

*Kyoto Compliance Regime : its contents and effects on other internal systems**

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Table of Contents

Introduction

I . Non-Compliance Procedures in Multilateral Environmental
Agreements

II . Compliance Procedures and Mechanisms under the Kyoto
Protocol

III . Compliance Procedures and Other Internal Systems under
the Kyoto Protocol

Conclusions

Abbreviations

AAUs: Assigned Amount Units: units issued pursuant to the re-
levant provisions or registers in decision

CDM: Clean Development Mechanism

CERs: Certified Emission Reductions: units issued under CDM

COP: the Conference of Parties For example, 'COP-1' means COP
on the first session

COP/MOP: the Conference of the Parties serving as the meeting
of the Parties to Kyoto Protocol

ERTs: Expert Review Teams

ERUs: Emission Reduction Units: units under the Joint Implementation

GHG: Greenhouse Gas

ICJ: International Court of Justice

JWG: Joint Working Group

MEA: Multilateral Environmental Agreement

NGOs: Non-Governmental Organisations

RMUs: Removal Units from carbon sequestration by sink activities

SBI: Subsidiary Body of Implementation

UNCLOS: United Nations Convention on the Law of the Sea

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Introduction

The Kyoto Protocol of the UN Framework Convention on Climate Change ('the Kyoto Protocol') entered into force on 16 February 2005. As is generally known, this Protocol establishes individual and legally binding emissions targets in respect of GHG for Annex B Parties, which are all developed states and states that are undergoing the process of transition to a market economy. Japan, for example, will have to cut its GHG emission by 6%, calculated from the level in 1990 until the end of

2012. These targets are equal to an aggregate reduction of about 5.2% from the Parties' 1990 emissions levels.

The main issue is, however, how Annex B Parties can implement their own commitment. In other words, if a Party cannot fulfil its own obligation, what kind of consequences does this Party have to bear? This is a common issue for almost all international treaties and in particular, one of the most important problems for MEAs. Article 18 of the Kyoto Protocol only provides that 'the Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance'. Pursuant to this clause, COP-4 established JWG to develop a compliance system under the Protocol in 1998. However, the negotiations held at the Hague in 2000 broke down, because the Parties could not agree on a fair compliance system. In 2001, COP-6 bis held at Bonn could barely resolve the pending problem,⁽¹⁾ and COP-7 recommended that COP/MOP-1 adopt the procedures and mechanisms relating to compliance in terms of Article 18 of the Kyoto Protocol.⁽²⁾ In 2005, COP/MOP-1 managed to adopt the above-mentioned procedures.⁽³⁾

In this paper, Chapter I illustrates the non-compliance procedures introduced in MEAs. Chapter II surveys the significant aspects of the procedures and mechanisms relating to compliance in the Kyoto Protocol. Chapter III analyses the relationship between the Compliance Procedure and the other mechanisms in the Kyoto Protocol.

I. Non-Compliance Procedures in Multilateral Environmental Agreements

Needless to say, MEAs are included among 'international agreements concluded between states in written form and governed by international law'.⁽⁴⁾ Non-compliance with an obligation in an MEA by a member state therefore constitutes an international wrongful act of that Party.⁽⁵⁾ It may be said, however, that the law of state responsibility is inadequate to respond to non-compliance with international environmental law.

Indeed, states have the general obligation to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control, as the ICJ reaffirmed in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons in 1996.⁽⁶⁾ On the other hand, it is very difficult for states to control emissions that have indirect adverse environmental effects, such as GHG causing global warming. It may be impossible to prove a causal relationship between activities within a state and the environmental damage caused due to these activities. In addition, it may be difficult to establish the necessary causal link between an identifiable source and the damage caused.

