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**JOINT WORKING GROUP COMPLIANCE ON THE KYOTO PROTOCOL:
AN OVERVIEW OF SUGGESTIONS ON COMPLIANCE**

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10. Conclusions and recommendations

1. Introduction

Annex II of Decision 8/CP.4 from COP4 on "Preparation for the first session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol" established a joint working group (JWG) on compliance under the SBI and SBSTA.³ Because of the relation between the legal and the technical aspects the suggestion is done that this JWG should include both legal and technical experts.⁴

Much preliminary and exploratory work remains to be done, including on identifying key issues and options, both in the context of individual Kyoto mechanisms and regarding any broader compliance regime. Issues related to compliance arise under different provisions of the Protocol and it is important to coordinate relevant work under the auspices of different groups so as to develop a coherent compliance system for the Protocol and to avoid unnecessary duplication.⁵

Annex II invited Parties also to submit views to the secretariat on matters relating to compliance under the Kyoto Protocol, to be made available by the secretariat in a miscellaneous document.⁶ This document contains some main issues in the comments of the Parties and my suggestions about these issues.

The Annex II also gives a mandate to the JWG to take a proactive, integrative and comprehensive approach to identifying the needs, resources and gaps in the Protocol's compliance system. It is important to see that, while specialized rules and procedures may well be developed within the context of particular mechanisms, the JWG must be in a position to ensure that the combined resulting rules are coherent, proportionate, and effective.⁷

A main point is also to see that the adoption, through the Kyoto Protocol, of legally binding and quantified commitments and the introduction of market-based "mechanisms" make the development of non-compliance procedures imperative.⁸

The monitoring, reporting and review framework and the provisions governing the Kyoto mechanisms should be a priority in the development of a compliance system for the Kyoto Protocol.

There will be direct link on compliance-related issues that might arise in the other groups working out the Kyoto mechanisms.⁹

2. Legal basis and tasks of the JWG Compliance

³ Australia; AOSIS.

⁴ EU.

⁵ Canada.

⁶ AOSIS.

⁷ AOSIS.

⁸ AOSIS.

⁹ Canada.

Compliance encompasses a number of elements, ranging from measures designed to assess compliance to determining non-compliance and possible consequences for such non-compliance. But first there must be an answer to the question of the legal basis of the activities of the JWG Compliance and the tasks of the working group.

2.1 Article 18 a legal basis

Article 18 of the Kyoto Protocol calls for "appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol". So the first legal basis of the JWG Compliance can be found in Article 18. One can consider that the "procedures and mechanisms" called for in Article 18 of the Kyoto Protocol constitute only one aspect of the regime's compliance effort. The Protocol must be assessed in its totality with a view to identifying the essential tools for anticipating, preventing, identifying and responding to non-compliance.¹⁰

The possibility of ensuring binding consequences will be an important element of a compliance procedure, and will enhance the Parties' collective ability to deter non-compliance and to take decisions that counteract the effects of non-compliance. Procedural means can and should be found to bring into force Article 18 procedures and mechanisms that have the full authority to adopt decisions with binding consequences, simultaneously with the entry into force of the Protocol and the operations of its mechanisms.¹¹

The Article 18 procedures could help to answer the concern about the long-term consequential impacts of non-compliance, by making available any financial penalties resulting from a non-compliance procedure to meet the costs of adaptation. In any case, any non-compliance procedures developed under the Protocol or the Convention will in no way affect the rights of all States under international law concerning State responsibility for the adverse effects of climate change.¹²

2.2 Decision 8/CP.4 a legal basis

A second legal basis for this JWG can be found in Decision 8/CP.4. This decision identifies four elements for the Joint Working Group's agenda, namely to: 1. identify compliance-related elements in the Kyoto Protocol; 2. follow the development of these elements in various groups including, for example, elements on substantive rules and consequences of non-compliance, and identify gaps in order that they are addressed in the suitable forum; 3. develop procedures by which compliance with obligations under the Kyoto Protocol should be addressed, to the extent that they are not being considered by other groups; 4. ensure coherent approaches to developing a comprehensive compliance system.¹³

2.3 Tasks of the JWG

¹⁰ AOSIS.

¹¹ AOSIS.

¹² AOSIS.

¹³ AOSIS; Australia and United States mention more or less the same elements but speak about tasks.

One of the first tasks facing the JWG will be a. the identification of compliance-related elements in the Kyoto Protocol. This task will involve a detailed survey of the different obligations contained in the Protocol, an analysis of their varying nature and consideration of any further elaboration that is necessary (most of which will be undertaken by other groups). The specific nature of obligations under the Protocol must be taken into account in the development of the Compliance system. The JWG will also need to be fully apprised of work taking place in other relevant groups and bodies and the implications of this work for the likely shape of the compliance regime. The JWG might also be able to identify compliance-related issues to be taken up in these groups and bodies.¹⁴

Other tasks of the JWG will include b. identifying and addressing compliance related issues not dealt with by other groups, c. developing procedures for the assessment of whether obligations under the Protocol have been met (for example, the steps which will follow technical assessments by expert review teams under Article 8), d. considering responses to non-compliance and e. ensuring that a coherent and comprehensive approach is taken to compliance under the Protocol.¹⁵

To determine and address cases of non-compliance, an indicative list of consequences will have to be developed, taking into account the cause, type, degree and frequency of non-compliance. Such an indicative list of consequences could include the following aspects: a. appropriate assistance (including technical and financial expertise and capacity building), b. issuing cautions, c. suspension of rights, including ability to participate in articles 6, 12 and 17, d. penalties, including financial penalties.

