Unfinished Business*, 77 FOREIGN-AFF. 54, 54 (July-Aug. 1998); Hermann Ott, *The Kyoto Protocol: Unfinished Business*, 40 ENV'T 3, 3 (1998).

5. *See* Kyoto Protocol, *supra* note 3, arts. 3.4, 5.1, 6.2, 7.4, 8.4, 12.7, 16, 17, and 18. Note, however, that in the case of Article 17 on international emissions trading, the Conference of the Parties to the FCCC, rather than COP/MOP, is empowered to define the "relevant principles, modalities, rules and guidelines." *Id.* art. 17.

6. *See Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Fourth Session*, U.N. FCCC, U.N. Doc. FCCC/CP/1998/16/Add.1 (1998) [hereinafter *COP-4 Report*], Decision 8/CP.4; *see also Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Fifth Session*, U.N. FCCC, U.N. Doc. FCCC/CP/1999/6/Add.1 (1999) [hereinafter *COP-5 Report*] (visited May 12, 2000) <http://www.unfccc.de/resource/cop5.html#report5part2>, Decision FCCC/1999/1/CP.5 (addressing the implementation of the Buenos Aires Plan of Action and calling for intensified efforts to enable the COP to take decisions at its sixth session).

7. COP-6 will be held from November 13-24, 2000, at The Hague, Netherlands. *See COP-5 Report*, *supra* note 6, Decision 2/CP.5.

8. Kyoto Protocol, *supra* note 3, art. 18.

goals, and about ensuring a level playing field among parties, compete against states' reluctance to subject themselves to sovereignty-invasive procedures, let alone penalties for noncompliance. The design of MEA noncompliance procedures or mechanisms involves striking a delicate balance between steps to bring about parties' full compliance with their commitments and respect for individual states' sovereign spheres. The balancing act is nowhere more complex than in the context of the Kyoto Protocol.

On the one hand, experience with existing compliance regimes,[9] and the bulk of recent academic analysis,[10] suggest that the primary

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9. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1550 (1987) (entered into force Jan. 1, 1989); adjusted and amended June 29, 1990, 30 I.L.M. 539 (1990); adjusted and amended Nov. 25, 1992, 32 I.L.M. 875 (1993) [hereinafter Montreal Protocol]. Article 8 of the protocol called upon the parties to develop "procedures and institutional mechanisms for determining non-compliance" and for "treatment" of noncompliant parties. *Id.* art. 8. While an interim procedure had been adopted at the second Meeting of the Parties (MOP-2) in 1990, only MOP-4 adopted the full noncompliance procedure (NCP). *See Report of the Fourth Meeting of the Parties to Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Doc. UNEP/OzL.Pro.4/15 (1992), Decision IV/5, annexes IV, V, 32 I.L.M. 874 (1993) [hereinafter *MOP-4 Report*]. Some changes to the NCP, concerning the mandate of its Implementation Committee (IC), were adopted at MOP-10. *See Report of the Tenth Meeting of the Parties to Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Doc. UNEP/OzL.Pro.10/9 (1998), Decision X/10, annex II. Under the NCP, the IC is to secure "amicable solutions" to compliance problems and to make recommendations to the MOP. *See id.* ¶¶ 8-9. Possible responses to noncompliance are set out on an "indicative list of measures" and include appropriate assistance, cautions and suspension of rights and privileges under the protocol. *See MOP-4 Report*, *supra*, annex IV. A compliance procedure was also adopted under Article 7 of the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions on June 14, 1994. *See* 33 I.L.M. 1540, 1545 (1994). In 1997, that convention's Executive Body extended the application of the procedure to all protocols to the convention. *See Concerning the Implementation Committee, its Structure and Functions and Procedures for Review of Compliance*, U.N. Economic Commission for Europe, Executive Body, U.N. Doc. ECE/EB.AIR/53 (1998), Decision 1997/2, annex III; *see also id.* Decision 1997/3, annex IV; *Concerning the Implementation Committee, its Structure and Functions and Procedures for Review of Compliance*, U.N. Economic Commission for Europe, Executive Body, U.N. Doc. ECE/EB.AIR/59 (1998), Decision 1998/6, annex II, *reprinted in* EDITH BROWN WEISS ET AL., 2 INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES (Supp. 1999). The procedure, which is now in operation, resembles the Montreal Protocol NCP. Another compliance regime is being developed pursuant to Article 19 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. *See* 18 I.L.M. 657 (1999). For an overview of this topic, see Maas M. Goote, *Non-compliance Procedures*, 9 Y.B. INT'L ENVTL. L. 146 (1998).

10. For a discussion of the benefits of regimes that seek to promote and facilitate compliance, see, for example, THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (David G. Victor et al. eds., 1998); ULRICH BEYERLIN & THILO MARAUHN, LAW-MAKING AND LAW-ENFORCEMENT IN INTERNATIONAL ENVIRONMENTAL LAW AFTER THE 1992 RIO CONFERENCE (1997); JAMES CAMERON ET AL., IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW (1996); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Laurence Boisson de Chazournes, *La mise en oeuvre du droit international dans le domaine de la protection de l'environnement: enjeux et défis*, 99 REVUE

emphasis of the protocol regime should be on compliance, rather than noncompliance. In the case of the Kyoto Protocol, this means that parties must develop a broad-based compliance system, taking advantage of the opportunities that exist to flesh out the protocol regime through rules and processes that help prevent noncompliance by promoting and facilitating compliance. Indeed, the development of a credible and workable compliance regime is inextricably linked to the further elaboration of other parts of the protocol including, in particular, the so-called "Kyoto mechanisms," which are intended to provide the parties with greater flexibility in meeting their commitments.[11] On the other hand, it is unlikely that, in the high stakes world of the Kyoto Protocol, facilitative approaches alone can ensure compliance. Thus, the protocol confronts negotiators with an unprecedented challenge: they must find ways to build into the compliance system "procedures and mechanisms to determine and to address cases of non-compliance" that are at once acceptable and credible.[12]

Efforts to develop the compliance system for the protocol are now underway. Parties have submitted initial views on compliance issues and a Joint Working Group on Compliance (JWG), established under the Buenos Aires Plan of Action, has been operating since June 1999 with the mandate to:

- identify compliance related elements in the Kyoto Protocol;
- follow the development of these elements in various groups including, for example, elements of substantive rules and

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GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 32 (1995); Günther Handl, *Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio*, 5 COL. J. INT'L ENVTL. L. & POL'Y 305 (1994); Harold K. Jacobsen & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project*, 1 GLOBAL GOVERNANCE 19 (1995); Patrick Széll, *The Development of Multilateral Mechanisms for Monitoring Compliance*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 97 (Winfried Lang ed., 1995); Rüdiger Wolfrum, *Means of Ensuring Compliance With and Enforcement of International Environmental Law*, *in* ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS 272 (1998); O. Yashida, *Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of International Environmental Institutions*, 10 COL. J. INT'L ENVTL. L. & POL'Y 95 (1999); Kyle Danish, Book Review, 37 VA. J. INT'L L. 789 (1997) (reviewing CHAYES & CHAYES, *supra*).

11. Through the Kyoto mechanisms, which include joint implementation (Article 6), the clean development mechanism (Article 12), international emissions trading (Article 17), and, arguably, joint fulfillment (Article 4), parties can transfer or acquire emission entitlements or reduction credits respectively. For a description of these mechanisms, see *infra* notes 32-43 and accompanying text.

12. Kyoto Protocol, *supra* note 3, art. 18 (emphasis added). Note that "procedures and mechanisms" to determine and address noncompliance are to be distinguished from the "Kyoto mechanisms," *supra* note 11. In the context of Article 18, "mechanisms" refers to institutional features of a noncompliance process.

consequences of noncompliance, and identify gaps to ensure that they are addressed in the suitable forum;

- develop procedures by which compliance with the obligations under the Kyoto Protocol should be addressed, to the extent that they are not being considered by other groups; and
- ensure coherent approaches to developing a comprehensive compliance system.[13]

This mandate reflects the fact that the elements of a broad-based compliance system will be anchored in different parts of the protocol. It also reflects the parties' recognition of the need to design noncompliance procedures in light of the features of the overall compliance system. Indeed, it was the fact that other elements of the compliance system are developed under the auspices of the convention's Subsidiary Body for Implementation (SBI) and Subsidiary Body for Scientific and Technological Advice (SBSTA), respectively, and need to be closely tracked, that prompted the creation of a joint working group under SBI and SBSTA.[14] The JWG, therefore, finds itself confronted with an additional challenge: whereas the compliance regimes for other MEAs were negotiated when the relevant commitment regimes were already in existence,[15] the Kyoto compliance regime must be developed at the same time as rules that elaborate on important aspects of the commitment package. While this parallel process offers opportunities for the development of an innovative and robust compliance system, anchored in different parts of the protocol, it also exposes the JWG negotiations to the risk of being caught up in bargains over various parts of the protocol.[16]

Although the JWG process is in an early stage and while a broad spectrum of views exists on many key issues, there are indications

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13. *COP-4 Report*, *supra* note 6, Decision 8/CP.4.

14. *See Report of the Joint Working Group on Compliance on Its Work During the Tenth Session of the Subsidiary Bodies*, U.N. FCCC, ¶ 6, U.N. Doc. FCCC/SB/1999/CRP.3/Rev.1 (1999) [hereinafter *June 1999 JWG Report*] (presenting the conclusions of the first session of the JWG, which note that "its work is closely linked to that on Articles 5, 7 and 8 as well as the mechanisms in Articles 6, 12 and 17" and that the "JWG needs to follow the development of this work and exchange information with the bodies or groups working on those issues"). Given that some parties' initial preference was for the creation of an independent working group on compliance, COP-4 had requested that the JWG report to COP-5 and that COP-5 take further steps including, if necessary, the establishment of an ad hoc working group on compliance or other procedure, with a view to completing the work on compliance by COP-6. *See COP-4 Report*, *supra* note 6, Decision 8/CP.4. COP-5 noted the "valuable progress" made by the JWG and decided that the group should "continue its work based on the mandate contained in decision 8CP.4." *COP-5 Report*, *supra* note 6, Decision 15/CP.5.

15. *See supra* note 9 (surveying other compliance regimes).

16. *See, e.g.*, *infra* Part III.B.1 (noting potential pressure to minimize the costs of noncompliance).

that the negotiations may produce a compliance system that will go beyond the largely facilitative models under other MEAs. It is likely that the Kyoto compliance system will be fitted with at least some teeth that could crack down on instances of noncompliance with the protocol's emission reduction commitments. Therefore, it is timely to take a closer look at the ongoing compliance negotiations, at the issues that must be resolved by the negotiators, and at options for designing a compliance regime. The focus of this Article is on the noncompliance procedures and mechanisms that the JWG is tasked to develop, not on the broader compliance system in which these procedures and mechanisms will eventually be embedded. However, because the noncompliance procedures and mechanisms must be responsive to the features of the Kyoto Protocol, brief overviews on salient aspects of the Kyoto Protocol regime and of its compliance system are first provided. Then, based upon a review of the JWG's work so far, the key design questions around which the negotiation of the regime is likely to revolve will be identified. Finally, against this backdrop, the Article will reflect upon the shape that a Kyoto Protocol compliance regime might take and how a balance between sovereignty concerns and the need for an assertive approach to noncompliance might be struck.[17] To make this discussion more concrete and to highlight the difficult choices that are involved, possible elements of a protocol compliance regime are assembled into a basic model.

II. THE KYOTO PROTOCOL: IDENTIFYING THE BUILDING BLOCKS OF A COMPLIANCE SYSTEM

A. Key Commitments

The FCCC was one of the instruments adopted at the 1992 Rio Conference on Environment and Development.[18] In it, the parties acknowledged that "change in the Earth's climate and its adverse

17. In this Article, the term "compliance regime" is used to refer to the procedures and mechanisms that can lead to formal findings of compliance or noncompliance and, potentially, to consequences. By contrast, the protocol's "compliance system" is broader and includes elements that are designed to promote compliance and prevent noncompliance (e.g., the rules to be elaborated for the Kyoto mechanisms).

18. *See Report of the United Nations Conference on Environment & Development*, U.N. Doc. A/CONF.151/Rev.1 (1992), 31 I.L.M. 881 (1992). For helpful reviews of the FCCC and its negotiating history, see Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451 (1993); Winfried Lang & Hugo Schally, *La Convention Cadre sur les Changements Climatiques*, 97 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 321 (1993).

effects are a common concern of humankind,"[19] and that they "should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects."[20] The "ultimate objective" of the convention is to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[21] To this end, all FCCC parties took on various inventory, reporting and policy-related commitments.[22] For developing country parties, the "effective implementation" of these commitments is contingent upon the effective implementation of the developed country parties' financial and technology transfer commitments.[23] Only developed country parties and parties with economies in transition (EIT), listed in Annex I to the convention, are subject to an undertaking to return, by the year 2000, to their 1990 levels of greenhouse gas emissions.[24] Although this goal has been widely recognized as insufficient to address climate change, several key Annex I parties are likely to fail to achieve the stabilization of emissions for which it calls.[25]

The dichotomy between Annex I and non-Annex I party commitments also underpins the Kyoto Protocol. It contains no new concrete commitments for non-Annex I parties, only a series of soft, highly qualified, policy-related commitments, and the language neither envisages future emissions-related commitments by developing countries nor provides a process for their creation.[26]

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19. FCCC, *supra* note 2, pmbl. For a further discussion, see Detlef F. Sprinz, *Internationale Klimapolitik*, 73 DIE FRIEDENS-WARTE 25, 46 (1998).

20. *Id.* art. 3.3.

21. *Id.* art. 2.

22. *See id.* arts. 4.1, 12.1.

23. *See id.* art. 4.7.

24. *See id.* art. 4.2 (a), (b) (containing, in very cagey language, a commitment to make efforts to this end). The distinction between the commitments of developing country parties on the one hand and those of developed country and EIT parties on the other, is an expression of one of the FCCC's guiding principles, namely that the parties should protect the climate system "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities." FCCC, *supra* note 2, art. 3.1.

25. *See Review of the Implementation of the Convention and of the Decisions of the First Conference of the Parties, Commitments in Article 4: Second Compilation and Synthesis of First National Communications from Annex I Parties: Executive Summary by the Secretariat*, U.N. FCCC, ¶ 43 *passim*, U.N. Doc. FCCC/CP/1996/12 (1996) (providing an overview of the results of the review of Annex I parties' first national communications); *see also* Christopher Flavin, *Last Tango in Buenos Aires: While Climate Treaty Negotiators Dance on with Their Slow Give-and-Take, the Climate Itself Is Running Amok*, 11 WORLD WATCH 10, 14 (1998) (noting that the emissions goal is insufficient but also possibly unattainable).