State responsibility is also based on the formal conception of breach of treaty that does not and cannot take into account the variety of situations involved, while a state's failure to meet its environmental obligations results from economic or political difficulties that the concept of state responsibility does not take, or insufficiently takes, into account.⁽⁷⁾

As a result, the compliance procedures in MEAs should be co-operative, non-confrontational and non-judicial.⁽⁸⁾ Such regimes are concerned both with facilitating compliance by Contracting Parties with their obligations under the relevant treaty, and with providing a 'softer system' for addressing non-compliance by a Contracting Party than is presently provided by traditional dispute settlement procedures under general international law.

To take the most significant example, the fourth Meeting of the Parties to the Montreal Protocol in 1992 adopted a non-compliance procedure and an indicative list of measures that might be taken up by the meeting of the Parties in respect of non-compliance with the Protocol.⁽⁹⁾ According to this procedure, the objective of the Implementation Committee is to secure an 'amicable solution' of the matter based on respect for the provisions of the Protocol. After receiving and considering any submissions addressed in writing to the Secretariat, the Implementation Committee reports to the Meeting of the Parties, including any appropriate recommendations. The Meeting of the Parties may take the following measures against a non-complying Party :

- A. Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.
- B. Issuing cautions.
- C. Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of

technology, financial mechanism and institutional arrangements.

This procedure had been used as one of the most representative references in a negotiation process in the JWG to develop a compliance system under the Kyoto Protocol. However, it is understood that there are some differences between the two protocols. Moreover, there is no doubt that the process of rule-making was influenced by USA's rejection of the negotiations, which occurred in 2001. Thus, the Kyoto Compliance Procedures should be reflected in both the inherent features and the negotiating process undertaken by the COP.

II. Compliance Procedures and Mechanisms under the Kyoto Protocol

A : Organisation of the Compliance Committee

COP-7 Decision, held at Marrakesh in 2001, established a Compliance Committee divided into a facilitative branch and an enforcement branch, as well as a plenary and a bureau.

The facilitative branch has the aim of promoting compliance and providing early warnings of potential non-compliance, and is responsible for providing advice and facilitation for compliance with

- (a) quantitative emission commitments (Article 3.1) prior to the beginning of the relevant commitment period and during that commitment period ; and
- (b) methodological and reporting requirements (Articles 5.1, 5.2, 7.1 and 7.4) prior to the beginning of the first commitment period.⁽¹⁰⁾

Kyoto Compliance Regime : its contents and effects on other internal systems

On the other hand, the enforcement branch, with the aim of the restoration of non-compliance to ensure environmental integrity, has the primary responsibility to determine whether an Annex I Party is in compliance with

- (a) quantitative emission commitments (Article 3.1) ;
- (b) methodological and reporting requirements (Articles 5.1, 5.2, 7.1 and 7.4) ; and
- (c) eligibility requirements under Articles 6, 12 and 17.⁽¹¹⁾

The Committee consists of twenty members, ten for each branch. Each branch is composed of one member from each of the five regional groups of the United Nations, one member from the small island developing states, two Annex I Parties and two non-Annex I Parties, for a term of four years.⁽¹²⁾ The procedures stipulate that the Members of the Committee shall serve in their individual capacities and shall have recognised competence relating to climate change, as well as in relevant fields, including scientific, technical, socio-economic, or legal fields.⁽¹³⁾ Particularly when electing the members of the enforcement branch, the COP/MOP shall be satisfied that the members have legal experience.⁽¹⁴⁾

B : Trigger and Screening Process

The Kyoto Protocol Compliance Procedures provide for three means by which mechanism may be triggered. Firstly, any Party may submit a question relating to implementation to the Compliance Committee with respect to another Party, if supported by corroborating information. Secondly, any Party may submit a similar question with respect to itself. Thirdly, the Compliance Committee can receive questions relat-

ing to implementation as indicated in the reports of ERTs.⁽¹⁵⁾ Unlike the secretariats of the Montreal Protocol, the Secretariat of the COP cannot raise questions relating to implementation. This was decided in order to avoid 'politicising' its role and to preserve its neutrality.