In the development of such a list, Parties should keep in mind that any procedure and mechanism under the Article 18 entailing binding consequences can only be adopted through an amendment to the Protocol.¹⁶

During the process there is also a need for an assessment of the Protocol's In-Depth Review (IDR) procedures, based on the experience thus far with the Convention's IDR under 2/CP.1. The potential application to the Protocol of any multilateral consultative processes adopted under the Convention is necessary. Finally a critical evaluation of the Convention and the Protocol's financial mechanism must be given as a means of assessing both the obligations of Annex II Parties, and the adequacy of this mechanism in assisting non-Annex I Parties to comply with the Protocol.¹⁷

3. Parties and Compliance

3.1 A strong and effective Compliance System

In general Parties consider that it is essential to have an effective compliance system for the Kyoto Protocol which provides certainty and enhances the confidence of all Parties that the commitment obligations will be and have been met. The compliance system should:

- be simple, efficient, flexible and transparent; - encourage Parties to undertake and comply with their commitments; - be structured towards preventing non-compliance; - facilitate the efficient

¹⁴ Australia.

¹⁵ Australia.

¹⁶ South Africa.

¹⁷ AOSIS.

operation of the Kyoto Protocol mechanisms; - enable identification of instances of potential or actual non-compliance; - deal with the consequences of non-compliance in a manner which facilitates and assists compliance and promotes the protection of the environment.¹⁸

In other words, a comprehensive, coherent, unified, strong, efficient and effective compliance system is essential for the successful implementation and application of the Kyoto Protocol.¹⁹ A comprehensive and unified approach is necessary towards supervision of compliance regarding obligations in respect of, in particular, reporting, assigned amounts, Kyoto mechanisms and policies and measures. In order to ensure a comprehensive system, close co-operation inter alia between the groups elaborating rules, modalities and guidelines for the Kyoto mechanisms and the group developing a compliance system will be necessary.²⁰

The development of a strong and effective compliance framework under the Kyoto Protocol is essential.²¹ The reasons are: a. to ensure the environmental integrity of the Kyoto Protocol; b. to achieve the successful implementation of the Kyoto Protocol, including its mechanisms, and c. to provide Parties with certainty and confidences as they implement their commitments.²²

The aspect of the reasonable certainty has consequences for the system. There needs to be a certain level of automaticity to the system²³, so that Parties know which actions/inactions will lead to which results and so that parallel infractions will be treated in a parallel manner. On the other hand, the system somehow needs to take account of particular circumstances.²⁴

There is a strong believe that the possibility of ensuring binding consequences will be an important element of a compliance procedure, and will enhance the Parties' collective ability to deter non-compliance and to take decisions that counteract the effects of non-compliance. Procedural means can and should be found to bring into force Article 18 procedures and mechanisms that have the full authority to adopt decisions with binding consequences, simultaneously with the entry into force of the Protocol and the operations of its mechanisms.²⁵

3.2 Institutional level

Everybody will understand that national and regional regulatory institutions will play an important role in ensuring compliance with the Protocol. For this reason, each Party should be called upon to demonstrate that robust relevant regulatory frameworks are in place as part of their Protocol

¹⁸ New-Zealand, Canada; see about transparency also United States.

¹⁹ Switzerzlerland, EU, also Canada.

²⁰ EU.

²¹ Australia, United States.

²² Australia.

²³ United States, AOSIS.

²⁴ United States.

²⁵ AOSIS.

commitments. However, because the Protocol will involve complex transnational and interregional relationships, a multilateral and global regime will also be essential to fill gaps in domestic and regional structures, and to ensure the coherent and consistent enforcement of the Protocol's rules.²⁶

Achieving compliance with the Protocol's obligations will largely depend upon domestic enforcement by various Parties of their laws implementing the Protocol.²⁷ The international non-compliance regime should create incentives for Parties to have strong domestic enforcement, but the international regime will not be directly involved in domestic enforcement. This being so, it seems desirable for Parties (whether under article 5 or 7 or elsewhere) to report on the domestic enforcement regime(s) applicable to domestic laws implementing Protocol obligations, particularly article 3.²⁸

A question is: is a distinct (non) compliance body needed to conduct legal compliance assessment?²⁹ This body makes the first step, the compliance assessment; the second step, formal findings of (non) compliance is a qualitatively different task and may require involvement of a different body.³⁰

There is an idea that a single body should treat all questions (procedural and substantive) with relation to non-compliance. This body should be a small, specialized, independent entity which can address individual problems on an ad hoc basis and react rapidly to demands.³¹ Members to this body shall be elected by the COP/MOP on the basis of their personal expertise and merits in technical and legal fields related to the implementation of the UNFCCC, taking into account equitable geographical distribution. This body shall report directly to the COP/MOP. Cases can be submitted to the compliance-body by: Parties with respect to their own or the implementation by another party, other bodies of the Convention/Protocol, the review teams and the Secretariat.

One of the countries has the question: assuming that several procedures are needed to deal with the rules governing the individual Kyoto mechanisms, could these all be handled by the same body?³² But there is also the suggestion that existing bodies should be utilised where appropriate.³³ Parties concerned have the right to participate fully in the proceedings and to present their views (principles of due process), but do not participate in the decision-making.³⁴

In order to allow fast progress in developing a compliance regime, the Joint Working Group on compliance established at COP4 should report to COP5 on progress in the areas identified in

²⁶ AOSIS.

²⁷ Also Australia.

²⁸ United States.

²⁹ Canada.