26. *Cf.* Kyoto Protocol, *supra* note 3, art. 10 (chapeau). For reviews of the Kyoto Protocol and its negotiating history, see Clare Breidenich et al., *The Kyoto Protocol to the United*

Indeed, many of its provisions would likely have to be amended if such commitments were to be added to the Kyoto Protocol.[27] The Kyoto Protocol is thus largely a vehicle for the creation of concrete, legally-binding emission reduction and limitation commitments by Annex I parties (Article 3), of mechanisms intended to increase options for meeting these commitments (Articles 4, 6, 12, and 17), of related monitoring and reporting commitments (Articles 5 and 7), and of processes to assess compliance and address noncompliance (Articles 8, 16, and 18).[28]

1. Emission Reduction and Limitation Commitments

The protocol's central provision is Article 3. Under Article 3.1, Annex I parties are to ensure, "individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts."[29] The goal is to reduce Annex I parties' collective greenhouse gas emissions by at least five percent below 1990 levels during the first commitment period (2008 to 2012).[30] Individual parties' "quantified emission reduction and limitation commitments" (QELRCs) are inscribed in Annex B to the protocol and their resulting

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Nations Framework Convention on Climate Change, 92 AM. J. INT'L L. 315 (1998); D. French, *The 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change 1997*, 10 J. ENVTL. L. 227 (1998); Ott, *supra* note 4; Farhana Yamin, *The Kyoto Protocol: Origins, Assessment and Future Challenges*, 7 REV. EUR. COMMUNITY & INT'L ENVTL. L. 113 (1998).

27. The core commitments in the protocol (Articles 3, 5-8) and some of the provisions that provide access to the Kyoto mechanisms (Articles 4, 6, and 17) are premised upon a party being listed in Annex I to the FCCC and Annex B to the Protocol. Amendments to FCCC and protocol would be required for a party to join both annexes. There is no obvious "unilateral" way for non-Annex I parties to make a target commitment. For example, at COP-5, Argentina announced a "voluntary commitment" to reduce its greenhouse gas emissions growth rate. *See COP-5 Negotiations, Tuesday, November 2, 1999* (visited May 12, 2000) <http://www.iisd.ca/climate/cop5/negotiations/nov2n.html>; *FCCC COP-5 Highlights: Tuesday, 2 November 1999*, 12 Earth Negotiations Bulletin (IISD) 120 (Nov. 3, 1999) <http://www.iisd.ca/linkages/vol12/enb12120e.html>. It projected that, with this commitment, its emissions would be between two and ten percent below a "business as usual" scenario. *See id.* For various reasons, Argentina does not wish to join Annex I to the FCCC and called upon parties to find ways for "voluntary commitments" to be built into the FCCC/Kyoto Protocol system. *See id.* By contrast, Kazakhstan wanted to join Annex I. *See Amendment to Annex I to the Convention, Proposal by the Republic of Kazakhstan*, U.N. FCCC, Conf. of the Parties, 5th Sess., U.N. Doc. FCCC/CP/1999/2 (1999). However, COP-5 could not reach consensus on the necessary amendment. *See COP-5 Negotiations, Friday, November 5, 1999* (visited May 12, 2000) <http://www.iisd.ca/climate/cop5/negotiations/index.html>.

28. *See* Kyoto Protocol, *supra* note 3, arts. 3-8, 12, 16-18.

29. *See id.*

30. *See id.*

"assigned amounts" range from eight percent reductions to ten percent increases.[31]

2. Flexibility in Meeting QELRCs

Although these commitments arguably fall short of what is required to forestall global warming,[32] their implementation nonetheless presents serious challenges to many Annex I parties.[33] Consequently, agreement upon the QELRCs was possible only after several elements that allow for flexibility in meeting the commitments were built into the protocol.[34] Some of this flexibility is provided by Article 3 itself through the use of a five year commitment period rather than a single target year.[35] However, the most important, and controversial, mechanisms for flexibility are the option to pool assigned amounts through joint fulfillment under Article 4, the opportunities for joint implementation (Article 6), use of the clean development mechanism (Article 12), and international emissions trading (Article 17).[36] What these mechanisms have in common is that they involve transfers of emission units between parties, thereby altering parties' Annex B assigned amounts.[37] Parties risking being in noncompliance with their original assigned amount can acquire other parties' emission rights or reduction credits. By the same token,

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31. *Id.* annex B. Annex B inscribes percentages of greenhouse gas emissions in 1990 for each Annex I party and the party's assigned amount is determined by multiplying this percentage by five—the number of years in the commitment period. *See id.* art. 3.7.

32. *See* Bert Bolin, *The Kyoto Negotiations and Climate Change: A Scientific Perspective*, 279 SCIENCE 330 (1998); Flavin, *supra* note 25, at 14.

33. *See* Peter Cook, *Kyoto: The Climate Changes*, TORONTO GLOBE & MAIL, Oct. 29, 1999, at B2. Cook notes that, rather than achieve an overall greenhouse gas emission reduction of five percent below 1990 levels, "the world is on track to raise these emissions by 18 per cent." *Id.*; *see also* Flavin, *supra* note 25, *passim*.

34. *See* Flavin, *supra* note 25, at 14-15.

35. *See* Kyoto Protocol, *supra* note 3, art. 3. A party can exceed the relevant percentage in any one year, so long as its emissions in other years during the commitment period are low enough to achieve the required reduction at the end of the commitment period. *See id.* Further flexibility is provided by Article 3.3, which permits parties to meet their greenhouse gas emission reduction commitments not only through actual emission reductions, but also through increases in sink capacity. *See id.* art. 3.3. "Sinks" are defined in Article 1.8 of the FCCC as processes, activities, or mechanisms that remove greenhouse gases or their precursors from the atmosphere. *See* FCCC, *supra* note 2, art. 1.8. This includes, for example, forested areas. Due to difficulties in measuring the absorptive capacity of sinks, it is difficult at this point to predict how Article 3.3 will work.

36. *See* Kyoto Protocol, *supra* note 3, arts. 4, 6, 12, 17.

37. According to Articles 3.10-3.12, the effect of transfers under Articles 6, 12, and 17 is that emission units are added to or subtracted from, as the case may be, the assigned amounts of the parties involved. *See id.* arts. 3.10-3.12. Under Article 4, assigned amounts are altered through a joint fulfillment agreement among parties. *See id.* art. 4; *see also infra* note 38 and accompanying text.

Annex I parties that will remain below their assigned amount or that generate more reduction credits than they require for their own compliance, can profit from transferring emission units.

When parties form a "bubble" for joint fulfillment under Article 4, their assigned amounts are added together and so long as the emissions of the bubble as a whole remain within the members' aggregate assigned amount, individual "bubble" parties are deemed to be in compliance even if they fail to meet their individual assigned amounts.[38] Joint implementation (JI) under Article 6 allows Annex I parties to transfer or acquire "emission reduction units" that result from projects undertaken in other Annex I countries.[39] The clean development mechanism (CDM) under Article 12 is similarly project-based and intended to help Annex I countries to meet their Article 3 commitments.[40] However, since the CDM also aims to assist non-Annex I parties in achieving sustainable development, CDM projects must take place in non-Annex I countries.[41] The most controversial of

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38. *See* Kyoto Protocol, *supra* note 3, art. 4. In effect, Article 4 is a form of emissions trading. When parties enter into a bubble arrangement, they can reallocate assigned amounts amongst themselves, thereby altering their original Annex B assigned amounts. *See id.* Only when the bubble as a whole fails to meet its overall emission allocation—the combined assigned amounts of its members—will bubble parties be exposed to noncompliance. *See id.* In that event, each party is responsible for its own level of emissions as set out in the bubble agreement. *See id.* The Article 4 option has been referred to as the "EU bubble," because, it was originally introduced by the European Union (EU) with a view to meeting EU concerns regarding burden-sharing arrangements among its member states; however, after lengthy negotiations, Article 4 was redrafted to make the "bubble" option available to all Annex I parties. *Cf.* Jacob Werksman, *Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime*, 9 Y.B. INT'L ENVTL. L. 48, 77-78 (1999) [hereinafter Werksman, *Compliance*].

39. *See* Kyoto Protocol, *supra* note 3, art. 6. JI projects can include activities aimed at reducing greenhouse gas emissions or at enhancing removals of greenhouse gases by sinks. *See id.* art. 6.1. To ensure that JI provides genuine climate benefits, and does not undercut Article 3 commitments, Article 6.1 further requires that emission reductions or sink enhancements are "additional" to those that would otherwise have occurred, and that acquisition of reduction units is "supplemental" to domestic actions. *See id.* Many issues pertaining to ensuring the credibility of JI remain to be resolved; the notions of "additionality" and, in particular, "supplementarity" are among the most controversial issues in the negotiations. While the EU seeks a limit on the use of JI and international emissions trading (thus interpreting "supplementary" to mean that at least 50% of a party's reductions should be achieved at home), the United States and other states have argued there should be no fixed cap on mechanisms use. *See Mechanisms Pursuant to Articles 6, 16 and 17 of the Kyoto Protocol: Synthesis of Proposals by Parties on Principles, Modalities, Rules and Guidelines*, U.N. FCCC, ¶¶ 27-28, U.N. Doc. FCCC/SB/1999/8 (1999) [hereinafter *Mechanisms*]; *see also id.* ¶¶ 64, 150-51.

40. *See* Kyoto Protocol, *supra* note 3, art. 12.

41. *See id.* In part, the CDM is intended to demonstrate to developing countries the benefits that they could derive from emission reduction efforts under the Kyoto Protocol. Ultimately, therefore, negotiators will likely adopt a flexible approach to Article 12 and seek to accommodate the interests of non-Annex I parties. However, the CDM also creates a number of particular challenges. For example, because emission reductions are generated in countries that do not themselves have Article 3 commitments, there is a particular need to verify that reduction

the flexible mechanisms is international emissions trading (IET) under Article 17.[42] IET transactions do not involve credits for actual emission reductions, but allow Annex I parties to sell or acquire "parts of assigned amounts."[43] Critics, including many non-Annex I countries, are concerned that IET allows Annex I parties to avoid domestic emission reductions by acquiring "surplus air" (or hot air) from parties, such as Russia or Ukraine, whose emissions will remain considerably below their assigned amounts, not due to deliberate emission reductions, but due to economic decline.[44] A related concern is that IET provides an incentive to non-Annex I countries, if and when they take on commitments, to negotiate inflated targets that would enable them to introduce further "hot air" into the system.[45]

There are a number of arguments in favor of these transfer mechanisms, chiefly that they provide avenues for more efficient and cost-effective emission reductions.[46] Countries facing high compliance costs can choose to acquire lower-cost reductions elsewhere, thereby also transferring resources, and potentially technologies (e.g., through JI or CDM projects), to countries that may otherwise not have access to these.[47] Market dynamics, suggest proponents of the mechanisms, will create incentives to both generate tradable reductions and to find lower cost domestic solutions so as to avoid having to acquire emission units abroad.[48] To take full advantage of these dynamics, a further innovative feature of JI, CDM and IET is that they envision the involvement of private entities.[49] The hope is that corporations and utilities will become interested in

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units are genuine (otherwise the CDM could actually increase overall Annex I emissions by introducing additional units into the system). This is particularly true in view of the fact that Article 12 does not include a "supplementarity" requirement. *See supra* note 39 (discussing "supplementarity"). To address these concerns, Article 12 envisages particularly rigorous quality control for emission reductions, stipulating that only certified emission reductions (CERs) can be used for purposes of compliance with Article 3. *See* Kyoto Protocol, *supra* note 3, art. 12.3(b).

42. *See generally* David M. Driesen, *Free Lunch or Cheap Fix? The Emissions Trading Idea and the Climate Change Convention*, 26 B.C. ENVTL. AFF. L. REV. 1 (1998).

43. Kyoto Protocol, *supra* note 3, art. 17.

44. *See* Hermann Ott, *Global Climate*, 9 Y.B. INT'L ENVTL. L. 183, 185 (1999).

45. *See id.* at 185-86. Currently, Argentina and Kazakhstan are expressing interest in taking on commitments. *See supra* note 27.

46. *See* Jonathan Wiener, *Global Trade in GHG Control: Market Merits and Critics' Concerns*, RESOURCES, Fall 1997, at 129 (visited May 12, 2000) <http://www.rff.org/resources_articles/files/ghgcontrol.htm> (giving an overview of the arguments in favor of emissions transfers).

47. *See id.*

48. *See id.*

49. *See* Kyoto Protocol, *supra* note 3, arts. 6, 12. While Article 17 makes no reference to the involvement of private entities in IET, it is to be expected that the IET rules to be developed by parties will provide for it.

"carbon commerce" opportunities and that a private market will evolve and support the parties' efforts to implement the protocol.[50] Such private entity involvement, of course, also raises an array of issues regarding the interface between states' international legal obligations under the protocol and corporate transactions of entities under their jurisdictions.[51]

Whether the optimistic assessments of the Kyoto mechanisms' potential are correct is a matter of debate. The very same dynamics that hold the promise of creating incentives for compliance could also create incentives, or at least additional opportunities, for noncompliance. As indicated earlier, the Kyoto mechanisms were included in the protocol not for their own sake or for the economic opportunities they may provide, but in order to facilitate and promote the achievement of the protocol's emission reduction goals. Therefore, while the mechanisms should operate efficiently and rely upon the incentives inherent in opportunities to transfer emission rights and credits, their integrity and credibility must also be ensured. In particular, use of the mechanisms should not lead to increases of greenhouse gas emissions in comparison to the Annex I parties' aggregate of assigned amounts. Such aggregate increases could be the outcome, however, if the protocol fails to prevent "over-selling," that is, if Annex I parties that have exceeded their assigned amount could nonetheless sell emission rights or credits, or if parties could sell

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50. *See* Wiener, *supra* note 46 (discussing how preparations for private "carbon transactions" are underway domestically and internationally as businesses prepare for the opportunities and challenges of a "carbon-constrained" world). The World Bank unveiled its Prototype Carbon Fund, which invests in emission reduction projects and from which companies and governments can buy shares that will provide emission reductions for the purposes of Kyoto Protocol commitments. Information about the fund is available at (visited May 12, 2000) <http://www.prototypecarbonfund.org>. For individual examples of "carbon commerce," see, for example, news reports chronicled at *The Road to Bonn: Timeline* (visited May 12, 2000) <http://www.iisd.ca/linkages/climate/cop5/cop5timeline.html> (relevant reports include *Dropping the Fight on Science, Firms Scramble to Look Greener*, Oct. 19, 1999; *PriceWaterhouse, Ecosecurities in Greenhouse Deal*, Sept. 8, 1999; *Sydney Futures Exchange Announces Plan to Create Carbon Exchange*, Aug. 28, 1999; and [*British*] *Companies Launch GHG Emissions Trading System*, June 28, 1999); *see also* Christopher Zinn, *Japan Makes Ecology Deal with Australia*, GUARDIAN WKLY., Feb. 24-Mar. 1, 2000, at 2 (describing an arrangement between the Tokyo Electric Power Company and the Australian Forest authorities pursuant to which the New South Wales forestry division will plant 40,500 hectares of hard and soft wood to capture carbon dioxide).

