A COMPLIANCE SYSTEM FOR THE *KYOTO PROTOCOL*

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I INTRODUCTION

Compliance with the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ('*Kyoto Protocol*')[1] is a challenge that some countries, including Australia, seem likely to fail.[2] The reasons for this include the sheer immensity of the task of mitigating greenhouse gas emissions in energy intensive societies, the complexity of the associated multi-sectoral management needs, and the high dependency of successful implementation on private sector initiative and cooperation. In any case, compliance with the *Kyoto Protocol* will be 'too little, too late' to be effective in mitigating climate change. However, its effectiveness in environmental terms must be distinguished from its implementation in legal terms. If it comes into force, it may well be legally implemented.

The effects of anticipated non-compliance with the *Kyoto Protocol*, in comparison with other non-economic treaties, will be highly quantifiable in domestic economies. These include competitive effects in the global market, such as distortions of countries' relative productivity in greenhouse gas-related goods and services, and the altering of their attractiveness as investment destinations. This makes non-compliance by some countries an unusually direct disadvantage for those others that are compliant. Many will therefore consider it in their interests to establish a compliance regime to ensure that each nation implements measures to meet the obligations it has undertaken under the *Kyoto Protocol*. The compliance regime currently emerging could mark a watershed in international environmental law.

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1 Opened for signature 16 March 1998, 37 ILM 22.

2 Ian Lowe, 'Its time to get our greenhouse in order' *Sydney Morning Herald* (Sydney), 29 November 2000, 16.

II COMPLIANCE SYSTEM NEGOTIATIONS

Parties to the *United Nations Framework Convention on Climate Change* ('*UNFCCC*')[3] and the *Kyoto Protocol* have taken steps to develop a robust compliance regime. They have sought to create a system that will collect, integrate, consider and respond to compliance information. The information gathering system draws together methodological issues in assessing greenhouse gas emissions, national communication of information to the Secretariat and international review of that information by expert review teams. The information will then be considered to determine whether there is actual non-compliance. However, an agreed method of response to identified cases of non-compliance is yet to be formulated.

Under the *Buenos Aires Plan of Action* ('*BAPA*'),[4] adopted in November 1998 at the Fourth Conference of the Parties to the *UNFCCC* ('COP 4'), Parties agreed on steps to prepare for the coming into force of the *Kyoto Protocol*, including development of a compliance system.[5] To implement the parts of the *BAPA* dealing with *Kyoto Protocol* compliance, a Joint Working Group ('JWG') on compliance was established in June 1999 by both *UNFCCC* Subsidiary Bodies – ie, the Subsidiary Body for Implementation ('SBI') and the Subsidiary Body for Scientific and Technological Advice ('SBSTA'). The JWG held two productive workshops – in Vienna in October 1999,[6] and in Bonn in March 2000[7] – which developed thinking on the topic. Actual negotiations between *UNFCCC* Parties on elements of a *Kyoto Protocol* compliance system took place through informal consultations at Montreux in February 2000, and formally during the subsequent Subsidiary Bodies' sessions – the 12th session in Bonn in June 2000; and 13th session in Lyon[8] and in The Hague[9] in September and November 2000 – as well as within the Fifth Conference of the Parties to the *UNFCCC* ('COP 5') in Bonn in October 1999 and the Sixth Conference of the Parties to the *UNFCCC* ('COP 6') in The Hague in November 2000.[10] Progress has been slow and tentative.

It should be noted that art 13 of the *UNFCCC* itself provides a more timid approach to establishing a compliance system. Article 13 states that:

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3 Opened for signature 4 June 1992, 31 ILM 849 (entered into force 21 March 1994).

4 *UNFCCC* Secretariat, *Report of the Conference of the Parties on its fourth session, held at Buenos Aires from 2 to 14 November 1998: Addendum*, 4, UN Doc FCCC/CP/1998/16/Add.1 (1999).

5 Ibid Annex II.

6 International Institute for Sustainable Development, 'Informal Exchange of Views and Information on Compliance under the *Kyoto Protocol*: 6-7 October 1999' (1999) 12(111) *Earth Negotiations Bulletin* 1.

7 International Institute for Sustainable Development, 'Summary of the Workshop on Compliance under the Kyoto Protocol: 1-3 March 2000' (2000) 12(124) *Earth Negotiations Bulletin* 1.

8 *UNFCCC* Secretariat, *Report of the Subsidiary Body for Implementation on the work of its thirteenth session (Part One) Lyon, 11-15 September 2000*, Annex III, UN Doc FCCC/SBI/2000/10 (2000).

9 *UNFCCC* Secretariat, *Report of the Subsidiary Body for Implementation on the work of its thirteenth session (Part Two) The Hague, 13-18 November 2000*, Annex I, UN Doc FCCC/SBI/2000/17 (2000).