³⁰ Canada.

³¹ Also Canada; but Canada has questions about the mandate of such a body and the role in finding parties to be in (non)compliance.

³² Canada.

³³ New Zealand.

³⁴ See also South Africa, EU, United States.

decision 8/CP.4. COP5 should establish an ad hoc working group on compliance comprising legal and technical experts.³⁵

A party's performance under the Kyoto Protocol will ultimately depend upon private actors. Domestic incentive and enforcement systems will thus be crucial to Parties achieving compliance with their commitments. Thought should be given to how national systems could support the Kyoto Protocol's compliance system.

4. Principles of the Compliance System

In developing the Protocol's compliance regime, it is important to bear in mind that there are already some relevant elements in the Protocol. Article 8 already sets forth numerous aspects of a review process applicable to annex I Parties. In addition, the Framework Convention has established the principles of transparency and public access in its procedures for reporting and review. Extension of these principles to the procedures and mechanisms under the Protocol (e.g., reports from the Parties, reports from the experts groups to the Parties, etc.) could serve as a valuable compliance tool.³⁶

4.1 New Multilateral compliance framework

In general, existing compliance-systems for international environmental treaties tend to be piecemeal and underdeveloped and focused on annual reporting, supported by supervision by the COP and various adjudication provisions. There is general acceptance among Parties that a strong compliance framework is needed for the Kyoto Protocol. Having said this, Parties will be concerned to avoid the creation of a new, and potentially administratively complex, multilateral compliance framework.³⁷

4.2 Sensitive to states sovereignty

A compliance system which is sensitive to the sovereignty concerns of States is likely to find greater support among Parties. The compliance framework developed for the Protocol should therefore allow Parties sufficient flexibility to determine domestic compliance procedures which accord with national circumstances provided they meet agreed international requirements. These domestic procedures should work in a complementary manner with international compliance procedures to ensure that consistency in outcomes is achieved.³⁸

Some countries are concerned to ensure that all Parties keep in mind the potential, long-term consequential impacts of non-compliance with the Protocol.³⁹ The Article 18 procedures could help to answer this concern by making available any financial penalties resulting from a non-compliance

³⁵ Switzerland; see EU but then in relation to the JWG itself.

³⁶ United States.

³⁷ Australia.

³⁸ Australia.

³⁹ See also under 2.1.

procedure to meet the costs of adaptation. In any case, any non-compliance procedures developed under the Protocol or the Convention will in no way affect the rights of all States under international law concerning State responsibility for the adverse effects of climate change.⁴⁰

4.3 Compliance regulations built into Kyoto Mechanisms

References have been made previously to the need for provision in the international emissions trading rules for appropriate compliance and enforcement mechanisms relevant to the trading system (paragraph 32, Non-Paper on Principles, Modalities, Rules and Guidelines for an International Emissions Trading Regime, FCCC/SB/19998/MISC.1/Add.1/Rev.1, 10 June 1998). Compliance procedures and consequences should, as far as possible, be built into the rules for all the Kyoto Mechanisms to ensure market confidence and the efficient and effective operation of the mechanisms. This approach should ensure that compliance procedures and consequences of non-compliance are relevant to, and can interact with, the operation of these rules. These procedures and consequences for the mechanisms must be as rigorously defined as those agreed for other obligations under the Protocol to achieve consistency and equity in the application of the compliance framework.⁴¹

Consistent elaboration, application and compliance with the core obligation of Article 3 will be important in ensuring the overall integrity of the Protocol. Similarly the development of appropriate Kyoto Protocol mechanism rules designed to ensure the integrity of the Kyoto Protocol mechanisms can have a beneficial impact on and enhance compliance, including through lowering the costs of meeting Parties' emission reduction commitments.⁴²

Consideration might be given to opportunities that the Kyoto Mechanisms may provide for promoting compliance. It has been suggested that the mechanism rules could make compliance with certain Protocol obligations (article 5 on monitoring and article 7 on reporting) a prerequisite for transferring/selling emission rights or credits through mechanisms such as joint implementation or international emissions trading.⁴³

There is a need for the definition of relevant principles, modalities and guidelines for the verification, reporting and accountability under the Protocol's mechanisms.⁴⁴

4.4 Prevention of non-compliance

The compliance system should be structured towards the prevention of non-compliance.⁴⁵ This requires a rigorous reporting, monitoring and review system which would enable the early identification of potential compliance problems and enhance the incentive to comply. Reliable and

⁴⁰ AOSIS.

⁴¹ Australia.

⁴² New Zealand.

⁴³ Canada.

⁴⁴ AOSIS.

⁴⁵ New Zealand; Canada.

transparent information on which to base assessments of compliance is fundamental to such a compliance system.⁴⁶

The key focus of the compliance system should be on encouraging and facilitating compliance with emission limitation and reduction commitments. A compliance system for the protocol must have strong preventive and facilitative features.⁴⁷

It is also important that the Protocol's compliance framework works to prevent non-compliance and to facilitate and promote compliance. One simple way to facilitate compliance is to allow Parties the opportunity to correct minor omissions or errors (e.g. not following the required format for reporting emission estimates). A pro-compliance approach to the Protocol may be encouraged through promoting strong domestic compliance systems.⁴⁸

Experience with existing MEAs has demonstrated that compliance systems that focus upon facilitating means by which Parties can fulfil their commitments, such as advice or assistance, are more likely to encourage Parties' participation, both in the agreement as a whole and in the compliance system. Facilitative and cooperative approaches are crucial to promoting Parties reliance upon and trust in the compliance system. In turn, trust in the compliance system is crucial to the legitimacy and effectiveness of both the system as such and any consequences to non-compliance that may eventually be decided upon.⁴⁹