51. These "interface" issues remain under-explored. More attention has been devoted to questions of private international law arising in the context of contracts between entities engaging in Kyoto mechanism transactions. *See, e.g.*, Ibibia L. Woricka et al., *Contractual Aspects of Implementing the Clean Development Mechanism and Other Flexibility Mechanisms Under the Kyoto Protocol*, *in* GLOBAL CLIMATE GOVERNANCE: INTERLINKAGES BETWEEN THE KYOTO PROTOCOL AND OTHER MULTILATERAL REGIMES 77 (Bradnee Chambers ed., 1998).

emission rights or credits that they themselves need to remain in compliance.

3. The Kyoto Mechanisms and the Compliance System: Preventing Noncompliance

The success or failure of the Kyoto mechanisms will very much depend on the principles, rules, guidelines, or modalities that the parties are developing to flesh out the mechanisms.[52] It is here that the balance between efficiency and credibility must be struck. If the mechanism rules are too lenient, abuse of the mechanisms could undercut the protocol's emission reduction goals and threaten its very integrity.[53] For example, the protocol's goals would be at risk if the mechanism rules did not erect sufficient barriers against "overselling," or failed to ensure reliable tracking of transactions on the basis of transparent and reliable inventories and reports. On the other hand, rigorous mechanism rules could provide unique tools not only for promoting compliance with the mechanism regimes, but also with the key protocol commitments. A full discussion of the tools that could be deployed through the mechanism rules is beyond the scope of this Article.[54] Nevertheless, for purposes of illustration, some key options for promoting compliance through the mechanism rules will be highlighted.

For example, the mechanism rules should exclude parties that are not in compliance with key protocol commitments from participating in mechanism transactions.[55] Given that the mechanisms are based

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52. Note that the development of additional rules is envisaged only for JI, the CDM and IET. *See* Kyoto Protocol, *supra* note 3, arts. 6, 12, 17. The rules for joint fulfillment are set out directly in Article 4, which does not call for additional rules for bubble arrangements. *See id.* art. 4. It has been argued that the COP/MOP may nonetheless wish to adopt additional rules. *See* Werksman, *Compliance*, *supra* note 38, at 77-78.

53. This Article uses the term "mechanism rules" to refer generically to what the protocol variously refers to as principles, rules, guidelines, or modalities.

54. For a comprehensive discussion of this issue, see Werksman, *Compliance*, *supra* note 38, *passim*.

55. The fact that Article 4 does not provide for the development of additional rules for joint fulfillment means that participation in a bubble arrangement cannot be made contingent upon compliance with protocol commitments. *See supra* note 52 (commenting on Article 4). This position has been taken by the EU, which does not consider joint fulfillment to be one of the Kyoto mechanisms. *See Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol*, *Addendum 1*, U.N. FCCC, Subsidiary Body for Scientific and Technological Advice, Subsidiary Body for Implementation, 10th Sess., at 3, point A.4, U.N. Doc. FCCC/SB/1999/MISC.4/Add.1 (1999) [hereinafter *Procedures Add.1*]. The United States, in particular, has pointed out the apparent inconsistency of this approach. *See Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, Responses to Questions Related to a Compliance System Under the Kyoto Protocol*, U.N. FCCC, Subsidiary Body for Scientific and

upon transfers of emission units or emission reduction credits among parties, it is crucial that reliable information exists about Annex I parties' QELRC performance. Therefore, as is modeled by Article 6.1(c) for the acquisition of reduction units generated by a JI project, compliance with Articles 5 and 7 of the protocol should be an eligibility prerequisite for all Annex I party mechanism transfers and acquisitions.[56] To address the concern about "overselling," at least in the case of IET, Annex I parties should also be in compliance with their commitment under Article 3.1 to be eligible for the transfer of emission units.[57]

The threat of such "loss of eligibility" may not always be a sufficient deterrent, especially since noncompliance with Article 3.1 can be determined only at the end of the five-year commitment period so that eligibility could be lost only for the following commitment period.[58] Therefore, the mechanism rules, in particular the IET rules, need to take additional precautions against parties selling emission rights in excess of their assigned amount, or bringing themselves into noncompliance through the sale of emission units. Proposals range from instituting continuous performance monitoring during the commitment period with a view to suspending a party's right to sell emission units based on certain indicators of likely noncompliance (as opposed to actual noncompliance),[59] over requiring parties to maintain "compliance reserves" of emission units to make up for possible shortfalls at the end

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Technological Advice, Subsidiary Body for Implementation, 11th Sess., at 79, U.N. Doc. FCCC/SB/1999/MISC.12 (1999) [hereinafter *Submissions*].

56. Note that the proposals of several parties for Kyoto mechanism rules include compliance with Articles 5 and 7 as an eligibility requirement. *See Mechanisms*, *supra* note 39, ¶¶ 29-32, 65-73, 150-51. Some parties, however, suggest this should apply only to reporting that is directly relevant to the implementation of target-related commitments, and not to the implementation of all commitments under the protocol. *See, e.g.*, *infra* note 68 (noting arguments against compliance with Article 7.2 as an eligibility requirement).

57. Note that this does not apply to the acquisition of emission rights. One of the very purposes of IET is to enable parties that might otherwise exceed their assigned amount to bring themselves into compliance. Several parties suggest, however, that compliance with Article 3.1 should be a prerequisite for transfers of emission units. *See Mechanisms*, *supra* note 39, at 150-51.

58. Articles 5 and 7 require annual inventories and annual submission of national communications so that compliance can be assessed regularly during a given commitment period. *See* Kyoto Protocol, *supra* note 3, arts. 5, 7. Because such annual assessments are not possible with respect to QELRCs, a party's eligibility could at best be made contingent upon its compliance with Article 3.1 in the preceding commitment period. This means that eligibility rules alone cannot completely prevent the participation of noncompliant parties in the Kyoto mechanisms, at least not during a given commitment period.

59. *See, e.g.*, WORLD WILDLIFE FUND, CREATING AN EFFECTIVE COMPLIANCE SYSTEM FOR THE KYOTO PROTOCOL 6-12 (1999) (on file with the author); ENVIRONMENTAL DEFENSE FUND, EIGHT RULES OF ACCOUNTABILITY AND COMPLIANCE UNDER THE KYOTO PROTOCOL 3-4 (1999) (on file with the author).

of the commitment period,[60] to "pay-as-you-go" systems that would retire some of a party's emission units, such as units equivalent to its emissions in each year of the commitment period.[61]

Nonetheless, it will not be possible to build perfect safeguards into the mechanism rules. Thus, the rules must also deal with the implications of an issuer's (i.e., the party transferring emission units) noncompliance with Article 3.1 for the parties to a mechanism transaction.[62] In this context, the notion of "liability" has been central to the discussions about the elaboration of the Kyoto mechanisms and, in particular, the IET regime.[63] As between the parties involved in an emission rights or credit transfer, liability rules determine who should bear the risk of the issuer's failure to comply with Article 3.1. Several approaches to distributing the noncompliance risk are under discussion, ranging from pure issuer or pure buyer liability to hybrid approaches.[64] Suffice it to note for the purposes of this Article that, by assigning responsibility for issuer noncompliance, liability rules can not only help deter noncompliance but also provide an important interface between the mechanisms' transaction rules and the compliance regime.

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60. *See, e.g.*, DONALD M. GOLDBERG ET AL., CENTER FOR INT'L ENVTL. L./EURONATURA, BUILDING A COMPLIANCE REGIME UNDER THE KYOTO PROTOCOL 15-16 (1998) [hereinafter GOLDBERG ET AL., BUILDING A COMPLIANCE REGIME] (forwarding the possibility of requiring parties to maintain "compliance reserves") (visited May 12, 2000) <http://www.ciel.org/pubccp.html>; RICHARD BARON, INT'L ENERGY AGENCY, AN ASSESSMENT OF LIABILITY RULES FOR INTERNATIONAL GHG EMISSIONS TRADING 28-29 (1999) (same) (visited May 12, 2000) <http://www.oecd.org/env/cc/freedocs.htm#emis3>.

61. *See* BARON, *supra* note 60, apps. 2-3 at 29-32, 40-41.

62. Unless otherwise specified, the terms "issuer" and "buyer," as used in this Article, refer to protocol parties. In recent proposals, the term "issuer" has replaced the narrower term "seller."

63. *See, e.g.*, BARON, *supra* note 60 (reviewing the liability issue); SUZI KERR, RESOURCES FOR THE FUTURE, CLIMATE ISSUE BRIEF NO. 15, ENFORCING COMPLIANCE: THE ALLOCATION OF LIABILITY IN INTERNATIONAL GHG EMISSIONS TRADING AND THE CLEAN DEVELOPMENT MECHANISM (1998) (same) (visited May 12, 2000) <http://www.rff.org/environment/climate.htm>.

64. Under a pure issuer liability system, the units sold would remain valid notwithstanding the issuer's noncompliance; the buyer could use these units to meet its commitments under Article 3. Under a pure buyer liability system, units acquired could lose validity if the issuer is subsequently found to be in noncompliance, which, in turn, could bring the buyer into noncompliance. Under a hybrid (buyer-issuer) liability approach, units could also be invalidated, potentially bringing both issuer and buyer into noncompliance, depending on how the system is designed; and under a joint buyer-issuer approach, both parties would be jointly liable. For an overview on all of these approaches and their relative strengths and weaknesses, see BARON, *supra* note 60; KERR, *supra* note 63; DONALD M. GOLDBERG ET AL., CENTER FOR INT'L ENVTL. L./EURONATURA, RESPONSIBILITY FOR NON-COMPLIANCE UNDER THE KYOTO PROTOCOL'S MECHANISMS FOR COOPERATIVE IMPLEMENTATION (1998) (visited May 12, 2000) <http://www.ciel.org/pubccp.html>; Werksman, *Compliance*, *supra* note 38, at 84-89.

4. Inventory and Reporting Commitments

A strong and transparent monitoring and reporting regime is another essential element of the protocol compliance system, both with respect to compliance with protocol commitments and with respect to the operation and integrity of the Kyoto mechanisms. The information generated through the inventories assists parties in recognizing at an early stage potential compliance problems they may face and in determining what measures may be required to prevent noncompliance. Transparent information about parties' performance can also have deterrent effects. Finally, reliable and comprehensive factual information is a prerequisite for, and facilitates, compliance assessment.

Article 5.1 of the protocol requires Annex I parties to have in place, by 2007, a national system for the estimation of anthropogenic emissions by sources and removals by sinks of greenhouse gases.[65] Guidelines for such national systems, which are to incorporate methodologies accepted by the Intergovernmental Panel on Climate Change (IPCC), are to be adopted by the COP/MOP at its first session.[66] The national monitoring systems to be established pursuant to Article 5 are intended to facilitate the production by each Annex I party of an annual inventory of greenhouse gas emissions and removals. These inventories, in turn, will enable parties to meet their reporting commitments and, ultimately, will permit an assessment of parties' compliance with their emission reduction commitments. Inventory and reporting commitments, then, provide a crucial interface between the parties' implementation efforts and the compliance assessment process. The FCCC contains extensive reporting obligations (national communications) to allow for the evaluation of the emissions performance of individual Annex I parties.[67] Article 7 of the protocol is based on the provisions of the convention and regulates the collection and submission of supplementary information necessary to demonstrate, through annual inventories of greenhouse gas emissions and removals (Article 7.1) and through national communications (Article 7.2), compliance with the provisions of the protocol.[68] Guidelines for the preparation of

65. *See* Kyoto Protocol, *supra* note 3, art. 5.1; *supra* note 35 (discussing the term "sink").

66. *See* Kyoto Protocol, *supra* note 3, art. 5.1.

67. *See* FCCC, *supra* note 2, art. 12.1. The provision also imposes some reporting obligations upon all parties, Annex I and non-Annex I alike. *See id.*

68. *See* Kyoto Protocol, *supra* note 3, arts. 7.1-7.2. Note that, whereas Article 7.1 focuses on supplementary information necessary to ensure "compliance with Article 3," Article 7.2 appears broader by focusing on supplementary information necessary to demonstrate compliance

information too are to be adopted at the first session of the COP/MOP.[69]

B. Elements of the Compliance Regime

So far, this Article has surveyed provisions that contain or provide for elements of the protocol's broader compliance system, which can help promote compliance and prevent noncompliance. In addition, the Kyoto Protocol contains several provisions that outline the building blocks for the processes that will be needed to determine whether parties are in compliance or noncompliance, and to address instances of noncompliance.

1. In-Depth Review

The first step in the assessment of parties' performance is the regular review of information submitted by parties pursuant to Article 7 by expert teams.[70] According to Article 8.3, this in-depth review is to provide "a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of [the] Protocol."[71] Although this wording seems to indicate an open-ended scope of the review process, by virtue of the focus on reports submitted by Annex I parties, the review would appear to be limited to Annex I commitments.[72] The review teams are to prepare reports to the COP/MOP "assessing the implementation of the commitments of the Party and identifying any potential problems."[73] In addition, on the basis of these reports, the secretariat is to list "those questions of implementation" for further consideration by the COP/MOP.[74] It is important to note that the protocol tasks the expert review teams only with the identification of questions of implementation, not the determination of parties' compliance, let alone noncompliance, with their commitments. This terminology is designed to preserve the technical and factual focus of

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with (all) "commitments under this Protocol." This prompted some negotiators at COP-5 to argue that Article 7.2 is of lesser importance in the context of the compliance criteria that should be met for mechanism eligibility, i.e., mechanism participation should not be contingent upon reporting on the implementation of all commitments under the protocol. *See* Personal Communication with Alain Richer, Legal Officer, Dep't of Foreign Affairs and Int'l Trade Canada (Nov. 8 and 29, 1999) [hereinafter Personal Communication, Alain Richer] (on file with the author). On the role of reporting requirements in the mechanism rules, see *supra* note 56 and accompanying text.