10 *UNFCCC* Secretariat, *Report of the Conference of the Parties on the first part of its sixth session, held at The Hague from 13 to 25 November 2000 – Addendum Part three: Texts forwarded to the resumed sixth session by the Conference of the Parties at the first part of its sixth session*, UN Doc FCCC/CP/2000/5/Add.3 (Vol. IV) (2001).

> The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention.

The Ad Hoc Group on Article 13 ('AG13') met six times between October 1995 and November 1998 to flesh out the means of its implementation. It agreed that the multilateral consultative process should have the objective of resolving questions regarding the implementation of the *UNFCCC*, firstly by advising and assisting Parties in overcoming difficulties encountered in their implementation of the *UNFCCC*; secondly by promoting understanding of the *UNFCCC*; and thirdly by preventing disputes from arising. The process is to be facilitative, cooperative, non-confrontational, transparent, timely, and non-judicial.[11] The efforts of AG13 were in effect superseded by the JWG, anticipating the *Kyoto Protocol*'s entry into force, although most Parties to the *UNFCCC* are yet to ratify it.

III OVERVIEW OF COMPLIANCE ISSUES

Article 18 of the *Kyoto Protocol* 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. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

Those *UNFCCC* Parties that become Parties to the *Kyoto Protocol* will be subject to the *Kyoto Protocol* compliance system. Questions then arise concerning whether the *Kyoto Protocol* compliance measures should apply to both *Kyoto Protocol* and *UNFCCC* obligations, to differentiated obligations within the *Kyoto Protocol*, or even to all *Kyoto Protocol* Parties (as obligations are differentiated between Parties). Further, it is not clear whether amendment to the *Kyoto Protocol* is required before the compliance system can be adopted. The following account sets out some of these issues as debated in the JWG.

A Adoption of a Compliance Instrument

The requirement for an amendment to the *Kyoto Protocol* to ensure its compliance system can entail legally binding consequences is problematic. Not all Parties advocate legally binding consequences. Instead, many would be satisfied with merely adopting a non-binding decision of the *UNFCCC* Parties on an interim or permanent system. For those who desire legally binding consequences, rather than waiting for the *Kyoto Protocol* to enter into force and then amending it, a legal instrument could be adopted by the Conference of the Parties to enter into force at the same time as the *Kyoto Protocol*. This legal

11 *UNFCCC* Secretariat, *Report of Ad Hoc Group on Article 13 on its sixth session, Bonn, 5-11 June 1998*, UN Doc FCCC/AG13/1998/2 (1998).

strategy can be compared to the adoption of the *Agreement relating to the Implementation of Part IX of the United Nations Convention on the Law of the Sea of 10 December 1982*,[12] which was concluded in 1994 before the 1982 convention came into force and implicitly amended it. As the dilatory rate of ratification of the *Kyoto Protocol* demonstrates, the usual delays in normal amendment processes would tend to postpone establishment of a compliance system and would also result in it not applying between all Parties at the same time.

Without a legal instrument, it is still possible that in cases of material breach of *Kyoto Protocol* obligations, suspension of a non-compliant Party's rights in whole or in part is an option in international law, as set out in art 60(2) of the *Vienna Convention on the Law of Treaties*.[13] However, defining a 'material breach' as a question of jurisdiction in any given case poses difficulties and a legal instrument would remove doubt as to the mandate of a compliance body.

B Establishment of a Compliance Body

A proposal to create one compliance body with two branches has gained support. The first branch would facilitate compliance, by such means as advising Parties. The second branch would undertake enforcement action by imposing penalties. The two branches reflect differences in regulatory approach and it is not yet clear how they will inter-relate. Some have argued that all enforcement action should be preceded by facilitation. Others have argued that the functions are not necessarily consecutive and that a screening process will be required to determine which branch is appropriate in each case. In certain cases, a consecutive approach could delay necessary response action.

A dedicated Compliance Body staffed by independent experts has no analogue in other environmental treaty secretariats. International environmental treaties usually adopt weak implementation promotion regimes and the emerging *Kyoto Protocol* Compliance Body would therefore be a quantum leap forward.

In addition, a compliance committee under the Meeting of Parties would be established. Such a committee – or a sub-committee of it – could screen and direct cases to the appropriate branch of the compliance body. This committee would be comprised of national representatives elected by the Meeting of Parties on a regionally equitable basis and its evaluation role would have a political hue. This is similar to the establishment and role of the Implementation Committee under the *Montreal Protocol on Substances that Deplete the Ozone Layer* ('*Montreal Protocol*').[14]

C Information System

The basic framework for an information system to assess national compliance is already established in the *Kyoto Protocol*. Monitoring of emissions,

12 Opened for signature 28 July 1994, 33 ILM 1309 (entered into force 16 November 1994).

13 Opened for signature 23 May 1969, 8 ILM 169 (entered into force 27 January 1980).

14 Opened for signature 16 September 1987, 26 ILM 1550 (entered into force 1 January 1989).

accounting for sinks and related methodologies in assessing greenhouse gas emissions in countries listed in Annex I of the *UNFCCC* are required under art 5. National reports of Annex I country inventory information are required to be submitted to the Secretariat under art 7. Final compliance information would be available after the first commitment period (2008-12), following a brief 'truing up' period which would allow countries to acquire emission credits to bring themselves into compliance.[15] International review of national reports is then to be conducted by independent expert review teams under art 8. Operational details are in the process of being elaborated by the *UNFCCC* Subsidiary Bodies. It is clearly the most robust compliance information system yet established under a global environment treaty.