The bureau of the Committee allocates questions relating to implementation to the appropriate branch in accordance with the mandates of each branch. If such a question is referred to the Compliance Committee, the bureau of the Committee is directed to allocate it to the relevant branch in accordance with their specified mandates. The relevant branch is then directed to undertake a preliminary examination to ensure that the question allocated is supported by sufficient information, is neither *de minimis* nor ill-founded, and is based on the requirements of the Protocol.⁽¹⁶⁾

Following the preliminary examination of questions relating to implementation, the branches commence the general procedure. Each branch must base its deliberations on any relevant information provided by reports of ERTs, the Party concerned, the Party that has submitted a question of implementation with respect to another Party, reports of the COP, the COP/MOP and the subsidiary bodies, and the other branch.⁽¹⁷⁾

The Committee must make every effort to reach agreement on any decisions by consensus. If all efforts at reaching consensus have been exhausted, the decisions are, in the last resort, adopted by a majority of at least three-quarters of the members present and voting. In addition, the adoption of decisions by the enforcement branch requires a majority of members from Parties included in Annex I present and voting, as

Kyoto Compliance Regime : its contents and effects on other internal systems

well as a majority of members from Parties not included in Annex I present and voting.⁽¹⁸⁾ As a result, both Annex I and non-Annex I Parties have an opportunity to block the decisions of the enforcement branch.

Decisions include conclusions and reasons. The relevant branch notices the Party concerned forthwith in writing, through the Secretariat, of its decision, including conclusions and the reasons for the conclusions. The Secretariat makes the final decisions available to other Parties and to the public.⁽¹⁹⁾

C : Procedures for the Enforcement Branch and the Legal Nature of its Consequences

The enforcement branch has some additional processes on general procedures. Firstly, within ten weeks from the date of receipt of the notification, the Party concerned may make a written submission to the enforcement branch, including rebuttal of information submitted to the branch. Secondly, if so requested in writing by the Party concerned within ten weeks from the date of receipt of the notification, the enforcement branch shall hold a hearing at which that Party concerned has the opportunity to present its views. In addition, the enforcement branch may utilise expedited procedures where a question relating to implementation involves eligibility requirements under the Kyoto Mechanisms.⁽²⁰⁾

Where the enforcement branch has determined that the emissions of a Party have exceeded its assigned amount, calculated pursuant to its quantified emission limitation or reduction commitment inscribed in Annex B to the Protocol and in accordance with the provisions of

Article 3 of the Protocol, it declares that that the Party is not in compliance and applies the following consequences :

- (a) deduction from the Party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions ;
- (b) development of a compliance action plan in accordance with paragraphs 6 and 7 below ; and
- (c) suspension of the eligibility to make transfers under Article 17 of the Protocol until the Party is reinstated in accordance with section X-3 or 4.⁽²¹⁾

The fact that the procedure of the enforcement branch sets the appeal system is also a unique feature. The Party in respect of which a final decision has been taken may appeal to the COP/MOP against a decision of the enforcement branch relating to Article 3.1 of the Protocol if that Party believes it has been denied due process. The COP/MOP considers the appeal at its first session after the lodging of the appeal and may agree by a three-quarters majority vote of the Parties present and voting at the meeting to override the decision of the enforcement branch, in which event the COP/MOP shall refer the matter of the appeal back to the enforcement branch. As the rules of procedure for appeals have yet to be agreed, uncertainty remains as to how appeals will be conducted in practice.

However, as noted at the outset, the most significant unresolved issue relating to the compliance regime is whether the consequences to be applied in respect of non-compliance are legally binding under inter-

Kyoto Compliance Regime : its contents and effects on other internal systems
national law.

Despite the unanimous adoption of the compliance rules at COP-7 held at Marrakesh, the Parties had not been able to agree on the precise legal nature of the rules. The question of whether the consequences noted above are legally binding is thus among the most important compliance-related issues remaining for the COP/MOP to resolve after the Protocol enters into force.

The last sentence of Article 18 of the Protocol stipulates that '[a]ny procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol'.