69. *See* Kyoto Protocol, *supra* note 3, art. 7.4.
70. *See id.* art. 7.
71. *Id.* art. 8.3.
72. *See id.* art. 8.1.
73. *Id.* art. 8.3.
74. *Id.*

expert review and to clearly separate it from potentially sensitive and politicized compliance issues.

The role of the COP/MOP under Article 8 is to consider parties' national communications, the expert reviews thereof, and any questions of implementation compiled by the secretariat or raised by other parties.[75] Pursuant to this information, the COP/MOP is to "take decisions on any matter required for the implementation of [the] Protocol."[76]

2. The Multilateral Consultative Process

Article 16 of the Kyoto Protocol asks the parties to consider application to the protocol of the multilateral consultative process (MCP) under Article 13 of the FCCC.[77] The MCP is not yet in operation, as parties have been unable to agree upon the size and composition of the Multilateral Consultative Committee that is to run the process.[78] All other aspects of the MCP have been settled. It is to address issues raised with regard to the implementation of the convention in a "facilitative, cooperative, nonconfrontational, transparent, and timely manner" and on a "non-judicial" basis.[79] The Multilateral Consultative Committee would be a standing body of limited membership that would consider questions concerning a party's implementation.[80] Such questions could be raised by that party itself, a group of parties concerning their own implementation, another party or group of parties, or the COP.[81] The mandate of the committee revolves around clarification and resolution of questions and provision of advice.[82] Its work is to result in recommendations to the COP on measures to assist or bring about compliance by a party.[83]

The facilitative approach of the MCP reflects the nature of commitments in the FCCC. The MCP is not intended to produce "findings" of noncompliance but is aimed at bringing about parties' compliance with their convention obligations. By definition, this type

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75. *See id.* art. 8.5.
76. *Id.* art. 8.6.
77. *See id.* art. 16.
78. *Ad Hoc Group on Article 13*, U.N. FCCC, U.N. Doc. FCCC/AG13/1998/2 (1998), Decision 10/CP.4, annex [hereinafter MCP Doc.] (adopted by COP-4). At COP-5, these questions were again deferred, this time with a view to resolution, in the context of other issues, at COP-6. *See FCCC COP-5 Highlights: Thursday, 4 November 1999*, 12 Earth Negotiations Bulletin (IISD) 122 (Nov. 5, 1999) <http://www.iisd.ca/linkages/vol12/enb12122e.html>.
79. MCP Doc., *supra* note 78, ¶ 3.
80. *See id.* ¶¶ 8, 6.
81. *See id.* ¶ 5.
82. *See id.* ¶ 6.
83. *See id.* ¶ 12.

of approach cannot adequately address noncompliance with protocol commitments and, in particular, the target-related commitments of Annex I parties. Whether any application of a MCP-type process to the protocol is appropriate will depend on the noncompliance procedures that the parties end up developing pursuant to Article 18. To the extent that these encompass facilitative approaches, there may be no need for a protocol specific MCP.

3. Procedures and Mechanisms to Determine and Address Noncompliance

As noted at the outset, Article 18 calls upon the first meeting of the COP/MOP to approve appropriate and effective procedures and mechanisms to determine and address cases of noncompliance with the protocol.[84] This is to include "an indicative list of consequences, taking into account the cause, type, degree and frequency of noncompliance."[85] Article 18 also provides that procedures and mechanisms entailing binding consequences cannot be established through the adoption of the noncompliance mechanism itself.[86] Rather, they require additional action of the parties in the shape of an amendment to the Protocol.[87] This amendment requirement clarifies that binding consequences to noncompliance cannot be adopted simply by decision of the COP/MOP and thus, potentially, against the will of some parties or without involvement of their legislatures.[88] It does, however, confront the parties with a dilemma because an amendment to the protocol will bind only those parties that ratify it.[89]

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84. *See* Kyoto Protocol, *supra* note 3, art. 18.

85. *Id.*

86. *See id.*

87. *See id.*

88. Originally, this amendment requirement was inserted to address the concerns of some parties regarding their domestic separation of powers. For example, U.S. negotiators sought to ensure that binding consequences had to be ratified by the legislature, rather than agreed to by the executive branch. *See* PERSONAL COMMUNICATION WITH SUE BINIAZ, DEPUTY LEGAL ADVISER, OFFICE OF OCEANS, INT'L ENVTL. AND SCIENTIFIC AFFAIRS, U.S. DEP'T OF STATE (Nov. 29, 1999) (on file with the author). Arguably, given that decisions of a COP are not generally legally binding (a COP would have to be clearly authorized to adopt binding decisions), an amendment would be required even absent an explicit requirement. By contrast, some have argued that binding consequences could be adopted under other protocol provisions. *See* Werksman, *Compliance*, *supra* note 38, at 74. However, it is not clear that "binding consequences" could be established through decisions that flesh out protocol provisions (e.g., Articles 5, 7, 6, 12, and 17) that merely authorize the COP or the COP/MOP to elaborate principles, modalities, rules, or guidelines. For additional discussion on the legal status of COP decisions, see *id.* at 98-99; Jacob Werksman, *Conferences of Parties to Global Environmental Treaties*, *in* GREENING INTERNATIONAL INSTITUTIONS 55 (Werksman ed., 1996); and Yashida, *supra* note 10, at 118-21. *See also infra* note 168 (discussing the views of the parties on this point).

89. *See* Kyoto Protocol, *supra* note 3, art. 20.4.

This means that the current text of the protocol cannot guarantee that all parties will be exposed to binding consequences. Thus, if the noncompliance regime is to include any binding consequences, parties will have to agree upon a legal approach that avoids the amendment dilemma.

4. Dispute Settlement

Finally, according to Article 19 of the Kyoto Protocol, the FCCC's provisions on the settlement of disputes regarding the interpretation or application of the agreement are to be applied *mutatis mutandis* to the protocol.[90] Article 14 of the convention provides a standard menu of dispute settlement procedures, ranging from optional adjudication by the IJC or arbitration, to conciliation at the request of one party, albeit with nonbinding results.[91]

III. DEVELOPING A COMPLIANCE REGIME FOR THE KYOTO PROTOCOL

Up to this point, this Article has surveyed the commitments contained in the Kyoto Protocol and the procedural building blocks that it provides for the development of a compliance regime. Against this background, and through a review of the work of the JWG to date, the Article will now proceed to identify the key issues that must be resolved in the compliance negotiations. Possible elements of a compliance regime are then assembled into a model that, it is hoped, can serve to illustrate more concretely available options and attendant choices and compromises.

A. The JWG Process: Emerging Trends and Open Questions

The JWG convened for the first time during the SBI/SBSTA meetings in Bonn in May/June 1999.[92] In preparation for the JWG process, parties had been asked to submit to the secretariat preliminary views on issues related to compliance under the Kyoto Protocol.[93] These submissions, as well as the discussions within the

90. *See id.* art. 19.

91. *See* FCCC, *supra* note 2, art. 14.

92. *See June 1999 JWG Report*, *supra* note 14.

93. *See Procedures Add.1*, *supra* note 55; *Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol*, U.N. FCCC, Subsidiary Body for Scientific and Technological Advice, Subsidiary Body for Implementation, 10th Sess., U.N. Doc. FCCC/SB/1999/MISC.4 (1999). Preliminary views were submitted by Australia; Canada; Germany (on behalf of the European Community (EC) and its member states and Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovakia, and Slovenia); New

JWG, indicated that the views of most parties were of very preliminary nature. Thus, much of the JWG's time was spent on clarifying its mandate and developing a work program.[94] Nonetheless, initial views were expressed on the various elements that make up the broader compliance system, on the overall objectives of the compliance system, on aspects of the design of a compliance system, and on the range of possible consequences to noncompliance.[95] Based on these views, the secretariat developed a list of "Questions Related to a Compliance System under the Kyoto Protocol" and parties were invited to respond to these questions in further submissions on compliance.[96]

The questionnaire, containing reasonably specific questions relating to "general issues," "institutional issues" and "issues related to consequences of noncompliance,"[97] proved to be a useful tool in the preparation for the JWG's meetings during COP-5. Not only did it prompt parties to engage in greater detail and depth with compliance issues,[98] it also provided the material for a note by the JWG cochairs that outlined elements related to objectives, coverage, and functions of a compliance system, including possible institutional and procedural arrangements.[99] Together with the parties' submissions,

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Zealand; Samoa on behalf of the Alliance of Small Island States (AOSIS); South Africa, Switzerland; and the United States.

94. *See June 1999 JWG Report*, *supra* note 14.

95. *See id.* ¶¶ 5-11.

96. *Id.* ¶ 12(b), Annex I.

97. *Id.*

98. This engagement was crucial, in particular, to bringing about the active involvement of developing country parties in the development of the compliance system. Up until the first JWG meetings, only AOSIS and South Africa had developed views on compliance. This enabled hard line delegations in the developing country alliance of the "Group of 77" (G-77) to stall progress in the compliance discussions on the grounds that most developing country delegations had not had opportunity to develop views and, therefore, were unable to participate in the JWG's work. The questionnaire, developed on the basis of questions submitted by South Africa on behalf of the G-77 and China, was thus a key step in moving the process forward. Another important step on the way to COP-5 was an "informal exchange of views and information on compliance under the Kyoto Protocol," held in Austria from October 6-7, 1999. *See Informal Exchange of Views and Information on Compliance Under the Kyoto Protocol: 6-7 October 1999*, 12 Earth Negotiations Bulletin (IISD) 111 (Oct. 9, 1999) <http://www.iisd.ca/linkages/download/asc/enb12111e.txt>. The event included presentations on compliance regimes existing under other conventions and bodies (e.g., the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Long-Range Transboundary Air Pollution, and the International Labour Organization and World Trade Organization) and a session providing an overview on experiences with different elements of existing compliance systems.

99. *See Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, Report of the Joint Working Group on Compliance*, U.N. FCCC, Subsidiary Body for Scientific and Technological Advice, Subsidiary Body for Implementation, 11th Sess., at 2, U.N. Doc. FCCC/SB/1999/7 (1999) [hereinafter *Elements*].

and a synthesis of these submissions prepared by the secretariat,[100] the "elements" document served to highlight areas in which parties' views are converging, as well as issues on which a very broad spectrum of perspectives exists. Additional information can be gleaned from the preliminary schematic outlines (charts) of the potential steps in a protocol compliance regime that some parties presented during the JWG deliberations.[101]

COP-5 provided clear signals that the compliance discussions are gaining momentum. The initial resistance of some "Group of 77" (G-77) delegations to fast-paced marching orders for the JWG was overcome and a decision was adopted that calls upon the JWG to complete its work on the compliance system by COP-6.[102] The JWG requested that the Co-Chairs further develop the aforementioned "elements" document, with a view to using it "a basis for the negotiation of a compliance system under the Kyoto Protocol at the twelfth sessions of the subsidiary bodies."[103] In early 2000, fifteen

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100. For the submissions from parties, see *Submissions*, *supra* note 55, and *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, Submissions of the Parties*, *Addendum 1*, U.N. FCCC, Subsidiary Body for Scientific and Technological Advice, Subsidiary Body for Implementation, 11th Sess., U.N. Doc. FCCC/SB/1999/MISC.12/Add.1 (1999) [hereinafter *Submissions Add.1*]. Submissions were made by Australia, Canada, China, Finland (on behalf of the EC and its member states and Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovakia and Slovenia) [hereinafter EC et al.], Japan, Korea, New Zealand, Poland, Samoa (on behalf of AOSIS), Saudi Arabia, Switzerland, and the United States. For the synthesis of submissions, see *Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, Report of the Joint Working Group on Compliance, Addendum 1*, U.N. FCCC, Subsidiary Body for Scientific and Technological Advice, Subsidiary Body for Implementation, 11th Sess., U.N. Doc. FCCC/SB/1999/7/Add.1 (1999).

101. Such schematic outlines were circulated by Australia (Oct. 28, 1999), the EU (Oct. 27, 1999), Japan (undated), Samoa (undated), and the United States (July 30, 1999) [hereinafter collectively Charts] (on file with the author). The U.S. chart is appended to its submission. *See Submissions*, *supra* note 55, at 81.

102. *See COP-5 Report*, *supra* note 6, Decision 15/CP.5. COP-5 directed the JWG to:

> [C]ontinue to make substantial progress for the purpose of completing its work . . . and to provide a report on its findings to the Conference of the Parties at its sixth session . . . so as to enable the Conference of the Parties to adopt a decision on a compliance system under the Kyoto Protocol at its sixth session.

Id. This wording goes beyond Decision 8/CP.4, pursuant to which steps were to be taken by COP-5 with a view to completing the work on compliance by COP-6. *See COP-4 Report*, *supra* note 6, Decision 8/CP.4. It represents a delicate compromise between wording sought by many parties that would have had the JWG "complete its work" before COP-6 and the repeated demands of China, Nigeria, and Saudi Arabia that the decision ask the JWG to make "substantial progress" by COP-6. *See FCCC COP-5 Highlights: Saturday, 30 October 1999*, 12 Earth Negotiations Bulletin (IISD) 118 (Nov. 1, 1999) <http://www.iisd.ca/linkages/vol12/enb12118e.html>.

103. *Report of the Joint Working Group on Compliance on its Work During the Eleventh Sessions of the Subsidiary Bodies*, U.N. FCCC, ¶ 6(d), U.N. Doc. FCCC/SB/1999/CRP.7 (1999). The JWG invited Parties to submit any further proposals on compliance by January 31, 2000, and confirmed that a workshop on matters relating to a compliance system under the Kyoto Protocol

parties including several G-77 delegations, submitted further views on compliance.[104] On the basis of the various documents produced so far and the JWG's deliberations at COP-5, it is possible to identify several issue clusters on which the debate will focus as the JWG is poised to progress from stock-taking work to the difficult task of negotiating a compliance regime that is both credible and acceptable to a large majority of parties.[105]

1. The Role of Facilitative Approaches

There appears to be general agreement among parties that the Kyoto Protocol compliance system must seek to promote implementation and prevent noncompliance, including through opportunities being provided to parties to bring themselves into compliance and assistance offered to them in this regard.[106] Thus, parties agree that effective facilitative features must be built into the compliance system.[107] However, views diverge significantly with respect to the extent and manner in which facilitative approaches are to be applied. All parties appear to agree that facilitative approaches would be appropriate in the context of the Kyoto Protocol's "softer" commitments including, in particular, the commitments of non-Annex

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was needed and would be convened by the Co-chairs in March 2000. *See id.* In addition, on an informal basis, it was agreed that a document that had been prepared by the Co-chairs during the JWG session at COP-5, and which had been circulated informally among parties, would be used to provide the parties with ideas for further thinking and informal discussion on compliance issues. *See COP-5 Negotiations, Wednesday, November 3, 1999* (visited May 12, 2000) <http://www.iisd.ca/climate/cop5/negotiations/nov3n.html>. This document, dated November 3, 1999, is entitled "Co-Chairs' initial thoughts on procedures and mechanisms relating to a compliance system under the Kyoto Protocol" and is on file with the author. For a summary of the proceedings of the aforementioned workshop, held March 1-3, 2000, in Bonn, see *Summary of the Workshop on Compliance Under the Kyoto Protocol: 1-3 March 2000*, 12 Earth Negotiations Bulletin (IISD) 124 (Mar. 6, 2000) <http://www.iisd.ca/vol12/enb12124e.html>.