Another word is "credibility". While we should primarily be striving to create a "compliance system" rather than a "non-compliance" system, Parties and the public need to know that in the final analysis, there will be appropriate consequences for non-compliance. Credibility will be bolstered if it is clear that the system is depoliticized and cannot be "gamed".⁵⁰

In the event of non-compliance with the obligations of the Kyoto Protocol, it is the international community as a whole and the global environment which suffers harm. In order to promote the protection of the environment the compliance system should: secure the cooperation of Parties in efforts to correct problems resulting in or contributing to failure to comply; encourage a facilitative approach to compliance problems and ensure that any compliance response is relevant to and consistent with the environmental objective of the Protocol.⁵¹

5. Elements of the Compliance System

The elements of the Compliance System can be seen as the different steps in the (non) compliance process. Important is to have a coherent system with no overlaps, duplication and gaps. Also the relation with the existing elements, such as the expert review process under Article 8 must be

⁴⁶ New Zealand, Canada.

⁴⁷ New Zealand, Canada.

⁴⁸ Australia.

⁴⁹ Canada.

⁵⁰ United States.

⁵¹ New Zealand.

clear.⁵²

Once a sound compliance structure is in place, the compliance system should be allowed to evolve to encourage further change in the behaviour of States to reduce global emissions. The system should have the flexibility to develop as the implementation of the Kyoto Protocol matures.⁵³

The Compliance System must be workable, predictable, administratively cost-efficient and consistent in its application. Parties must be certain that "everyone is playing by the same rules" and be confident that all Parties face similar incentives to ensure that their obligations are met.⁵⁴

Compliance should as far as possible be promoted through incentive measures, since they are most in the interest of the environment. Incentives and sanctions in general should be applied in a graduated manner.⁵⁵

The compliance system should be applied without prejudice to the dispute settlement procedure. The multilateral consultative process (MCP) should be used in conjunction with the compliance system to assist in the resolution of compliance issues.⁵⁶

Elements of the compliance system are: a. Obligations and provisions of the Kyoto Protocol, b. Monitoring, reporting, review and redress, c. Procedures for determining non-compliance, d. Consequences of non-compliance.⁵⁷

6. Obligations and provisions of the Kyoto Protocol

An initial examination of the Kyoto Protocol indicates that consideration must be given to the differing nature and implications of the rules and guidelines in overseeing the development of a Kyoto Protocol Compliance System.⁵⁸

Provisions of the Kyoto Protocol that are relevant to compliance / non-compliance include those relating to⁵⁹: (a) Policies and measures (Article 2); (b) Assigned amounts (Article 3, Annex A); (c) Joint fulfilment (Article 4); (d) Monitoring, reporting and review (Articles 5, 7, 8); (e) National programmes (Article 10); (f) The mechanisms of the KP:- Joint implementation (Article 6), - Clean Development mechanism (Article 12), - Emissions trading (Article 17); (g) Potential application of the MCP (Article 13 UNFCCC; Article 16); (h) Procedures and mechanisms to determine and address cases of non-compliance (Article 18).

In essence these provisions are obligations, but obligations with different character.

⁵² Canada.

⁵³ New Zealand.

⁵⁴ Australia.

⁵⁵ EU.

⁵⁶ EU, Switzerland.

⁵⁷ Australia.

⁵⁸ Australia.

⁵⁹ Switzerland.

In a certain way there is a need for the further elaboration of the Protocol's primary obligations, in such a way that will allow clearer benchmarks against which to assess demonstrable progress (article 3), eligibility for participation in mechanisms (articles 4, 6, 12 and 17)⁶⁰, efforts to implement policies and measures (article 2), and progress in meeting quantified emissions reduction and limitation commitments (QUERLCs) (article 3)^{61, 62}.

Everybody should be guided by the understanding that some obligations are more central to overall compliance with the Protocol than others, for example a minor failure to meet the guidelines relating to reporting in the national communications is in a different category to a major breach of the rules for one of the Kyoto Mechanisms and its consequent effect on a Party meeting its Article 3 target.⁶³ Instead of central obligations or target other countries are speaking about the core obligation⁶⁴: article 3. The Protocol, its rules and guidelines contain the building blocks to enable this core obligation to be met. Reporting, measuring and monitoring emissions and changes in carbon stocks are supplementary obligations that underpin the commitment obligation in article 3.⁶⁵

One of the countries does not consider, aside from the core obligation (article 3), a prescriptive compliance system with each and every obligation under the Protocol is desirable.⁶⁶ Another country says that the first step must necessarily be compliance assessment, designed to evaluate the Parties' performance in meeting their Protocol commitments. Compliance assessment can be purely technical/factual (article 8), or can involve legal or political considerations. In most cases, technical assessment will be a prerequisite for legal or political assessments.⁶⁷

There are various kinds of obligations under the Protocol (e.g. quantitative/qualitative, individual/collective, annual/contentuous/end of commitment period). It would be desirable, from a compliance point of view, if negotiators charged with elaborating substantive rules/guidelines/etc. would make clear which are requirements and which are recommendatory, structure the requirements in relation to compliance.⁶⁸

Three types of obligations can be distinguished⁶⁹:

- central obligations and interpretation of relevant articles

⁶⁰ AOSIS, also Australia.

⁶¹ AOSIS, also Australia.

⁶² AOSIS

⁶³ Australia, United States.