Before COP/MOP-1, Saudi Arabia had submitted a proposal to amend by adding to the 'procedures and mechanisms relating to compliance under the Kyoto Protocol' as set forth in the annex to Marrakesh Compliance Procedure.⁽²²⁾ In COP/MOP-1, Saudi Arabia stressed the need for a legally binding system. Some Annex I Parties, including Japan, opposed any amendments, emphasising their preference for a facilitative approach to compliance. Other Parties, including the EU, stressed the need to handle the compliance system, and proposed its adoption by the COP/MOP-1 decision, following which amendment could be considered. Noting that amendments require ratification, the host Party, Canada, cautioned that the outcome was unpredictable, possibly creating two categories of Parties. Many developing Parties, including China, also supported the adoption of the compliance mechanism by COP/MOP-1 decision combined with the consideration of an amendment process.⁽²³⁾

As a result, COP/MOP-1 approved and adopted the same procedures as were recommended by COP-7, without prejudice to the out-

come of the amendment process. It requested SBI-24 to commence the consideration of an amendment to the Protocol and report to COP/MOP-3, which will make a decision on the issue.

III. Compliance Procedures and Other Internal Systems under the Kyoto Protocol

A : Compliance Procedure and Flexible Market Mechanisms in the Kyoto Protocol

The Kyoto Compliance Procedure has a significant bearing on the Kyoto Mechanisms ; Joint Implementation, CDM and Emission Trading.

Firstly, the Compliance Committee plays a role in respect of the eligibility criteria of the Kyoto Mechanisms. For example, the facilitative branch is responsible for addressing implementation questions relating to the provision of information about use of the Protocol, as a supplement to its domestic action by a Party included in Annex I of Articles 6, 12 and 17.⁽²⁴⁾ On the other hand, the enforcement branch is responsible for determining whether a Party included in Annex I is failing to comply with the eligibility requirements under Articles 6, 12 and 17 of the Protocol.⁽²⁵⁾ The eligibility criteria used in all mechanisms, that the Compliance Committee need to determine are as follows :

- (a) Party to the Kyoto Protocol
- (b) Assigned amount calculated
- (c) National system in place for estimating emissions/removals
- (d) National registry in place for tracking assigned amount
- (e) Submission of most recent required emissions inventory

Kyoto Compliance Regime : its contents and effects on other internal systems

- (f) Accurate accounting of assigned amount and submission of information

Where the enforcement branch has determined that if an Annex I Party does not meet one or more of the eligibility requirements under Articles 6, 12, and 17 of the Protocol, it suspends the eligibility of that Party in accordance with the relevant provisions under those articles. At the request of the Party concerned, eligibility may be reinstated in accordance with expedited procedures for the enforcement branch.⁽²⁶⁾ The branches are only required to check point (a) of the eligibility criteria set out above where developing countries, including China, participate in the CDM.

Secondly, the enforcement branch can apply a suspension of the eligibility to make transfers under Emission Trading to the Party that is not in compliance. It should be noted that the suspension relates to the eligibility to make transfers, not to the purchase of AAUs. For this reason, the Party failing to comply needs to meet its obligations under Article 3.1 and Annex B of the Kyoto Protocol.

However, if the enforcement branch applies a suspension, it means that not only one state supplier but also many private sector suppliers must leave the GHG market, since the compliance procedure accepts that a Party may authorise legal entities to transfer and/or acquire under Article 17, on the condition that the Party in question remains responsible for the fulfilment of its obligations under the Kyoto Protocol and ensures that such participation is consistent with the emission trading rules.⁽²⁷⁾ Generally, the more participants in the market, the

more effective a market could be developed, and *vice versa*. Annex I Parties are eligible to transfer and/or acquire ERUs, CERs, AAUs or RMUs. However if the number of parties failing to comply increases, and the number of transferring participants decreases, the transaction price of GHG allowances will rise sharply and confidence in Emission Trading will begin to be eroded. That would bring about the collapse of the GHG market mechanism.