104. *See Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol*, U.N. FCCC, Subsidiary Body for Scientific and Technological Advice, Subsidiary Body for Implementation, 12th Sess., U.N. Doc. FCCC/SB/2000/MISC.2 (prov. ed. dated Feb. 17, 2000) [hereinafter *February 2000 Submissions*] (visited May 12, 2000) <http://www.unfccc.de/wnew/sbsc2wp.pdf>. Submissions were made by: Argentina, Australia, Brazil, Canada, China, India, Japan, New Zealand, Poland (on behalf of the Czech Republic, Hungary, Slovakia and Slovenia), Portugal (on behalf of the EC, its member states and Bulgaria, Estonia, Lithuania and Romania), Samoa (on behalf of AOSIS), Saudi Arabia, South Africa, Switzerland, and the United States.

105. The following discussion does not purport to be an exhaustive exploration of outstanding issues, which would be beyond the scope of this Article. The discussion relies upon the submissions made in September 1999, *see Submissions*, *supra* note 55, and schematic outlines circulated at COP-5, *see* Charts, *supra* note 101. While the February 2000 submissions introduce some new points, the views expressed therein largely remain in line with the following survey. *See February 2000 Submissions*, *supra* note 104.

106. *See Elements*, *supra* note 99, ¶ 4.

107. *See id.* ¶ 14.

I parties.[108] The real debate about the relative roles of facilitation and enforcement, then, arises with respect to "hard," target-related commitments of, at least for the time being, Annex I parties.[109] A range of approaches were advocated at COP-5:

- Facilitation should be the primary approach to all instances of noncompliance, including noncompliance with target-related commitments; only once facilitative measures fail to bring about compliance, should enforcement measures be considered.[110]
- Parties might also be given a "grace period" within which to correct implementation problems and bring about compliance.[111]
- Facilitative approaches should be made available to parties depending on the cause of their noncompliance.[112]
- While facilitative and "help-desk" approaches should be available, noncompliance with certain commitments should always be channeled towards predetermined consequences (e.g., loss of eligibility for Kyoto mechanisms, or deduction of emissions in excess of assigned amount from the assigned amount of the subsequent commitment period).[113]

2. The Scope of the Compliance Regime

The question of how to deal with the differing nature of commitments in the Kyoto Protocol has also been prominent in the parties' deliberations.[114] The main focus of this debate has been on the differences between the "hard," target-related, commitments of Annex I parties and the "soft" commitments of non-Annex I parties. While there seems to be agreement that the compliance regime should

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108. *See id.*

109. *See id.* ¶ 17.

110. *See Submissions*, *supra* note 55, at 8 (Australia; in the context of the tasks of a compliance body), 25 (EC et al.), 27, 29 (Japan), 52-53 (Saudi Arabia; envisioning a first stage involving an MCP and then a noncompliance stage); *see also* Charts, *supra* note 101 (Japan and Australia).

111. *See Submissions*, *supra* note 55, at 5 (Australia), 32-33 (New Zealand), 35 (Poland), 108 (United States); *see also* Charts, *supra* note 101 (Australia).

112. *See Submissions*, *supra* note 55, at 9 (Australia), 20 (China), 29 (Japan).

113. *See id.* at 65, 71-72 (United States), 81 (U.S. chart).

114. Relevant differences include: (1) the "soft" and "hard" nature of commitments (e.g., QELRCs under Article 3.1 as opposed to policy-related commitments under Article 10); (2) the "collective" and "individual" nature commitments (e.g., the overall Annex I emission reduction commitment as opposed to individual QELRCs); and (3) the differing time frames for compliance (e.g., annual inventory and reporting commitments as opposed to QELRCs subject to a five-year commitment period). *See Elements*, *supra* note 99, ¶ 8.

apply to all commitments, notwithstanding the fact that target-related commitments are likely to be of greatest concern,[115] views vary significantly on how their differing nature is to be accommodated procedurally:

- Some parties advocate a comprehensive approach to all commitments, through one process and administered by one body. The outcome of the process, however, might differ depending on the type of commitment at issue.[116]
- Others call for separate "tracks" for soft (non-Annex I) and hard (Annex I) commitments, respectively. In general terms, a soft track is envisaged for soft commitments, while a harder track is contemplated for target-related commitments.[117]

3. The Spectrum of Consequences and Approaches to Consequences

Not surprisingly, many parties are reluctant, at this relatively early stage in the deliberations, to fully reveal their views on whether the consequences to noncompliance with the Kyoto Protocol should include penalties. Nonetheless, a number of points can be drawn from the parties' submissions and from the JWG deliberations. Parties are contemplating a spectrum of potential consequences to noncompliance, ranging from advice and assistance, over cautions or suspension of treaty rights (including eligibility to participate in the Kyoto mechanisms) to penalties.[118] There appears to be agreement that, if there were to be penalties, they would be appropriate only for noncompliance with target-related commitments. Indeed, a large number of parties have noted that at least some enforcement measures

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115. *See id.* ¶ 7.

116. *See Submissions*, *supra* note 55, at 22, 23 (EC et al.), 41-42 (Samoa), 52-53 (Saudi Arabia; envisaging a first stage involving an MCP and then a noncompliance stage); *see also* Charts, *supra* note 101 (EU and Samoa).

117. *See Submissions*, *supra* note 55, at 4 (Australia), 68, 71-72 (United States), 80 (U.S. chart); *see also* Charts, *supra* note 101 (Australia). Note, however, that the approach of the EU, as represented in its chart, comes close to a "separate track" model, albeit that the tracks seem to be housed in one overarching system. *See* Charts, *supra* note 101 (EU). In its February 2000 submission, the EU explicitly argues for the compliance body to have "facilitative and enforcement functions which should be exercised in two separate branches." *February 2000 Submissions*, *supra* note 104, at 65.

118. *See Elements*, *supra* note 99, ¶¶ 23-24. For an overview on the range of possible "consequences," see Werksman, *Compliance*, *supra* note 38, at 93-97, and GLEN WISER & DONALD M. GOLDBERG, CENTER FOR INT'L ENVTL. L./WORLD WILDLIFE FUND, RESTORING THE BALANCE: USING REMEDIAL MEASURES TO AVOID AND CURE NON-COMPLIANCE UNDER THE KYOTO PROTOCOL *passim* (2000) [hereinafter WISER & GOLDBERG, RESTORING THE BALANCE] (visited May 12, 2000) <http://www.ciel.org/pubccp.html>.

might be required to ensure implementation of target-related commitments. Some support has been expressed for the idea of deducting, at a "penalty rate,"[119] emission units emitted in excess of a party's assigned amount in one commitment period from its assigned amount in the subsequent period.[120] Some support, from non-Annex I countries, has been expressed for the use of financial penalties.[121] No parties have spoken in favor of reliance on trade measures to enforce compliance.[122] Finally, a number of questions relating not so much to individual types of consequences, but to the regime's overall approach to consequences will need to be resolved:

- Should the full spectrum of consequences, ranging from facilitation to enforcement, be available in all cases of noncompliance with target-related commitments, or should noncompliance with certain commitments (specifically, Article 3.1) always be exposed to penalties?[123] In the latter case, should parties be able to choose from a range of penalties?[124]

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119. This means that additional units would be deducted from the party's assigned amount.

120. During the JWG deliberations, interventions in support of exploring the idea of a deduction of excess tons were made by Australia, Canada, New Zealand, and the United States. *See FCCC COP-5 Highlights: Friday, 29 October 1999*, 12 Earth Negotiations Bulletin (IISD) 117 (Oct. 30, 1999) <http://www.iisd.ca/linkages/vol12/enb12117e.html>. For discussion of various approaches to the deduction of excess tons, see WISER & GOLDBERG, RESTORING THE BALANCE, *supra* note 118, at 18-22.

121. *See Submissions*, *supra* note 55, at 20-21 (China; supporting financial penalties for "serious" noncompliance, such as with Article 3 commitments), 57-58 (Saudi Arabia); *Submissions Add.1*, *supra* note 100, at 7 (Korea). Brazil and Iran supported financial penalties as a last resort. *See FCCC COP-5 Highlights: Friday, 29 October 1999*, 12 Earth Negotiations Bulletin (IISD) 117 (Oct. 30, 1999) <http://www.iisd.ca/linkages/vol12/enb12117e.html>. Several Annex I parties have explicitly rejected the idea of financial penalties. *See, e.g.*, *Submissions*, *supra* note 55, at 9 (Australia), 39 (Poland). The exception is Switzerland, which considers that financial penalties should be used "in very serious cases of repeated non-compliance." *Submissions*, *supra* note 55, at 64. Financial penalties, including payments into a compliance fund, have also been advocated by some nongovernmental groups (NGOs), such as the Center for International Environmental Law. *See* GOLDBERG ET AL., BUILDING A COMPLIANCE REGIME, *supra* note 60, at 28-30. For a discussion of various forms of financial penalties, see WISER & GOLDBERG, RESTORING THE BALANCE, *supra* note 118, at 17.

122. *See* Personal Communication, Alain Richer, *supra* note 68. However, trade measures have been advocated by some NGOs, such as the Center for International Environmental Law. *See* GOLDBERG ET AL., BUILDING A COMPLIANCE REGIME, *supra* note 60, at 28-30.

123. *See Submissions*, *supra* note 55, at 71, 76 (United States), 80 (U.S. chart).

124. Australia introduced the idea of a "menu of consequences" (encompassing payments into a compliance fund, deduction of excess tons, or no penalty) from which parties, once found to be in noncompliance, could choose. *See* Personal communication, Alain Richer, *supra* note 68; *see also Submissions*, *supra* note 55, at 9 (Australia); *FCCC COP-5 Highlights: Friday, 29 October 1999*, 12 Earth Negotiations Bulletin (IISD) 117 (Oct. 30, 1999) <http://www.iisd.ca/linkages/vol12/enb12117e.html>.

- To what extent should the consequences to noncompliance be predetermined and/or "automatic:"[125] Should there be an indicative list that predetermines the range of possible consequences but leaves the decision on appropriate consequences in individual cases to a compliance body?[126] Or should specific consequences attach to specific types of noncompliance?[127] If the latter, should the consequences follow automatically on a finding on noncompliance, or should the compliance body have discretion to determine whether the consequence is appropriate in an individual case?[128]

4. Institutional Requirements of the Compliance Regime

All parties agree that compliance assessment cannot solely rely upon the in-depth review by expert review teams operating under Article 8.[129] At least one additional body will be required to undertake political and legal assessment of compliance, arrive at findings of compliance or noncompliance, and determine consequences to noncompliance.[130] Parties also appear to agree that it is, at the very least, impractical for the COP/MOP to exercise all of these functions,[131] and that the COP/MOP might be most appropriately involved at the end of the compliance process.[132] Beyond these points

125. *See Elements*, *supra* note 99, ¶ 25.

126. *See Submissions*, *supra* note 55, at 16, 20 (China), 42-43 (Samoa; noting that there may be benefits to identifying in advance the range of potential consequences to noncompliance); *Submissions Add.1*, *supra* note 100, at 2, 7 (Korea); *see also* Charts, *supra* note 101 (Japan).

127. *See Submissions*, *supra* note 55, at 32, 34 (New Zealand; consequences only for noncompliance with the Kyoto mechanisms), 35, 39 (Poland; automatic consequences could be imagined for some, precisely described, breaches), 76 (United States; consequences for target related commitments).

128. *See Submissions*, *supra* note 55, at 9 (Australia; expressing concerns about automaticity), 20 (China; expressing concerns about automaticity), 25 (EC; supporting automaticity for certain noncompliance situations, but indicating the need for a graduated and proportionate approach), 48 (Samoa; reserving its position until more details emerge), 64 (Switzerland; expressing concerns), 76-77 (United States; supporting automatic penalties with, if at all, limited discretion of a compliance body); *Submissions Add.1*, *supra* note 100, at 7, 8 (Korea; supporting automaticity in a limited range of cases, so long as special circumstances can be considered).

129. *See supra* text following note 74 (discussing the importance of distinguishing "questions of implementation" and "compliance issues").

130. *See Elements*, *supra* note 99, ¶ 20.

131. *See, e.g.*, *Submissions*, *supra* note 55, at 70 (United States). Saudi Arabia, however, appeared to argue that the COP/MOP should be involved "'at the beginning, at the end and in the middle' of the compliance process." *FCCC COP-5 Highlights: Thursday, 28 October 1999*, 12 EARTH NEGOTIATIONS BULLETIN (IISD) 116 (Oct. 29, 1999) <http://www.iisd.ca/linkages/vol12/enb12116e.html>.

132. *See* Personal Communication, Alain Richer, *supra* note 68.

of convergence, however, there is little agreement on whether one or more bodies would be needed, what functions and composition such bodies should have, who should be able to bring noncompliance issues to such bodies, and what, if any, the role of the COP/MOP should be.

- Some parties are concerned about the proliferation of bodies and argue that one body should be able to address all noncompliance issues. Thus, according to some, no institutional separation is needed to deal with hard as opposed to soft commitments, facilitation as opposed to enforcement, Kyoto mechanism rules as opposed to protocol commitments, or assessment of compliance as opposed to final decisions.[133] Others see a need for separating at least some of these functions and thus for establishing more than one body.[134]
- Many parties appear to agree that a relatively small body, composed of legal and technical experts, would be needed at the core of the noncompliance procedures.[135] Most seem to assume that a standing body would be required.[136] Consensus also seems to be emerging that members, while nominated by governments, should act in their personal capacities.[137] An array of specific questions, however, remain to be resolved. Should membership be determined in accordance with equitable geographic distribution,[138] or is a different allocation of seats (e.g., equal numbers of Annex I and non-Annex I

133. *See Submissions*, *supra* note 55, at 36 (Poland; arguing for one body).