⁶⁴ New Zealand.

⁶⁵ New Zealand.

⁶⁶ New Zealand.

⁶⁷ Canada and in essence South Africa.

⁶⁸ United States.

⁶⁹ Australia.

- obligations to the Kyoto Mechanisms
- obligations relating to measuring, monitoring and reporting.

6.1 Central obligations under Kyoto Protocol

The central obligations under the Kyoto Protocol are the Article 3 quantified emission limitation and reduction commitments ("targets"). Interpretation of other Articles of the Protocol, such as Article 3.3 and 3.4, and the development, reporting and verification of inventory estimates under Articles 5, 7 and 8, are important to the substance of these obligations⁷⁰; for the articles 5, 7 and 8 guidelines are needed. So in an indirect way also these guidelines are relevant for the central obligations.

6.2 Kyoto Mechanisms obligations

Substantive rules, modalities and guidelines are necessary for each of the Kyoto Mechanisms: Emissions trading under Article 17, Clean Development Mechanism under Article 12 and Joint Implementation under Article 6.⁷¹

A work program for developing these rules, modalities and guidelines was set in place at COP4. The discussions on the Kyoto Mechanisms and other compliance-related aspects of the Protocol progress in parallel so that Parties can assess the whole compliance regime when considering ratification.⁷²

Some are of the view that an effective non-compliance regime will have to be tailor made in order to properly address the non-compliance challenges that various flexible mechanisms will present to it. The rules and procedures of these flexible mechanisms are still to be determined and their impact on non-compliance is thus difficult to assess. Therefore it is at this stage impossible to present precise views on how the non-compliance regime should look like.⁷³

Article 4 sets out certain obligations for those Parties which decide to make an agreement to fulfil their commitments under Article 3 jointly. Articles 4.5 and 4.6, which allocate responsibility in the event of failure to achieve the Parties' combined level of emission reductions under such an agreement, will be part of the Kyoto compliance framework.⁷⁴

6.3 Measuring, monitoring and reporting obligations

Guidelines are also required for: a. Measuring and monitoring emissions under Article 5 (national systems and methodologies for the estimation of emissions and removals by sinks); b. Reporting of emissions under Article 7 (communication of information, including inventories); c. Technical assessment of inventories and national communications under Article 8 (expert review teams).⁷⁵

⁷⁰ Australia; see New Zealand.

⁷¹ Australia.

⁷² Australia.

⁷³ South Africa.

⁷⁴ Australia.

⁷⁵ Australia; also South Africa.

Parties must have in place national systems for the estimation of emissions and removals by sinks under Article 5 and submit inventories and supplementary information under Article 7. However, there is no explicit obligation upon Parties to develop accurate inventories. Moreover, these obligations are partly based on "guidelines" rather than "rules". Unlike rules, guidelines are technically not legally binding. This distinction creates issues regarding whether a Party can be penalised for not following a guideline (when the contrary act of conforming with a guideline creates a presumption of compliance). Considerable work is progressing in other fora to improve the accuracy, transparency and reporting of Parties' emissions estimates. The JWG needs to take into account this work in the development of the compliance framework.⁷⁶

7. Monitoring, reporting, review and redress

These tools can help non-compliance by enabling Parties to identify possible compliance problems at an early stage.⁷⁷ Some countries see these tools useful for the determination process.⁷⁸ Other countries see them as the features that can prevent non-compliance, at an early stage of the potential compliance problems.⁷⁹ It seems desirable for Parties to report on the domestic enforcement regime(s) applicable to domestic laws implementing Protocol obligations.⁸⁰

7.1 Monitoring, reporting and review

The core obligation in the Kyoto Protocol to which a compliance system needs to be addressed is the Article 3 commitment to meet the emission reduction target. The Protocol, its rules, modalities and guidelines contain the building blocks to enable this core obligation to be met. Reporting, measuring and monitoring emissions and changes in carbon stocks are supplementary obligations that underpin the commitment obligation in Article 3. Consistent elaboration, application and compliance with these will be important in ensuring the overall integrity of the Protocol. Similarly the development of appropriate Kyoto Protocol mechanism rules designed to ensure the integrity of the Kyoto Protocol mechanisms can have a beneficial impact on and enhance compliance, including through lowering the costs of meeting Parties' emission reduction commitments.⁸¹

Three functions of monitoring, reporting and review can be distinguished:

- a. an instrument to fulfil the central obligation of Article 3;⁸²
- b. a procedure for determining non-compliance;⁸³

⁷⁶ Australia.

⁷⁷ Australia and EU.

⁷⁸ South Africa.

⁷⁹ Canada, New Zealand.

⁸⁰ United States.

⁸¹ New Zealand.

⁸² New Zealand, United States, Australia.

⁸³ South Africa, New Zealand.

c. a feature that can prevent non-compliance.⁸⁴

7.2 Need for harmonization of rules and guidelines

There is a need for the enhancement and harmonization of rules and guidelines for the calculation and reporting of national inventories of greenhouse gases.⁸⁵

At the centre of a strong, efficient and effective compliance system stands full and timely reporting by individual Parties. Timely and comprehensive reporting and review on the basis of Articles 5 and 7 of the Protocol is an essential element of a compliance system and is conducive to achieving such compliance.⁸⁶ There is a need for the definition of relevant principles, modalities and guidelines for the verification, reporting and accountability under the Kyoto Protocol mechanisms.⁸⁷ Pro-compliance can be encouraged by standardised monitoring and reporting at a national level.⁸⁸

Compliance should as far as possible be promoted through incentive measures, since they are most in the interest of the environment. Incentives and sanctions in general should be applied in a graduated manner.