D Procedures

The procedures for reference of possible cases to the compliance body continue to be controversial. Possibilities include self-reference; reference by the Meeting of Parties; reference by another Party; or reference by the Secretariat (eg, on advice from an expert review team under art 8, or perhaps also on its own assessment or on advice from non-governmental sources).

Linked to the acceptability of this wide range of referencing procedures is the introduction of a process to screen *de minimus* non-compliance cases out of the system. It has been suggested that the screening process could be undertaken by a sub-committee of the compliance committee but this seems likely to introduce political factors into what should be a technical assessment of the facts by the compliance body.

E Consequences of Non-Compliance

Once a determination of non-compliance has been made, the main issues currently confronting negotiators in addressing the consequences are what enforcement measures to apply and when to apply them, including whether to differentiate between enforcement measures applicable to *UNFCCC* Annex I and non-Annex I Parties.

Article 18 requires that the compliance procedures take into account the 'cause, type, degree and frequency of non-compliance'. This is likely to involve non-compliant Parties representing the circumstances of their particular situations and the consequence being negotiated with the compliance committee. Yet there is also the possibility that some circumstances could trigger predetermined or automatic consequences, thereby avoiding the politics of individually considered cases. Automation would be premised on considerations of cause, type, degree and frequency of non-compliance being built into the procedures, without the need for reconsideration of those factors. If well designed, it would enhance efficiency, equity and transparency.

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15 See, eg, Department of Foreign Affairs and Trade, *Climate Change: Options for the Kyoto Protocol Compliance System*, Discussion Paper (2000) 17.

Article 18 also requires that Parties to the *Kyoto Protocol* approve an indicative list of non-compliance consequences. The 'indicative list' approach reflects that taken under the Compliance Procedure of the *Montreal Protocol*. There, the Parties agreed to a menu of three non-compliance responses of escalating severity: assistance, warnings, and suspension of rights. Possible responses to *Kyoto Protocol* non-compliance range through a similar spectrum, from facilitative to enforcement measures. The suggested facilitative measures begin with offering advice and finish with requiring adoption of an action plan to remedy deficient performance. Enforcement measures that have been advocated range from public warnings to penalties, including: subtractions from allowed emissions amounts in the following commitment period; loss of eligibility to participate in the 'flexibility mechanisms'; liabilities to purchase emissions credits at penalty rates; or obligatory payment into a compliance fund.

The partial or full loss of eligibility to participate in the flexibility mechanisms seems to have substantial support among negotiators, although details remain contentious. The mechanisms enable distribution of the costs of reducing greenhouse gas emissions across countries, so as to enable individual Parties to meet their reduction commitments efficiently. Use of the mechanisms might reduce the costs of meeting commitments by up to two thirds and, therefore, loss of access to them would be a significant penalty for non-compliance.

The flexibility mechanisms are: 'joint fulfilment' of emissions reduction targets by members of a regional economic integration organisation (art 4); 'Joint Implementation' of emissions reductions resulting in exchange of funds and emission reduction units between Annex I countries (art 6); investment by Annex I countries in developing countries for certified emission reduction units under the 'Clean Development Mechanism' (art 12); and 'emissions trading' between Annex I countries in units of allowed amounts of emissions (art 17). Loss of access could apply to some or all mechanisms and to some or all transactions under a particular mechanism. For example, a Party might forfeit the right to sell emissions reduction units but not the right to buy.

In relation to differentiating measures between Parties, some developing countries argue that non-Annex I Parties should not be subject to enforcement measures. Others advocate that non-compliance response measures should differentiate between obligations, but not between Parties. This seems the better approach, as art 18 requires that cases of non-compliance be addressed taking into account the cause, type, degree and frequency, rather than who is non-compliant.

IV CONCLUSION

The *Kyoto Protocol* compliance system needs the support of all Parties to be effective. It must therefore be – and be perceived to be – fair. This requires transparency, simplicity and cost effectiveness in its procedures. Its essential functions are to deter non-compliance and to promote compliance. Therefore

facilitative measures are needed, backed up by enforcement measures which are applicable to all Parties and are proportionate, equitable and firm. These objectives require the adoption of a legally binding instrument coming into force at the same time as the *Kyoto Protocol*, and the establishment of a compliance body appropriately staffed with technical expertise to make findings of non-compliance. The consequences of non-compliance need to be clearly defined: some by predetermined formulae, others decided by a compliance committee under the Meeting of Parties. Should the JWG achieve these objectives, the *Kyoto Protocol* compliance system will mark a long awaited new era in robust regime design for compliance with environmental treaties.