Thirdly, the making of rules for the Kyoto Mechanisms also has a significant impact on the compliance regime for the Kyoto Protocol. The liability rules for Emission Trading under Article 17 address the question of whether states that participate in the trading can transfer or acquire assigned amount units originating from Parties that exceed their targets at the end of the commitment period. In this regard, there are three types of liability rules: seller, buyer and hybrid liability. Seller liability can encourage a more flexible market, while buyer liability places additional emphasis on achieving environmental integrity. Therefore, some NGOs believe that hybrid liability is preferable to either liability or buyer liability, and has additional benefits, including enhanced compliance, added flexibility and greater transparency.⁽²⁸⁾

Finally, the CDM, which is a unique mechanism, is so attractive that both developing and developed state parties have shown keen interest in it and the rules of use promulgated in respect of it. The purpose of the CDM is to assist Non-Annex I Parties in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Annex I Parties in achieving compliance with

Kyoto Compliance Regime : its contents and effects on other internal systems

their quantified emission limitation and reduction commitments under Article 3 of the Kyoto Protocol.⁽²⁹⁾ Hence, the CDM has important advantages in respect of decreasing the compliance costs of developed state parties and promoting investment in, and technology transfer to, developing state parties, while there may be a negative feedback loop between the compliance system and the CDM's integrity.⁽³⁰⁾ It should be noted that excessive use of the CDM might have the effect of maintaining or increasing the gap between developing and developed member states in respect of per capita GHG emissions.⁽³¹⁾

B : Compliance Procedures and Dispute Settlement Procedures in the Kyoto Protocol

Another feature of the Kyoto Protocol compliance regime is that, unlike other MEAs, it has certain 'quasi-judicial' characteristics.⁽³²⁾ The Compliance Committee under the Kyoto Protocol is different from others in respect of the individual capacities of the members of the Committee, its high degree of independence from the COP/MOP and possibility of appeals,⁽³³⁾ although the legal nature of the consequences it may apply remains yet vague. However, a 'quasi-judicial' feature is not the same as a 'judicial' one. In fact, the compliance procedure seems to provide for the possibility of the co-existence of dispute settlement mechanisms.⁽³⁴⁾

It must be noted that the Kyoto Protocol Compliance Procedures affirms that 'the procedures and mechanisms relating to compliance operate without prejudice to Articles 16 and 19 of the Protocol'.⁽³⁵⁾ In other words, the compliance regime of the Kyoto Protocol is different from dispute settlement systems such as the ICJ or other tribunals. In

fact, some small island states such as the Republic of Kiribati and the Cook Islands declare their understanding that accession to the Kyoto Protocol shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provision in the Protocol can be interpreted as derogating from principles of general international law. In this regard, the International Law Committee intended to achieve an increase in the likelihood that the state responsibility would provide a remedy for breach of international environmental obligations of an *erga omnes* or *erga omnes partes* character.⁽³⁶⁾ Nevertheless, the new direction of the Kyoto compliance regime may impinge on existing international law. For example, the enforcement branch decisions have a close connection with the law of treaties and the law on state responsibility.⁽³⁷⁾ In this respect, the question of whether the consequence applied by the enforcement branch is legally binding or not is of critical importance.

Conclusions

As shown in Chapter I, the non-compliance procedure, which is essential to MEAs, emphasises a facilitative approach. The reason seems to be that the cause of non-compliance may be not so much fault or negligence as the lack of technical, financial and/or administrative capability — common problems for developing member states. Therefore, facilitative measures, including technical and financial assistance, are useful in promoting compliance with MEAs.⁽³⁸⁾ On the other hand, the Kyoto Protocol does establish concrete obligations for developed parties based on equity and in accordance with their common but

differentiated responsibilities.⁽³⁹⁾ Even if the Compliance Committee could provide technical expertise and/or financial assistance to those parties that have *prima facie* capability and responsibility to mitigate global warming, it would be 'like teaching a fish to swim'.⁽⁴⁰⁾ Non-compliance by Annex I Parties with commitments, especially GHG targets, inevitably leads to punitive consequences being instituted by the Committee. But careful consideration should be given to the connection between the enforcement of the law and its binding effect or its effectiveness.⁽⁴¹⁾