Particular attention is warranted regarding Article 3 of the Protocol, along with Article 5 and 7, which are the means by which an Annex I Party demonstrates its compliance with Article 3. In order to develop a system capable of assessing compliance with quantified emission limitation and reduction commitments (targets), it is instructive to identify the various pieces of the Protocol that are relevant to such an assessment. When the Protocol is "reverse engineered", it appears that calculating compliance with targets is akin to a mathematical formula, with emissions during the commitment period on one side of the equation and assigned amount on the other. One of the Parties has developed the various components of the formula; emissions (less than or equal to assigned amount) on the left side and the "assigned amount" on the right side.⁸⁹

7.3 Redress

Article 16 has in it the possibility to develop the multilateral consultative process on the basis of Article 13 of the Convention. During the process of reporting and review Parties should be able to make use of the multilateral consultative process. The aim of this process is to avoid cases of non-compliance.

⁸⁴ Canada, EU, Australia, New Zealand.

⁸⁵ AOSIS.

⁸⁶ EU.

⁸⁷ AOSIS.

⁸⁸ Australia.

⁸⁹ See schedule of the United States.

8. Procedures for determining non-compliance

8.1 Existing or new procedures

Reporting, monitoring and review procedures should be the foundation of the compliance system. These procedures should be simple, efficient, impartial, cost-effective, and flexible. To enhance coherence and efficiency, existing bodies and mechanisms established in the Kyoto Protocol should be utilised where appropriate. The aim should be to enhance existing systems without restricting the flexibility the Protocol accords Parties in meeting their commitments.⁹⁰ Useful tools for the determination process of cases of non-compliance would be: monitoring, reporting, reviewing and verification of Parties' obligations.⁹¹

Fair assessment of compliance requires comparable measurement and verification of compliance as and between Parties. Confidence in the inventory data should be assured. These objectives may be assisted by the use of Article 8 expert review teams and the development of appropriate guidelines for review and verification of reporting and inventories.⁹²

8.2 Elements of special procedures

Given that the authority of the expert review teams under article 8 does not extend to determining or responding to non-compliance, there will be a need for an additional procedure. Numerous issues arise in connection with devising such a procedure.⁹³

There is the question of whether the procedure should automatically review each Party's compliance with its target obligation after each commitment period or, alternatively, whether compliance should only be reviewed when an issue has been affirmatively raised. It appears that the non-compliance procedure does not need to automatically review each Party's compliance with its target obligation. If there is confidence in a Party's measurement and reporting (which should be known from annual review of inventories and assigned amounts, as well as from period indepth reviews), then the only step that is required at the end of a commitment period is a final evaluation to ascertain whether total reported emissions are less than or equal to adjusted assigned amount. This evaluation should occur automatically as part of the annual review and accounting of assigned amounts by expert review teams. Referral to a further procedure would appear to be necessary only if there is a lack of confidence in a Party's measurement and reporting or if (taking into account the need for a true-up period) the annual review indicates that emissions exceed assigned amount.⁹⁴

There is also the question of the composition/expertise of any review body. As illustrated above through the target formula, compliance issues might arise under any one of the formula elements. On the left side of the equation, for example, there might be an issue concerning whether a Party has followed required methodologies; on the right side, for example, there might be issues con-

⁹⁰ New Zealand.

⁹¹ South Africa.

⁹² New Zealand, see also Australia.

⁹³ United States.

⁹⁴ United States.

cerning a Party's baseline emissions or whether the rules for a particular mechanism have been followed. The procedure and the members of any body need to be capable of reviewing all such issues.⁹⁵

Given the time-lag following the end of the commitment period before which inventory, emission and other data will be available, a short grace period to enable Parties to ensure compliance would also facilitate the achievement of commitments.⁹⁶ In affording Parties an opportunity to avoid non-compliance and the need to resort to any non-compliance processes, a grace period can enhance the preventive features of the compliance system.⁹⁷

The nature of the procedure also needs to be related to the consequences that might flow from a determination of non-compliance. The more "binding" and serious the potential consequences, the more the procedure must afford "due process".⁹⁸

Consideration might be given to the role that national compliance systems could play in promoting the implementation of Protocol commitments and to a "grace period" after the end of the commitment period, during which Parties can take final steps to ensure compliance.⁹⁹

The compliance procedure should be based on the principle of due process, which means in particular that Parties concerned have the right to participate in the proceedings and to present their views. Further consideration needs to be given to the question whether taking into account the "graduated riposte" approach, different stages of the compliance system ought to be elaborated. In this regard it is important to note that legal questions should be dealt with by quasi-judicial bodies. In any case sanctions should not be imposed without "due process".¹⁰⁰

Procedures need to be put in place for determining whether obligations under the Kyoto Protocol have been fulfilled. Issues which need to be addressed include¹⁰¹:

- a. Who and what would trigger an inquiry whether a Party is in compliance with a particular obligation (e.g. would such an inquiry occur only after the identification of a question of implementation by an Article 8 expert review team)?
- b. Who would be responsible for determining that a Party is not in compliance with its obligations?
- c. Do we need a separate procedure (or sub-procedure within a general procedure) for dealing with compliance elements of the Kyoto Mechanisms or certain issues relating to them?
- d. How would assessment of compliance, for example with procedural obligations such as the timeliness and format of annual inventories and communications, during the commitment

⁹⁵ See schedule of the United States.

⁹⁶ New Zealand, see also Australia and United States.