134. Although the parties' views on the need for institutional separation tend not to be expressed explicitly, they can be deducted from views expressed on other issues. *See, e.g.*, *supra* note 117 and accompanying text (discussing parties' views on the need for separate facilitative- and enforcement-oriented tracks). *But see Submissions*, *supra* note 55, at 68, 71 (United States). The United States argues that facilitative and enforcement functions must be "dealt with 'by two different sets of people.'" *FCCC COP-5 Highlights: Thursday, 28 October 1999*, 12 Earth Negotiations Bulletin (IISD) 116 (Oct. 29, 1999) <http://www.iisd.ca/linkages/vol12/enb12116e.html>. More explicit views are expressed with respect to the need for separate procedures and bodies for Kyoto mechanism issues. *See Submissions*, *supra* note 55, at 6 (Australia; citing potential need for separate mechanism procedure), 17 (China; supporting separate mechanism procedure); *see also* Charts, *supra* note 101 (Samoa; desiring a separate "Eligibility Committee" to review mechanism-related issues, including restoration of eligibility).

135. *See Elements*, *supra* note 99, ¶ 20.

136. *See id. But see Submissions*, *supra* note 55, at 29 (Japan; calling, for cost reasons, for an ad hoc body), 56 (Saudi Arabia).

137. *See February 2000 Submissions*, *supra* note 104, at 7 (Argentina), 14 (Australia), 26 (Brazil), 30 (Canada), 42 (China), 42 (India), 88 (Switzerland).

138. Some parties have argued in favor of equitable distribution. *See Submissions*, *supra* note 55, at 16, 19 (China), 38 (Poland), 56 (Saudi Arabia).

representatives) appropriate?[139] Would this body be empowered to reach final decisions on noncompliance or even consequences,[140] or would it make recommendations to the COP/MOP?[141] If the compliance body was empowered to reach decisions, should these decisions be subject to appeal to an adjudicative body?[142]

- A large number of parties appear to agree that parties should be able to bring compliance issues to the compliance body, either with respect to their own compliance or with regard to other parties' performance.[143] There was a range of views, however, on whether or not parties should be able to raise compliance issues even where an in-depth review of a party's performance had not raised any questions of implementation.[144] Similarly, it is not clear whether parties themselves should be able to turn to the compliance body when they already are in noncompliance, or only when they are looking to avoid noncompliance. Further, while some parties felt that questions of implementation raised by the expert review should automatically be referred to a compliance body,[145] others thought the COP/MOP could undertake the referral,[146] and yet others suggested that referral

139. Annex I parties have so far avoided explicitly addressing this issue. *But see Submissions*, *supra* note 55, at 38 (Poland). Australia and the United States indicated that different distribution principles might apply depending upon the article under review. *See FCCC COP-5 Highlights: Friday, 29 October 1999*, 12 EARTH NEGOTIATIONS BULLETIN (IISD) 117 (Oct. 30, 1999) <http://www.iisd.ca/linkages/vol12/enb12117e.html>.

140. *See Submissions*, *supra* note 55, at 24, 26 (EC et al.; implying that the compliance body would decide and provide reports to the COP/MOP); *see also* Charts, *supra* note 101 (EU; indicating only a policy-guidance role for the COP/MOP), (Samoa; indicating that the compliance body would determine consequences, subject to an appeal for Article 3 commitments).

141. *See Submissions*, *supra* note 55, at 63 (Switzerland).

142. *See* Charts, *supra* note 101 (Samoa; supporting quasi-judicial appeal of imposition of binding consequences), (Japan; supporting "appeal" to the COP/MOP); *see also Submissions Add.1*, *supra* note 100, at 3 (Korea; supporting "appeal" to the COP/MOP).

143. *See Elements*, *supra* note 99, ¶ 18; *FCCC COP-5 Highlights: Thursday, 28 October 1999*, 12 EARTH NEGOTIATIONS BULLETIN (IISD) 116 (Oct. 29, 1999) <http://www.iisd.ca/linkages/vol12/enb12116e.html>.

144. *See Submissions*, *supra* note 55, at 24 (EC et al.; in favor of raising compliance issues absent questions of implementation). Others, such as Canada and Australia, asked whether this would undermine the position of the review teams, which are tasked with thorough reviews. *See* Personal communication, Alain Richer, *supra* note 68.

145. *See Submissions*, *supra* note 55, at 23 (EC et al.).

146. *See id.* at 55 (Saudi Arabia).

guidelines and criteria might be required.[147] As to the secretariat's role, many parties argued that it should not be able to trigger a noncompliance procedure since this could compromise its position as the neutral administrative and facilitative core of the FCCC system.[148] A small number of parties suggested that the COP/MOP too should be able to bring forward compliance questions,[149] others expressed concern that this would politicize the compliance regime and reduce its ability to expeditiously address compliance issues.[150]

- Nongovernmental groups (NGOs) at COP-5 argued that NGOs and members of civil society too should be able to raise questions about a party's performance.[151]
- Several parties noted that the COP/MOP should have a general oversight function and provide policy guidance to the (non-) compliance process.[152] A majority of parties argued that the COP/MOP should retain final authority over all decisions on noncompliance and/or consequences.[153]

5. Linkages to Dispute Settlement

As noted earlier, according to Article 19 *mutandis* of the protocol, the FCCC's provisions on dispute settlement are to be applied *mutatis* to the protocol.[154] However, the dispute settlement options outlined in the convention are unlikely to fit the context of the

147. *See FCCC COP-5 Highlights: Thursday, 28 October 1999*, 12 EARTH NEGOTIATIONS BULLETIN (IISD) 116 (Oct. 29, 1999) <http://www.iisd.ca/linkages/vol12/enb12116e.html>. (indicating that Australia and the United States called for such guidelines).

148. *See id.* (indicating that Canada, China, the EU, Iran, Japan, South Africa and the United States had expressed this view). *But see Submissions Add.1*, *supra* note 100, at 5, 6 (Korea).

149. *See FCCC COP-5 Highlights: Thursday, 28 October 1999*, 12 EARTH NEGOTIATIONS BULLETIN (IISD) 116 (Oct. 29, 1999) <http://www.iisd.ca/linkages/vol12/enb12116e.html>. (indicating that China, the Russian Federation and Switzerland had expressed this view).

150. *See id.*

151. *See COP-5 Report*, *supra* note 6; *COP-5 Negotiations, Friday, November 5, 1999* (visited May 12, 2000) <http://www.iisd.ca/climate/cop5/negotiations/index.html>.

152. *See FCCC COP-5 Highlights: Thursday, 28 October 1999*, 12 EARTH NEGOTIATIONS BULLETIN (IISD) 116 (Oct. 29, 1999) <http://www.iisd.ca/linkages/vol12/enb12116e.html>.

153. *See* Personal Communication, Alain Richer, *supra* note 68; *see also FCCC COP-5 Highlights: Friday, 29 October 1999*, 12 EARTH NEGOTIATIONS BULLETIN (IISD) 117 (Oct. 30, 1999) <http://www.iisd.ca/linkages/vol12/enb12117e.html>.

154. *See* Kyoto Protocol, *supra* note 3, art. 19. Thus, unlike in the case of Article 16 on the application of the convention's MCP, the parties are not free to decide to modify the dispute settlement process "as appropriate" for the protocol.

protocol compliance regime.[155] To the extent, therefore, that parties have been suggesting that the protocol noncompliance procedure could have "adjudicative" components,[156] possibly in the context of an appeal of a compliance body's decisions, the role of the dispute settlement procedure must be clarified. At this point, a number of parties express a view that is consistent with the approach taken under most existing MEAs: dispute settlement pursuant to Article 19 should be separate from noncompliance proceedings and each process should be without prejudice to the other.[157] Some parties seem to see a role for a form of dispute settlement in the context of the Kyoto mechanisms, which might give rise to "bilateral" disputes that could usefully be resolved through binding dispute settlement.[158] Other parties have indicated that some form of dispute settlement might become part of the noncompliance process by providing a forum for appeals that would lead to final, binding decisions.[159]

6. Accommodating Developing Country Concerns

As previously noted, there seems to be agreement among parties that existing non-Annex I party commitments are most appropriately addressed through a facilitative process, geared to providing advice and, possibly, assistance. A more delicate question is whether the compliance system would have to make special provision for developing countries if and when they take on emission reduction or limitation commitments. Options for such accommodation have not been explicitly addressed in the JWG process. This is in large part due to the fact that the majority of developing countries currently resist, at least officially, the very idea of emission-related commitments. However, some non-Annex I parties have implicitly raised the question of accommodation by arguing that the compliance system should be based upon the principle of common but

155. *See infra* note 203 and accompanying text.

156. *See Submissions*, *supra* note 55, at 23 (EC et al.; indicating that "the circumstances of the Kyoto Protocol may justify taking a different approach" from the ordinary separation between compliance regimes and dispute settlement), 36 (Poland); *Submissions Add.1*, *supra* note 100, at 4 (Korea).

157. *See Submissions*, *supra* note 55, at 7 (Australia), 12 (Canada), 53-54 (Saudi Arabia); *Submissions Add.1*, *supra* note 100, at 4 (Korea).

158. *See Submissions*, *supra* note 55, at 34 (New Zealand; envisaging a "formal dispute settlement process, set up under Article 18" for Kyoto mechanism issues not resolved by automatic consequences, and for parties not using the mechanisms).

159. *See* Charts, *supra* note 101 (Australia; including a "possible appellate body"), (Samoa; including an "*ad hoc* appeal body" for "quasi-judicial appeals of imposition of binding penalties").

differentiated responsibility.[160] Annex I parties, by contrast, have questioned the relevance of this principle in the context of the noncompliance procedures.[161]

B. Towards a Balance Between Facilitation and Enforcement

1. Shaping a Compliance Regime: Initial Assumptions

On the basis of the issues and initial views surveyed in the preceding section, and in light of the key features of the Kyoto Protocol as identified earlier in this Article, it is possible to assemble a basic model of a compliance regime. This model is intended neither to second guess the various schematic outlines of the protocol compliance regime that parties presented during COP-5,[162] nor to predict what a protocol compliance regime will look like. Rather, the purpose of compiling key issues and possible elements of a compliance regime into a model is to illustrate more concretely how a balance could be struck between sovereignty concerns and the need for an assertive compliance regime, and how facilitative and enforcement-oriented approaches could be built into a compliance regime. Further, the model is offered in the hope that it can help render more visible the difficult choices that must be confronted, as well as the gaps, inconsistencies and compromises that are likely to result. Before proceeding, some basic assumptions that underlie the model presented here should be stated.

It seems safe to predict that the Kyoto Protocol noncompliance regime will follow in the footsteps of its predecessors under other MEAs and place significant weight on facilitative elements. However, given that the Kyoto Protocol places unique demands on its noncompliance regime, it is also to be expected that this regime will break new ground in including enforcement features. That said, it is an equally safe prediction that the question of penalties will be the most fought over issue in the development of the Kyoto Protocol compliance regime. The issue will be crucial not only to agreeing on

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160. *See Submissions*, *supra* note 55, at 15 (China), 49 (Saudi Arabia); *Submissions Add.1*, *supra* note 100, at 2 (Korea). For discussions of the concept of common but differentiated responsibility in the context of the climate regime, see Paul G. Harris, *Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L.J. 27 (1999) and Mohssen Massarrat, *Nachhaltigkeit, Nord-Süd-Verteilungskonflikte und Lösungsstrategien im Internationalen Klimaschutz*, 72 DIE FRIEDENS-WARTE 45 (1998).

161. *See Submissions*, *supra* note 55, at 4 (Australia), 66 (United States; arguing that the principle was relevant in establishing differing levels of commitments, as reflected in the FCCC and the Kyoto Protocol; once a differentiated commitment was violated, however, such violations had to receive equal treatment).

162. *See supra* note 101 and accompanying text.

the design of other aspects of the compliance system, but will also become entangled in the bargaining over flexibility in meeting the protocol's emission reduction commitments. On balance, while it is by no means clear that the Kyoto Protocol's "enforcement features" will ultimately include a strong penalty regime, a number of factors suggest that some types of penalties for noncompliance, at least with Article 3.1, will be included in the system.

A key consideration is that compliance with the QELRCs will be costly for parties and they will want to be assured of a reasonably "level playing field," eliminating competitive advantages that can be gained through noncompliance. This concern assumes particular importance in view of the protocol's strong reliance on market-based mechanisms. Both private and public entities in the international emissions marketplace will demand fair competition and clear signals. What is more, not only would the credibility of the Kyoto mechanisms be at risk if there were widespread noncompliance; arguably, its very foundation would be undermined, given that the value of emission units is inextricably linked to the existence of limited assigned amounts. Secondly, since the majority of current Annex I parties are developed countries, noncompliance is less likely to result from technical or financial inability to comply than is the case under other agreements. Thus, facilitative measures such as advice or assistance seem both less appropriate and less likely to be effective means to bring about compliance with QELRCs.[163]

That said, given that many Annex I parties will face an uphill battle to achieve compliance with the Kyoto Protocol QELRCs, there will be great pressure to minimize the costs of noncompliance. It remains to be seen whether parties will exert this pressure by resisting the inclusion of meaningful penalties in the noncompliance regime, by insisting on various procedural safeguards and hurdles to be overcome before penalties can be imposed, or by pushing for greater flexibility in meeting the QELRCs themselves.[164]

In sum, then, the first assumption underlying the following model is that, on the one hand, the compliance regime will have facilitative features and, on the other hand, will provide for actual

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163. There may be a role, however, for dialogue with the party concerned. *See, e.g.*, *infra* text following note 166 (noting the potential usefulness of an opportunity for dialogue once noncompliance proceedings have commenced); *infra* text accompanying note 177 (noting the potential usefulness of an opportunity for dialogue in the determination of questions of implementation).