Furthermore, the compliance mechanism under the Kyoto Protocol is affected by the amendment dilemma.⁽⁴²⁾ Although any amendment can be adopted by a three-quarters majority of the COP/MOP, the amendment only enters into force following ratification by three-quarters of the Parties, and only in respect of those states that have ratified. This makes it improbable that any given amendment would apply to all the Parties at any given time.

The Agreement relating to the Implementation of Part XI of UNCLOS might provide a useful reference to resolve this dilemma. UNCLOS and this Agreement, the practical effect of which is to amend the deep seabed regime prescribed in UNCLOS, entered into force on the same date in 1994. In fact, until the adoption of the Bonn Agreement at COP-6 bis, the JWG explored the possibility of developing some form of supplementary legal instrument, which all Parties would agree to in the Protocol.⁽⁴³⁾ This instrument would establish the compliance system and modify the Protocol so that binding consequences could be adopted via the supplementary instrument rather than an Article 18 amendment. However, this is not a particularly intelligent solution, since the

international community never abandons the '*pacta sunt servanda*' principle under international customary law, and any additional legal instrument would require ratification by all the Parties in order to achieve international law status.

In any case, the international community needs to agree with commitments after the second period and amend the Kyoto Protocol and its Annex, since it provides only for commitments from 2008 to 2012 and has no target in the period after 2013.

If the consequences for non-compliance with Article 3.1 of the Kyoto Protocol are not legally binding, a Party not in compliance will have two kinds of targets in the second period: one that is 'legal' and another 'political or moral' commitment target that is 1.3 times more than the legal commitment. Such a double-barrelled consequence may threaten market stability. In fact, the USA had emphasised that the compliance system for the Kyoto Protocol should be credible and transparent and have reasonable certainty, since these characteristics are fundamental conditions to be fulfilled in order to make fruitful use of the market.⁽⁴⁴⁾ It may be concluded that the success or failure of the Kyoto Mechanisms will depend on specific rule-making.⁽⁴⁵⁾ The application of a rigorous compliance system will be one of the essential pre-conditions for the Kyoto Mechanisms acquiring a large number of participants and which might tempt the USA to return to the Kyoto Protocol.

NOTES

- (1) Procedures and mechanisms relating to compliance under the Kyoto Protocol in Decision 5/CP. 6 The Bonn Agreements on the implementation of the Buenos Aires Plan of Action, Report of the Conference of the Parties on the second part

Kyoto Compliance Regime : its contents and effects on other internal systems

of its sixth session, held at Bonn from 16 to 27 July 2001, FCCC/CP/2001/5, 25 Sep. 2001 (hereafter cited as Bonn Compliance Agreement), pp. 48-49.