⁹⁷ Canada.

⁹⁸ United States.

⁹⁹ Canada, Australia and New Zealand.

¹⁰⁰ EU, see also South Africa and (more general) Switzerland.

¹⁰¹ Australia.

period be conducted?

9. Consequences of non-compliance

9.1 Substantive norms

Application of consequences should be proportionate to the nature of the obligation and the seriousness of the breach (i.e. "the cause, type, degree and frequency of non-compliance").

All consequences resulting from the compliance procedure - whether or not they are considered "binding" - should be proportionate and responsive to the case at hand. The Joint Working Group should therefore discuss a full range of potential cases of non-compliance and design an indicative list that is proportionate to the cause, type, degree and frequency of non-compliance. The Working Group should consider specifically the benefits of establishing procedures for imposing automatic consequences in certain circumstances.¹⁰²

In Buenos Aires a point of discussion was whether or not automatic consequences in cases of non-compliance are needed. Some countries did this suggestion¹⁰³, other countries did not agree at all.¹⁰⁴

9.2 Place of consequences: on international, regional or national level?

A compliance system which deals with the consequences of non-compliance has as its foundation domestic control measures, the effective implementation of which can provide a solid base for compliance. Domestic compliance procedures will likely form the cornerstone of a Party's compliance where sub-national entities are involved. The flexible mechanism rules and the reporting and other obligations that provide input into meeting the commitment target can usefully contribute to an effective compliance system. At each of these steps measures can be taken to facilitate compliance, or if a problem of non-compliance is identified, to assist in bringing a Party back into compliance. A coherent, mutually reinforcing, and consistently applied system of consequences is required.¹⁰⁵

The consequences of non-compliance with the emission limitation and reduction commitments should be the same irrespective of the manner in which a Party has sought to implement its obligations through recourse to Kyoto Protocol mechanisms.¹⁰⁶

Response to compliance problems should be designed to return a Party compliance. A facilitative approach would best achieve the environmental objective of the Protocol. Parties should consider what positive measures of assistance could be used to help overcome implementation of compliance

¹⁰² AOSIS.

¹⁰³ Australia, United States.

¹⁰⁴ South Africa and Switzerland.

¹⁰⁵ New Zealand.

¹⁰⁶ New Zealand.

problems.¹⁰⁷

The compliance system and the consequences of non-compliance should be designed to promote the achievement of the environmental objective of the Protocol. A graduated response may be necessary depending on the nature and gravity of any non-compliance.¹⁰⁸ Other countries say: the relative gravity of non-compliance depends on the type of obligation affected and the casuse, degree and frequency of non-compliance.¹⁰⁹

9.3 Types of sanctions

The language of the Protocol supports the development of differentiated or graduated responses to the various obligations under the Protocol. A wide spectrum of possible responses to compliance problems might be developed in the form of an indicative list, beginning, for example, with those responses designed to assist a Party to return to compliance. Consideration needs to be given whether the application of these measures to specific breaches would be discretionary and reactive or whether specific consequences might be mandated for particular breaches in advance of the event.¹¹⁰

In terms of consequences for non-compliance, again several points are worth considering.

The target formula appears to contain at least three different kinds of elements:

- (1) elements that are obligations in and of themselves (such as reporting under Article 7). Non-compliance with an element that is an obligation in and of itself might carry more than one consequence. For example, a reporting violation might carry its own consequence (such as the inability to use JI tonnes, as set forth in Article 6.1.c), as well as lead to a consequence related to non-compliance with the target obligation.
- (2) elements that are pure accounting elements and not actually written as obligations themselves (such as sinks under Article 3.3). Concerning accounting elements that are not written as obligations, such as sinks under Article 3.3, there cannot, strictly speaking, be "non-compliance" with such an element; rather, the value of that element in the formula would simply be adjusted to make it accurate (unless, perhaps, inaccuracies were chronic).
- (3) elements that are accounting elements but derive from mechanisms governed by obligations (such as CDM, trading, etc.). Regarding elements that derive from mechanisms, to the extent a problem with such an element were due to non-compliance with the rules governing the related mechanism, additional consequences might be appropriate beyond adjustment of the element's value.¹¹¹

Different kinds of inconsistencies could merit different treatment.

Some kinds of inconsistencies (such as being a day late in reporting or a minor technical error of no substantive import) should be considered de minimus, not rising to the level of a Protocol violation. Some kinds of inconsistencies, while not strictly speaking de minimus (such as missing a

¹⁰⁷ New Zealand.

¹⁰⁸ New Zealand.

¹⁰⁹ Canada, United States.

¹¹⁰ Australia.

¹¹¹ United States.

category of emissions in a communication), might be easily cured if the Party is given the opportunity.

At the other end of the spectrum, some kinds of inconsistencies (such as an inconsistency with Article 5 or 7 not in either of the above categories) might constitute a violation of that Article and/or non-fulfilment of a participation requirement for a Kyoto mechanism (see, e.g., Article 6.1.c on JI); it might also contribute to a violation of the target obligation.¹¹²

Consequences for exceeding the target after an assumed true-up/grace period should be designed so as to promote the environmental effectiveness of the Protocol (for example, by restoring excess tonnes to the system). Any excess tonnes must be subtracted from a Party's assigned amount for the subsequent commitment period, with a penalty (at a rate designed to make overages unattractive).¹¹³

10. Conclusions and recommendations

A. Legal basis and tasks of the JWG Compliance.

Conclusion 1:

There is some tension between the legal basis of Article 18 in which is spoken about "cases of non-compliance" on the one hand and the basis in Decision 8/CP.4 on the other hand where in essence the main point is "the compliance-related element" and which contains also as a minor point (as an example) substantive rules and consequences of non-compliance). These different legal basis' has important consequences for the tasks of the JWG Compliance and have therefore to be discussed.