164. Greater flexibility could be achieved, for example, through inclusion of additional sinks pursuant to Article 3.4 of the protocol, or through avoidance of a fixed cap on the use of the flexibility mechanisms to meet the QELRCs.

penalties. With respect to the regime's facilitative aspects, it is assumed that a facilitative process will be made available for "soft," nontarget-related commitments.[165] That side of the regime is *not* the focus of the following model. Rather, its focus is on dealing, building on the in-depth review under Article 8, with the target-related commitments in Articles 3.1, 5, and 7, which will be the most important, and most sensitive, preoccupation of the compliance regime in practice. It is assumed that, in this context, facilitation in the shape of advice and assistance is appropriate only in a limited range of cases, possibly involving EITs and, potentially, developing countries, or involving exceptional circumstances.[166] It is further assumed that there is value in designing the compliance regime as a continuum that encompasses facilitative approaches while being structured towards enforcement-oriented outcomes. This can be accomplished by building into the system a time-limited stage during which parties can correct implementation problems, including those identified by expert review teams. Such a "grace period" affords parties an opportunity to correct genuine errors and to prevent "questions of implementation" from becoming "issues of compliance." In addition, a useful role could be played by a further, time-limited, opportunity for dialogue once the noncompliance proceedings have commenced. Such dialogue, if conducted in the "shadow" of a pending finding of noncompliance and, potentially, attendant consequences, can have considerable persuasive force.

With regard to the Kyoto mechanisms, it is assumed here that eligibility for all mechanism transactions will be contingent upon compliance with commitments under Articles 5 and 7, and upon compliance with Article 3.1 in the case of sales of emission units under IET.[167] This has important implications for the role of the

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165. This process could be designed either as an entirely separate track, perhaps employing the convention's MCP (so as to avoid multiplication of bodies), or could be channeled through a facilitation body housed within the model outlined here. A separate body may be necessary not only because a facilitative approach is more appropriate for soft commitments but also because the Article 8 gateway into compliance assessment is available only for Annex I commitments. *But cf. infra* note 177 (noting the impracticality of a system that would have noncompliance issues go back and forth between different bodies).

166. *See supra* text accompanying note 163 (noting that advice and assistance are not likely to be effective means to bring about compliance with QELRCs); *infra* note 200 and accompanying text (noting the appropriateness of advice and assistance during a commitment period).

167. Note that the model leaves aside the issue of private entity participation in the Kyoto mechanisms. While there will be a need to monitor compliance of private actors with mechanism rules, particularly in the context of project-based mechanisms, the focus here is entirely on the linkages between the mechanisms and compliance of parties with their commitments under the protocol. Whether each mechanism would have separate auditing and verification arrangements,

compliance body. If the mechanism rules stipulate compliance with Article 3.1 and/or Articles 5 and 7 as eligibility criteria, the compliance body would simply confirm that the criteria are met, or determine that they are not met. Indeed, in the former case, it might be argued that there should be a presumption of compliance so that active confirmation of compliance should not be required at all. In the latter case, ineligibility would not be a consequence to noncompliance imposed by the compliance body, let alone a binding consequence, but would flow from the mechanism rules agreed upon by the parties.[168] With respect to penalties for noncompliance with protocol commitments, given that this idea has been gaining some momentum, it is further assumed for purposes of illustration that one of these penalties will consist in the "deduction of excess emissions" at a penalty rate. However, other penalties could be substituted or added.

Regarding the "triggering" of the process, the model assumes that, in addition to expert review teams, only parties can raise noncompliance issues.[169] However, other triggering entities could be

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or whether there may be a need for a mechanism-specific compliance body, remains to be determined. *See, e.g.*, Charts, *supra* note 101 (Samoa; noting the proposal for a separate "Eligibility Committee" to review mechanism-related issues). A similar proposal has been made by Japan. *See February 2000 Submissions*, *supra* note 104, at 52, 54.

168. This conception side-steps the difficult question of the legal status of mechanism rules adopted through decisions of the COP or the COP/MOP. *See supra* note 88. To the extent that such decisions are not legally binding, violations of mechanism rules could not have "binding consequences." Therefore, it is important that the compliance body merely assesses whether criteria contained in the mechanism rules are met. Of course, given that these criteria rely upon compliance with protocol commitments, noncompliance with those commitments per se can have (binding) consequences, so long as the compliance regime puts these on proper legal footing. In response to the questionnaire developed in the first session of the JWG, the submissions of the parties address the issues surrounding mechanism rules and (binding) consequences. *See Submissions*, *supra* note 55, at 5-6, 10 (Australia; noting that legal analysis will be required), 17, 21 (China; arguing that binding consequences should be imposed), 23 (EC et al.; maintaining that consequences for "non-observance" of mechanism rules should be "considered as part of the compliance system"), 32, 34 (New Zealand; apparently distinguishing "automatic consequences" from mechanism infractions and "further consequences"), 36, 40 (Poland; arguing that binding consequences should be imposed), 51-52 (Saudi Arabia; noting that it may not be legally possible to impose binding consequences for anything other than protocol violations), 61 (Switzerland; noting that binding consequences could be imposed), 67-68, 77-78 (United States; maintaining that binding consequences can follow only violations of legally binding obligations, thus appropriate legal avenues must be found; and indicating that mechanism rules can include participation requirements); *Submissions Add.1*, *supra* note 100, at 3 (Korea; arguing that binding consequences should be adopted); *see also* Charts, *supra* note 101 (Samoa; distinguishing eligibility criteria for mechanisms from consequences for noncompliance).

169. The reason for the sole focus on parties is that the process outlined here differs from existing, largely facilitative, compliance regimes. In the process outlined here, findings of noncompliance can lead to penalties. In this more sensitive context, it seems undesirable to give either the Secretariat or the COP the role of a "complainant." The model assumes that the in-

built into the process. With respect to the compliance body, it is assumed that it would be a body of limited size, composed of legal and technical experts. It is left open in what capacities members would serve and what the formula for distribution of seats would be. The model assumes that the compliance body, subject to an appeal option, makes findings of noncompliance and determine consequences. However, given the views thus far expressed by parties, the model indicates (in "square brackets") options for involvement of the COP/MOP. Finally, the following model does not address the question of how its "procedures and mechanisms," given that they entail "binding consequences," would be established. It is assumed that parties will develop a legal solution to the dilemma posed by the amendment requirement in Article 18.[170]

2. A Basic Model

a. In-Depth Review

Under the Kyoto Protocol, Annex I parties' target-related commitments are subject to in-depth review pursuant to Article 8. In-depth review is a necessary first step towards compliance assessment and provides the main gateway into the noncompliance procedure.[171]

- Expert review teams review national communications and inventories to determine:
  - ♦ implementation of Articles 5 and 7;
  - ♦ implementation of Article 3.1.
- If the assessment raises a *question of implementation*,[172] parties are given an *opportunity to address* the issue (e.g., by submitting inventories, missing data or other additional information; or, should the issue involve emissions in excess of assigned amount, by acquiring emission rights or reduction credits).

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depth reviews will uncover relevant "questions of implementation" and provide a sufficient foundation for comprehensive compliance assessment.

170. *See supra* notes 88, 168.

171. Note again that the expert review teams do not assess compliance, but parties' implementation. *See* Kyoto Protocol, *supra* note 3, art. 8.3; *see also* Part II.B.1 (discussing review under Article 8.3).

172. Parties could provide in the IET rules that a "question of implementation" raised by an expert review team has a "yellow light" effect such as that outlined for JI in Article 6.4. Pursuant to that provision, while transactions can continue, parties cannot use emission reduction units to meet their commitments under Article 3 once a "question of implementation" is raised and until any "issue of compliance" is resolved. Kyoto Protocol, *supra* note 3, art. 6.4.

- So as to provide parties with this opportunity to address implementation problems, there is a *grace period*, beginning when inventories and national communications are due for purposes of expert review and ending *x months after completion of the in-depth review, at which time* all *questions of implementation are* automatically *passed to a Compliance Body (CB) for screening*.[173]
- *Other parties* (Article 8.5(b)), within *x* weeks of the publication of the in-depth review reports, *can also raise questions of implementation*.[174]

b. Compliance Assessment

Compliance assessment is undertaken within a Compliance Body (CB). The process encompasses initial screening of all questions of implementation, assessment of "compliance issues" and, in the event of noncompliance, declaration or determination of consequences.

- All questions of implementation go through an *initial screening by a Screening Committee (SC)* of the CB.[175] The screening serves to
  - ♦ review any information, representations, factual and legal arguments submitted by parties;
  - ♦ determine whether parties, during the grace period, have taken adequate steps to resolve the questions of implementation. If yes, the SC will confirm that these parties are in compliance with their commitments under Articles 3, 5, and 7;
  - ♦ determine whether there are any other reasons (e.g., obvious legal or factual errors; or de minimis violations

173. The automatic referral is intended to put greater pressure on parties to address "questions of implementation" to prevent them from turning into a "compliance issue."

174. The grace period must be structured so as to allow sufficient time between in-depth review reports and CB screening to provide parties the opportunity to take measures that address questions raised by other parties.

175. At first glance, the screening stage may appear as an unnecessary procedural layer. However, it permits the separation of "implementation questions" from "compliance issues". Parties that address implementation questions during the grace period avoid the loss of reputation that may be associated with the discussion of compliance issues in the CB. At the same time, CB proceedings will carry heavier public opprobrium. Finally, from a purely practical standpoint, and given that a screening-type process would have to take place somewhere, it seems advantageous to free the CB itself from this task. The idea of a screening stage is now receiving some attention in the compliance negotiations. Parties are grappling with the issue of how any screening process could deal with the very difficult technical issues likely to be raised by the determination of *de minimis* levels of noncompliance. *See* Personal Communication with Jacob Werksman (Mar. 23, 2000) (on file with the author).

such as minor omissions in national communications) why a given question of implementation raised by the expert review does not raise a compliance issue;

- ♦ determine, for questions of implementation that were raised not by expert review but by other parties, whether these are serious questions that merit further consideration.

- *All questions of implementation that are not eliminated through the screening* go to a *hearing of the full CB*,[176] where parties have further opportunity to offer information and legal arguments. This part of the process could also provide a (time-limited) opportunity for further dialogue with the party concerned and exploration of the merit of other facilitative approaches, such as advice and assistance.[177]
- Based on the hearing, the *CB either confirms* that the party concerned is in *compliance* (if it is presumed that parties are in compliance, active confirmation by the CB may not be necessary), *or* [recommends that the COP/MOP] *find[s] the party to be in noncompliance*.
- In case of noncompliance, the CB will,
  - ♦ *for commitments under Articles 5 and 7,*[178]
    - ▪ *inform all parties that the party concerned is*, as of [*x* days/weeks after] the noncompliance finding, ineligible for participation in the Kyoto mechanisms.[179]
    - ▪ *determine whether advice and/or assistance are appropriate means* (e.g., due to lack of technical

176. Parties could provide in the IET rules that, once confirmed by the screening committee, a "question of implementation" has a "yellow light" effect such as that outlined for JI in Article 6.4. Pursuant to that provision, while transactions can continue, parties cannot use reduction units to meet their commitments under Article 3 once a "question of implementation" is raised and until any "issue of compliance" is resolved. Kyoto Protocol, *supra* note 3, art. 6.4.

177. It remains to be determined whether the CB itself should be engaged in this facilitative work, or whether a separate body—either a subgroup within the CB or the body to be created under the FCCC MCP—will be required. As it will be difficult to neatly separate the persuasive tools at the disposal of a compliance regime (ranging from facilitative to enforcement-oriented measures), it may be impractical to design a system that would have noncompliance issues go back and forth between different bodies. On the other hand, it may be equally impractical, indeed impossible, for one "super body" to carry out all compliance functions.

178. Noncompliance with Articles 5 and 7 would be addressed on an annual basis. *See supra* note 58.

179. Whether or not there should be a "fast-track" process for the party to demonstrate that it has regained eligibility, or whether this should only be possible pursuant to the following annual submission, remains to be determined. It would be possible, for example, to provide access to the CB to regain eligibility, on a fast-track basis, during a given annual period.

capacity; natural disaster or war) to bring the party back into compliance.[180]

- [recommend that the COP/MOP] *publicize the noncompliance*;
- [recommend that the COP/MOP] *publicize* the noncompliance *and issue a caution* if it is a recurrence of noncompliance with Articles 5 and 7 for this party;[181]
- The *party concerned can appeal* the noncompliance finding to an appeal body.[182]

♦ for *QELRCs under Article 3.1,*[183]

- *inform all parties that the party concerned is*, as of [*x* days/weeks after] the noncompliance finding, ineligible for the sale of emission units through IET.[184]
- *determine whether advice and/or assistance are appropriate means* (e.g., due to lack of technical capacity; natural disaster or war) to bring the party back into compliance.[185]
- [recommend that the COP/MOP] *publicize the noncompliance*;
- [recommend that the COP/MOP] inform the party that the overage will be deducted (with further deduction of penalty units) from its assigned amount for the next commitment period, [unless the party]
- [the recommendation to the COP/MOP would follow as a matter of course, unless the party]
  - *elects to pay a penalty into a compliance fund* instead;[186] or

180. *See supra* note 177.

181. Further consequences for noncompliance could be considered for parties that display a "persistent pattern of non-compliance."

182. The appeal would not stay ineligibility for the Kyoto mechanisms. Given the expert review, screening, and CB hearing conducted up to this point, it is assumed that an appeal body would reach different conclusions only in exceptional cases. Therefore, it seems undesirable to provide incentives for parties to appeal CB findings in other than exceptional cases. Of course, a party can always take the steps necessary to regain eligibility and request reinstatement, e.g., from the CB. *See supra* note 179.

183. Noncompliance with Article 3.1 would be addressed at the end of a commitment period. *See supra* note 58 and accompanying text.

184. *See supra* note 179 and accompanying text.

185. *See supra* note 177.

186. Various options exist for the parameters and beneficiaries of this type of fund. *See* GLEN WISER & DONALD M. GOLDBERG, CENTER FOR INT'L ENVTL. L., THE COMPLIANCE FUND: A NEW TOOL FOR ACHIEVING COMPLIANCE UNDER THE KYOTO PROTOCOL (1999) (visited May 12,

- *appeals* the noncompliance finding to an appeal body.[187]

c. Appeal Process

The appeal process would be run, on an ad hoc basis, by an appeal body. The appeal process would, of necessity, be an expeditious process. Whether mechanism eligibility issues require a yet faster track would have to be determined.[188] The structure of the body is left open here.[189]

- A representative of the CB would present the CB's conclusions.[190]
- The party concerned could argue its case.
- Other parties could make submissions.
- The appeal body would reach a final [and binding] decision.

d. Decision of the COP/MOP

The final step in the process would be a decision of the COP/MOP, adopting the recommendations of the CB or, where applicable, the appeal body. This would apply only to recommendations concerning findings of noncompliance and consequences to such noncompliance.[191] However, even in a model that involves the COP/MOP, it may be appropriate to treat mechanism eligibility questions separately and to leave noncompliance findings in this context entirely to the CB (subject to appeal).[192] In its decisions, the COP/MOP would apply a "reverse consensus" voting formula.