- (2) Decision 24/CP. 7 Procedures and mechanisms relating to compliance under the Kyoto Protocol in The Marrakesh Accords, Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 Oct. to 10 Nov. 2001 (hereafter cited as Marrakesh Accords) , FCCC/CP/2001/13/Add. 3, 21 Jan. 2002, pp. 64-77.
- (3) Decision 27/CMP. 1 Procedures and mechanisms relating to compliance under the Kyoto Protocol, Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 Dec. 2005 (hereafter cited as The Kyoto Protocol Compliance Procedures), FCCC/KP/CMP/2005/8/Add. 3, pp. 92-103.
- (4) Vienna Convention on the Law of Treaties, Art. 2.1 (a).
- (5) Draft Articles on Responsibility of States for International Wrongful Acts, Article 1.
- (6) See *ICJ Rep.* 1996, pp. 241-242. the United Nations had already affirmed the same principle in Stockholm Declaration in 1972 and Rio Declaration in 1992. This principle had been originally introduced as the responsibility not to cause damage to the environment of other states or to areas, by the award of international arbitral tribunal of Trail Smelter Case in 1941. See 3 *RIAA*, 1941, p. 1965.
- (7) M. Koskenniemi, 'Breach of Treaty or Non-Compliance ? Reflections on the Enforcement of the Montreal Protocol', 3 *Yearbook on International Environmental Law*, 1992, p. 126.
- (8) G. Loibl, 'Compliance with International Environmental Law-the Emerging under Kyoto Protocol,' Wolfgang Benedek, Hubert Isak and Renate Kicker ed, *Development and Developing International and European Law*, Peter Lang Pub. Inc, 1999, p. 100.
- (9) Report of the fourth meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Annex IV and V, UNEP/OzL. Pro. 4/15, 25 Nov. 1992, pp. 44-46.
- (10) Bonn Compliance Agreement, para. 1.
- (11) *Ibid.*, para. 3.

- (12) Ibid., para. 6. and The Kyoto Protocol Compliance Procedures, IV-2 and V-2.
- (13) The Kyoto Protocol Compliance Procedures, II-6.
- (14) Ibid., V-3.
- (15) Ibid., VI.
- (16) Ibid., VII.
- (17) Ibid., VIII-3.
- (18) Ibid., II-9. 'Members present and voting' means members present and casting an affirmative or a negative vote.
- (19) Ibid., VIII-7.
- (20) Ibid., IX-1 and 2 and X-1.
- (21) Ibid., XV-5.
- (22) Proposal from Saudi Arabia to amend the Kyoto Protocol, FCCC/KP/CMP/2005/2 26 May 2005.
- (23) For details of the summary of negotiation process of COP/MOP-1 held at Montreal in 2005, see *Earth Negotiations Bulletin*, at <http://www.iisd.ca/vol12/enb12291e.html>.
- (24) The Kyoto Protocol Compliance Procedures, IV-5 (b).
- (25) Ibid., V-4 (c).
- (26) Ibid., XV-4.
- (27) Decision 18/CP. 7. Modalities, rules and guidelines for emissions trading under Article 17 of the Kyoto Protocol in Marrakesh Accords, FCCC/P/2001/13/Add. 2, 21 January 2002, p. 53.
- (28) CIEL's Report, Hybrid Liability Revisited : Bridging the Divide Between Seller and Buyer Liability, 2000, at <http://www.ciel.org/Publications/HybridLiabilityCOP6.pdf>.
- (29) The Kyoto Protocol, Article 12.1.
- (30) E. Meijer and J. Werksman, 'Keeping it Clean-Safeguarding the Environmental Integrity of the Clean Development Mechanism', D. Freestone and C. Streck ed., *Legal Aspects of Implementing the Kyoto Protocol Mechanisms : Making Kyoto Work*, Oxford Univ. P., 2005, pp. 192-193.
- (31) In this regard, Article 12.3 (b) of the Kyoto Protocol Parties stipulates that 'Annex I Parties may use the CERs accruing from such project activities to

Kyoto Compliance Regime : its contents and effects on other internal systems

contribute to compliance with 'part' of their quantified emission limitation and reduction commitments under Article 3. In fact, a concrete cap has not been formulated in any rules of CDM or Kyoto Compliance Procedures'.