Recommendation 1:

It is desirable to start with a discussion about situations of non-compliance and to develop procedures and mechanisms. These mechanisms will not only and even not primarily have a repressive effect but the preventive effect will be much more important.

B. Parties and Compliance.

Conclusion 2:

The Parties agree that a strong and effective framework is essential, but it must be stressed that this is not the same as the reasonable certainty and the binding consequences of the compliance procedure.

Recommendation 2:

The reasonable certainty is a condition for the strong and effective compliance framework. The normative aspects in rules and guidelines are essential.

C. Institutional level.

Conclusion 3:

¹¹² United States.

¹¹³ United States proposed the possibility of a penalty at Kyoto.

Achieving compliance will largely depend upon domestic enforcement; an international regime will fill gaps in domestic and regional structures.

Recommendation 3:

An inventarisation should be made on domestic and regional enforcement to get an exact insight in the contents of these gaps.

Conclusion 4:

The discussion is whether a single new independent body should treat all non-compliance questions or that the existing bodies should do this.

Recommendation 4:

Outcome of inventarisation of domestic and regional enforcement gives an indication of the gaps; at that moment it will be more clear whether the existing bodies or a new body can fill these gaps.

D. Principles of the Compliance System.

Conclusion 5:

Parties have to avoid new multilateral compliance framework.

Recommendation 5:

Not a top down but a bottom up approach in relation to the development of the Compliance System is needed.

Conclusion 6:

Any international non-compliance regime will not affect the rights of the States under international law concerning State responsibility.

Recommendation 6:

The work of the Joint Working Group is essential for the development of the non-compliance regime on national, regional and international level.

Conclusion 7:

The Kyoto Mechanisms have to contain compliance regulations.

Recommendation 7:

In relation to this Compliance regulations especially the supervision-aspects will be relevant. Legal participation in the developing of the Kyoto Mechanisms is essential.

Conclusion 8:

The principle of the prevention of non-compliance means encouraging and facilitating and even the allowance to Parties to correct minor emissions.

Recommendation 8:

The best way to realize this prevention principle in relation to non-compliance is to work out a clear enforcement mechanism which gives everybody the legal certainty which is needed.

E. Elements of the Compliance System.

Conclusion 9:

The elements of the Compliance System are: a. obligations and provisions of the Kyoto Protocol, b. monitoring, reporting, review and redress, c. procedures for determining non-compliance, d. consequences of non-compliance.

Recommendation 9:

Essential in the Compliance System are the non-compliance situations for which a non-compliance system has to be worked out.

F. Obligations and provisions of the Kyoto Protocol.

Conclusion 10:

There are three different types of obligations: central obligations, Kyoto Mechanisms obligations and obligations in relation to measuring, monitoring and reporting.

Recommendation 10:

The consequences for these three types of obligations have to be worked out in relation to the situation of compliance and the situation of non-compliance.

Conclusion 11:

Article 3 contains the central obligations. Interpretation of other articles but also the interpretation in the guidelines are relevant for these obligations.

Recommendation 11:

An exact inventarisation of the relevant Articles of the Kyoto Protocol and the guidelines is desirable.

Conclusion 12:

Substantive rules, modalities and guidelines are necessary for the Kyoto Mechanisms; guidelines are necessary for measuring, monitoring and reporting obligations.

Recommendation 12:

The rules, modalities and guidelines have to be checked whether they are "compliance-proof"; the same has to be done to the guidelines for measuring, monitoring and reporting.

G. Monitoring, reporting, review and redress.

Conclusion 13:

Three functions can be distinguished on monitoring, reporting and review: the fulfilment of central obligation, a procedure for determining non-compliance and the prevention of non-compliance.

Recommendation 13:

The three functions of monitoring, reporting and review have to be worked out.

Conclusion 14:

There is a need for harmonization of rules and guidelines.

Recommendation 14:

Concrete suggestions for harmonization have to be developed to prevent that there will be a need for special harmonization-guidelines.

Conclusion 15:

The multilateral consultative process can have an useful function during the phase of reporting and review.

Recommendation 15:

For this informal process some basic rules have to be developed.

H. Procedures for determining non-compliance.Conclusion 16:

There is a need for a special procedure for determining non-compliance, that is not a task of the expert review teams. In that procedure a short grace period for Parties is desirable. The more binding the consequences of this process are, the more the procedure must afford "due process".

Recommendation 16:

Such a special procedure has to be developed and has to get the character of a "due process" model.

I. Consequences of non-compliance.Conclusion 17:

The consequences should be proportionate to the nature of the obligation and the seriousness of the breach.

Recommendation 17:

An overview of the potential cases of non-compliance has to be made.

Conclusion 18:

The compliance system has its foundation in the domestic compliance procedures; Parties should consider what positive measures of assistance could be used to help overcome implementation of compliance problems.

Recommendation 18:

On national level in relation to compliance problems also positive measures have to be developed.

Conclusion 19:

Different kinds of inconsistencies ask for different treatment in sanctioning.

Recommendation 19:

Different types of sanctions have to be developed on national, regional and international level. On national or regional (EU) level: repairing (enforcement action, coercive sum) and punitive sanctions (penalties, deposits, withdraw of rights) are possible. On international level: different types of suspension, expulsion or economic sanctions.