2000) <http://www.ciel.org/pubccp.html>; WISER & GOLDBERG, RESTORING THE BALANCE, *supra* note 118, at 3-13.

187. *See supra* note 182.

188. *See supra* note 179.

189. While different options exist, this body would need to be separate from the CB to ensure both bodies' integrity, especially since a representative of the CB would have to appear before the appeal body. Appeals could be heard by panels convened ad hoc. Such appeal panels could also be part of a broader dispute settlement structure, for example, if parties saw a need for opportunities to bring mechanism-related disputes between parties to binding settlement.

190. The CB representative could be either a designated CB member, or the CB chair, especially if the latter's role in the CB did not involve participation in the CB's decisions.

191. Given that the compliance regime is structured on the basis of an assumption that parties are in compliance, the CB merely confirms this assumption. It seems unnecessary to have a further confirmation issued by the COP/MOP. However, it would be easy enough to have COP/MOP confirm all actions of the CB.

192. *See supra* notes 179 and 182 and accompanying text.

A few additional comments are in order by way of background to some of the choices that were made in structuring the model outlined above and to highlight a number of unprecedented features that were included, taking into account the spectrum of views expressed in the JWG.

First, in existing noncompliance procedures, it is not the compliance body but the COP that makes actual findings of noncompliance and imposes any consequences. The compliance bodies, in these existing regimes, merely make recommendations.[193] One reason for separating the compliance bodies from the task of reaching findings and determining consequences is to keep the process as depoliticized as possible. At the same time, in view of the limited membership of most compliance bodies, involvement of the COP guarantees that all parties maintain control over the noncompliance process.[194] That said, given the linkages between compliance and the Kyoto mechanisms, and given that the Kyoto Protocol must be equipped to effectively address noncompliance with emission reduction commitments, a more assertive and agile process than one giving the COP the final say is required. Thus, the model outlined here does vest the power to make noncompliance findings and to determine consequences in the CB.

The potential for actual consequences to noncompliance is the second unprecedented aspect of the model sketched here. In light of this sensitive feature, the process is structured so as to reduce the burden placed on the CB in finding noncompliance and determining consequences. This is achieved in several ways. First, any consequences that may result are not determined by the CB, but are predetermined. The CB merely determines whether the preconditions for a party's ineligibility for the Kyoto mechanisms, or for deductions of assigned amount units from subsequent commitment periods, exist (i.e., whether the party concerned is in noncompliance) and whether there are any reasons why the consequences should not follow. Secondly, parties can appeal the CB's conclusions, although, in view of the extensive factual assessment up to this point, such an appeal should arguably be limited to questions of law.[195]

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193. *See, e.g.*, Montreal Protocol NCP, *MOP-4 Report*, *supra* note 9, ¶ 9.

194. This feature is particularly important to parties that may find themselves before a compliance body, but are not represented in the membership of the body.

195. Obviously, if the final decision was left to the COP/MOP, the outcome of the appeal would not be binding but subject to confirmation by the COP/MOP. In view of a COP/MOP decision stage, however, there may be less need for an appeal process.

The use of predetermined penalties constitutes a third new feature of the approach described. While, in the JWG process, some have referred to the desirability of "automatic" penalties,[196] this is not what is described here. In the above model, penalties do not "automatically" follow findings of noncompliance.[197] Rather, the penalties for certain types of noncompliance are "predetermined". This means that the process is structured on the basis of a presumption in favor of certain consequences for certain types of noncompliance. At the same time, several procedural layers are inserted to make this approach more acceptable: parties have an opportunity to be heard, the CB can consider (limited) circumstances to conclude that the normal penalty should not follow, and the CB's conclusion that the predetermined penalty is warranted can be appealed.

Of course, if the COP/MOP retained the final say and could "overrule" the CB's conclusions, a further safeguard would be built into the system. As noted, involvement of the COP/MOP would make the compliance regime considerably more cumbersome and significantly reduce its ability to swiftly address instances of noncompliance. However, parties may not be ready to leave the final decisionmaking authority in the hands of a limited membership compliance body. In that event, an alternative approach could involve the COP/MOP on the basis of the "reverse consensus" approach contemplated by several parties.[198] Under this approach, the COP/MOP retains final control over noncompliance findings and consequences, but the process tilts decisionmaking slightly more in the direction of the CB: the reverse consensus approach introduces a presumption that the CB's recommendations should be upheld, thereby implying that these should be altered only for exceptional reasons. As noted earlier, in a model that involves the COP/MOP, it may be appropriate to treat mechanism eligibility questions separately and to leave noncompliance findings in this context to the CB.[199]

In essence, these various "procedural layers" provide opportunities to rebut the penalty presumption underlying the

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196. *See supra* notes 125-128 and accompanying text.

197. Arguably, "automatic" penalties, following upon a finding of noncompliance without any opportunity to assess their appropriateness in individual cases, would run afoul of the requirement in Article 17 that consequences take into account "cause, type, degree and frequency of non-compliance." Kyoto Protocol, *supra* note 3, art. 17. The approach outlined here, by contrast, would meet that requirement.

198. The approach was discussed at COP-5. *See* Personal Communication, Alain Richer, *supra* note 68.

199. *See supra* note 192 and accompanying text.

noncompliance regime for QELRCs. This design was chosen because, once it is assumed that "real" consequences are required to ensure compliance with QELRCs, including by enhancing the "persuasive force" of facilitative opportunities, there must also be a realistic chance of actual exposure to these consequences. "Real" consequences would have little impact if the process did not provide for a "real" chance that they will result. As previously discussed, the particular problem for the Kyoto Protocol regime is that it will likely not tolerate noncompliance with QELRCs or long compliance delays—the mechanisms could collapse and the environmental goal of the protocol could quickly become unattainable if parties exceeded their assigned amounts significantly and over extended periods.

It should be emphasized again that the inclusion of predetermined consequences does not mean that there is no room for, or benefit to, facilitative approaches to target related commitments, including opportunities for parties, particularly EITs (or developing country parties, should they take on such commitments) to seek advice and assistance, and opportunities for dialogue with developed country parties. On balance, however, these approaches may be most appropriate during a commitment period, when there is concern that a party will have future compliance problems.[200] Once there is actual noncompliance (i.e., after the end of the commitment period) a more assertive approach may is warranted. Therefore, the model proceeds along a continuum that encompasses facilitative approaches, but is structured towards enforcement-oriented outcomes. Of course, the larger compliance system could provide relatively greater opportunities to EITs (or developing country parties) to seek advice and assistance designed to prevent noncompliance.

A further unprecedented feature of the process outlined here is the inclusion of an element of binding dispute settlement. At first glance, experience gained under existing MEAs would seem to suggest that dispute settlement will play an insignificant role in the Kyoto Protocol compliance regime. Many observers have noted that states have thus far avoided resort to binding settlement of differences regarding the interpretation or application of a MEA.[201] Along with

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200. Indeed, it has been argued that facilitative approaches should be applied *only* during the commitment period, while enforcement should be the focus of the compliance regime after the commitment period ends. *See* GOLDBERG ET AL., BUILDING A COMPLIANCE REGIME, *supra* note 60, at 3, 18, 20-23; WORLD WILDLIFE FUND, *supra* note 59, at 7-12.

201. *See, e.g.*, Werksman, *Compliance*, *supra* note 38, at 62. Note also that, to the extent that dispute settlement can lead to binding results, resort to it tends to be optional for parties. Conversely, to the extent that the process is mandatory, the outcomes are nonbinding. *Cf.* FCCC, *supra* note 2, art. 14.

several others, I have previously argued that conventional dispute settlement procedures are also unsuited to dealing with MEA compliance issues because they rely upon an adversarial rather than a cooperative model, and because, due to their largely bilateral focus, they cannot adequately address typically polycentric MEA compliance issues.[202] While all of these reservations apply also to the Kyoto Protocol, it nonetheless seems possible that the protocol compliance regime can carve out a role for some type of dispute settlement procedure, for example, for an appeal process such as outlined above. As noted, if noncompliance could attract penalties, especially predetermined penalties, states may want an opportunity for binding resolution of compliance questions. In turn, the existence of an appeal option could make the inclusion of penalties more acceptable. Further, competitiveness concerns may prompt individual parties participating in the Kyoto mechanisms to resort to binding settlement. Because all of these issues retain a polycentric quality, engaging not just the interests of individual parties but the interests of all parties in compliance with the protocol, any such dispute settlement option would have to be tailor-made for the protocol compliance regime, rather than drawn from the convention's dispute settlement provisions.[203] The model sketched above addresses the polycentric aspects of the proceedings by involving a representative of the CB, who presents the CB's findings to the appeal body.[204] In this function rests a final unprecedented dimension to the above model: in going before the appeal body, the CB representative would represent the interests of all parties to the protocol in ensuring compliance with its terms.[205]

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202. *See* Jutta Brunnée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT'L L. 26, 47 (1997).

203. There may be some room to address these concerns through the development of a conciliation procedure pursuant to Article 14.7 of the FCCC. However, as per Article 14.7, conciliation can result only in a "recommendatory award."

204. *See supra* note 190 and accompanying text.

205. Indeed, one might argue that this approach would be an appropriate reflection of the FCCC's acknowledgement that climate change "and its adverse effects are a common concern of humankind." FCCC, *supra* note 2, pmbl. On models for such representation of common interest in an international context, see Ulrich Beyerlin, *State Community Interests and Institution Building in International Environmental Law*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 602 (1996), and Profullachandra N. Bhagwati, *Environmental Disputes*, *in* THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS: A SURVEY OF EXISTING LEGAL INSTRUMENTS 436 (Sand ed., 1992).

IV. CONCLUDING OBSERVATIONS: BEYOND COMPLIANCE

This Article has taken a very pragmatic look at the ongoing negotiations for a Kyoto Protocol compliance regime. This focus has, in part, been shaped by my involvement in the early stages of the deliberations. Writing this Article afforded me an opportunity to reflect upon the issues that underpin the compliance negotiations and extrapolate some tentative conclusions regarding the shape that a compliance regime for the protocol might take. I made a choice, then, to tell the story of the compliance negotiations as one that highlights the dilemmas and choices that must be addressed and the compromises that must be struck in finding a balance between facilitation and enforcement. Except for brief references,[206] I chose not to situate the discussion in the context of the rich theoretical literature on compliance, nor in the context of the related work on the evolution of legal regimes and their influence on state behavior. It is not for this conclusion to introduce this theoretical context through the backdoor, so to speak. I believe it is appropriate, however, to flag that the ongoing compliance negotiations and the regime that will ultimately emerge provide fertile ground for examinations through the lenses of theories on legal norms and on compliance.

The compliance literature has seen a lively debate about the extent to which the claims of the "managerial model,"[207] which focuses upon facilitative and cooperative means to bring about compliance, are contingent upon the nature of the commitments at hand. In other words, to what extent is compliance with MEAs truly brought about by "process," and is a function of persuasion through iterated interaction and "justificatory discourse" among regime members,[208] and to what extent is the apparent success of facilitative MEA compliance regimes a function of the limited, mostly technical, nature of the commitments, or the fact that parties would meet them at any rate?[209] By extension, does the effectiveness of facilitative approaches decrease to the extent that commitments become more onerous and that the importance of a "level playing field" among parties increases?[210] Does it follow that compliance with certain types

206. *See* sources cited *supra* note 10.
207. CHAYES & CHAYES, *supra* note 10, at 3 (1995).
208. *Id.* at 25.
209. *See* George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?* 50 INT'L ORG. 379 (1996).
210. *See* Werksman, *Compliance*, *supra* note 38, at 57.

of commitments can be ensured only through more enforcement-oriented approaches?[211]

The negotiations under the Kyoto Protocol, at first glance, might suggest that the answers to these latter questions must be affirmative. It is intriguing, for example, that the parties appear to draw clear distinctions between "soft" and "hard" commitments,[212] between procedural commitments (Articles 5 and 7) and the most onerous target-related commitments (Article 3), and between the facilitative and enforcement-oriented compliance approaches that may be appropriate in each case.[213] However, experience with existing compliance regimes strongly suggests that no bright line should be drawn between facilitation and enforcement and that the two approaches are best understood as components of a "persuasive continuum." This perspective also serves to alter our focus just slightly from "*what* makes states comply with legal commitments" to "*why* do states comply," thereby revealing the challenging questions that lie beneath the surface of the debate about compliance approaches. Ultimately, questions about compliance are questions about the very nature of legal norms.[214] The Kyoto Protocol and the

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211. For an overview on the debate between managerial and enforcement-oriented approaches, see Danish, *supra* note 10.

212. At the same time, it is interesting to observe that parties are intent on speaking of "commitments" rather than "obligations," even when they are in fact referring to ("hard") legally binding obligations. On this point, see DOUGLAS M. JOHNSTON, CONSENT AND COMMITMENT IN THE WORLD COMMUNITY 156 (1997).

213. Further to the preference for the language of "commitment," *see id.*, and notwithstanding the distinctions that are made between facilitative and enforcement-oriented approaches, parties are equally intent on avoiding the language of "enforcement" or "punishment" even where the consequences under discussion are in effect penalties. For example, the protocol speaks of "(binding) consequences" to noncompliance. During the JWG deliberations at COP-5, some parties even sought replacement of the term "consequence" with the term "outcome." *See FCCC COP-5 Highlights: Friday, 29 October 1999*, 12 EARTH NEGOTIATIONS BULLETIN (IISD) 117 (Oct. 30, 1999) <http://www.iisd.ca/linkages/vol12/enb12117e.html>.

214. These linkages have been explored from a variety of perspectives. *See, e.g.*, CHAYES & CHAYES, *supra* note 10; THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); FRIEDRICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989); Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107 (1998); Brunnée & Toope, *supra* note 202; Michael Byers, *Taking the Law Out of International Law: A Critique of the Iterative Perspective*, 38 HARV. INT'L L.J. 201 (1997); Ian Johnstone, *Treaty Interpretation: The Authority of Interpretative Communities*, 12 MICH. J. INT'L L. 371 (1991); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998); Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123 (1992); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996); Stephen J. Toope, *Emerging Patterns of Governance and*

negotiation of its compliance regime offer unique opportunities for a case study that can provide us with answers not just about the most effective means to bring about compliance with treaty norms, but about the processes through which binding rules evolve in the context of regimes, and about how legal norms influence state behavior.

International Law, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 119 (Byers ed., 1999); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review).