- (32) Glenn Wiser, CIEL, 'Reports on the Compliance Section of Marrakech Accords to the Kyoto Protocol' at http://www.ciel.org/Publications/Marrakech_Accords_Dec01.pdf.
- (33) See the table at the end of this paper.
- (34) P. Sands presents five possibilities as regards non-compliance with the obligation under the Kyoto Protocol : compliance procedure of the Protocol, multilateral consultative procedure by 1992 Framework Convention, ICJ, ITOLOS that a small island state was threatened by rise in the sea level and WTO panel on the ground of manufacturing products in a manner which is climate-unfriendly and which does not meet the obligation under the Protocol. See P. Sands, 'Non-compliance and Dispute Settlement', U. Beyerlin, P. Tobias Stoll and R. Wolfum eds., *Ensuring Compliance with Multilateral Environmental Agreements*, Martinus Nijhoff, 2006, pp. 353-354.
- (35) The Kyoto Protocol Compliance Procedure XVI.
- (36) Draft Articles on Responsibility of States for International Wrongful Acts, Article 48. And see M. A. Fitzmaurice and C. Redgwell, 'Environmental Non-Compliance Procedures and International Law', 31 *Netherlands Yearbook of International Law*, 2000, p. 65.
- (37) Jacqueline Peel, 'New State Responsibility Rules and Compliance with Multilateral Environmental Obligations : Some Case Studies of How the New Rules Might Apply in the International Environmental Context', 10 *Review of European Community and International Environmental Law*, 2001, pp. 96-97.
- (38) G. Handl, 'Compliance Control Mechanisms and International Environmental Obligations', 5 *Tulane Journal of International and Comparative Law*, 1997, p. 29.
- (39) UN Framework Convention on Climate Change, Article 3.1.
- (40) D. G. Victor, 'The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure', D. G. Victor, L. Raustiala and E. B. Skolnikoff ed., *The Implementation and Effectiveness of International Environmental Commitments : Theory and Practice*, MIT Press, 1998, p. 139.

- (41) J. Burnee, 'Enforcement Mechanisms in International Law and International Environmental Law', *supra* note 34, pp. 1-23.
- (42) J. Brunnee, 'A Fine Balance : Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol', 13 *Tulane Environmental Law Journal*, 2000, p. 256.
- (43) Xueman Wang and Glenn Wiser, 'The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol', 11 *Review of European Community and International Environmental Law*, 2002, p. 198.
- (44) Procedures and Mechanisms relating to Compliance under the Kyoto Protocol, Submissions from Parties, FCCC/SB/1999/Misc. 12, p. 65.
- (45) J. Brunnee, *supra* note 42, p. 236.

Kyoto Compliance Regime : its contents and effects on other internal systems

Table : Compliance Procedures under the Montreal Protocol and the Kyoto Protocol

	The Montreal Protocol	The Kyoto Protocol	
Adopted year	Adopted in 1992	Recommended in 2001 and adopted in 2005	
Trigger	Secretariat	ERTs	
	Non-complying Party itself		
	Any other Party		
Committee	Implementation Committee	Compliance Committee divided into a facilitative branch and an enforcement branch	
Number/Term	10 members/2 years	10 members each branch, 20 members in total/4 years	
Criteria for election	The MOP elects on the basis of equitable geographical distribution.	The COP/MOP elects on the basis of the following : A. 1 member from each of the five regional groups of UN B. 1 member from the small island developing States C. 2 members from Annex I Parties D. 2 members from non Annex I Parties	
Competence	Nothing (Parties themselves)	Individuals that have competence relating to climate change and in relevant fields such as the scientific, technical, socio-economic or legal fields	
			Legal experience
		The facilitative branch	The enforcement branch
Aim	To secure an amicable solution of the matter	To promote compliance and provide for early warning of potential non-compliance	The restoration of non-compliance to ensure environmental integrity
Steps	The committee reports to the MOP, which shall take measures	The branch directly decides on the application.	
Appeal	Nothing	Nothing	Possible
Consequences	-Appropriate assistance, -Issuing cautions and -Suspension of specific rights and privileges under the Protocol	-Provision of advice and facilitation of assistance, -Facilitation of financial and technical assistance and -Formulation of recommendations	-Declaration of non-compliance and development of a plan. Especially in the non-compliance with Article 3.1 of the Protocol. -Deduction of the assigned amount for the 2nd period by 1.3 times the amount of excess tonnes. -Development of a compliance action plan and -Suspension of the eligibility to make transfers under ET