

Report to CAN on Compliance Section of Marrakech Accords to the Kyoto Protocol

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Introduction

While compliance was the last area that kept Parties apart when they negotiated the Bonn Agreement in July, in Marrakech the compliance working group was the only group to complete its task days before the high-level, ministerial segment of COP7 began. Because the compliance text was finished, none of its provisions had to be resolved by ministers. Instead, the text was adopted by the Conference of the Parties (COP) intact and in its entirety as part of the Marrakech Accords.

The final, adopted text faithfully incorporates the terms of the Bonn Agreement's compliance section.² Nevertheless, it differs from earlier drafts of the compliance text in a number of ways. These changes were usually compromises that reflected the general dynamic of the negotiations: The European Union and the G-77 and China tried to maintain the integrity of the Bonn Agreement and the strength of the existing compliance text, while the Umbrella Group (Japan, Canada, Russia and Australia) demanded numerous concessions by claiming each was a "ratification issue."

This report does three things. Part One identifies the highlights of the compliance system established under the Marrakech Accords. This Part will be useful for the reader who wants a quick, general introduction to how the Kyoto Protocol's compliance system will work. Part Two focuses on the legal nature of the consequences of non-compliance available under the compliance system. The question of whether there will be "legally binding consequences" is among the most important compliance-related issue remaining for the future governing body of the Kyoto Protocol (the COP/MOP) to resolve. Part Three contains an analysis that identifies and discusses key ways in which the final compliance text differs from the earlier draft text that emerged from Bonn and that provided the initial basis for negotiations in Marrakech. This final Part may be of interest to readers who are already familiar with many of the technical aspects of the compliance system and its negotiating history.

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² The Bonn Agreement provided solutions to many of the key issues that the technical negotiators had been unable to resolve. After Bonn, the compliance working group's task was to develop "a balanced package of further decisions incorporating and giving full effect" to the compliance section of the Agreement.

I. Highlights of the Compliance System

Like many of the Protocol's other features, the compliance system adopted as part of the Marrakech Accords will be on the "cutting edge" of international environmental law. It should provide a strong basis for facilitating and evaluating compliance, as well as responding to cases of non-compliance, during the first commitment period and beyond.

The compliance text establishes that:

- There will be a **compliance committee** comprised of two "branches." The **facilitative branch** will be available to assist all Parties—both developed (Annex I) and developing (non-Annex I)—in their implementation of the Protocol. Importantly, it will serve as an "early warning system" for Annex I Parties that may have trouble meeting their emissions targets.
- The **enforcement branch** will serve as a judicial-like forum for determining whether an Annex I Party has (1) met its target, (2) complied with its monitoring and reporting requirements and (3) met the eligibility tests for participating in the mechanisms. When the enforcement branch finds that a Party has failed to comply with one of these obligations, the enforcement branch will apply the appropriate, predetermined consequence(s) for the Party.
- The **membership** of both the facilitative and enforcement branches will be based upon equitable geographical representation.³ Winning this composition rule was a dramatic victory in Bonn for the G-77 and China. Members of the Umbrella Group had insisted that Annex I Parties should have an outright majority on the enforcement branch, because only they will be subject to enforcement branch proceedings. The equitable geographical representation rule for the enforcement branch has made some Umbrella Group members more resistant to accepting the mandatory nature of the compliance regime as a whole.
- Both branches will take decisions by **double majority voting**. Under this rule, a decision can only be adopted if majorities from each bloc of branch members—Annex I and non-Annex I—approve it. The safeguard of double majority voting should allay the concerns of some Annex I Parties that enforcement branch membership based upon equitable geographical representation could somehow mean they might be subject to unfair or politically motivated decisions by that branch.
- There will be potentially significant opportunities for **public participation** in compliance proceedings. NGOs will be entitled to submit technical and factual information to the relevant branch. Subject to limited exceptions, all information

³ All members of the compliance committee will serve in their individual capacities and not as representatives of Parties. Nevertheless, because most Parties believe committee members may decide cases in a way that reflects the interests of their home countries or regions, the composition question has been an important one throughout the negotiations.

considered in a proceeding will be publicly available and any compliance hearings will be open to the public.

- There will be specific **consequences** when an Annex I Party fails to comply with its emissions target: (1) For every tonne of emissions by which a Party exceeds its target, 1.3 tonnes will be deducted from its assigned amount for the subsequent commitment period. (2) The Party will prepare a detailed plan explaining how it will meet its reduced target for the subsequent commitment period. The enforcement branch will have the power to review the plan and assess whether or not it is likely to work. (3) The Party will not be able to use Article 17 emissions trading to sell parts of its emissions allocation (“assigned amount”).
- There will be procedures for **reinstatement** of a Party’s eligibility to participate in the Protocol’s three flexibility mechanisms. These procedures will help ensure that the enforcement branch applies specific criteria when deciding whether or not to reinstate the Party’s eligibility after it has been suspended, and they will help guarantee that only those Parties that are truly eligible to participate will be allowed to do so. Umbrella Group countries fought very hard in Marrakech for these reinstatement procedures, demonstrating that they anticipate being fully bound by the Protocol’s compliance system.
- After the enforcement branch determines that a Party has exceeded its target, the Party will have the right to **appeal** the decision to the supreme body of the Protocol, the COP/MOP. An appeal will be accepted only on the grounds that the Party was denied due process during the enforcement proceeding. The enforcement branch’s decision will stand pending an appeal, and it may be overturned only by a $\frac{3}{4}$ majority vote of the COP/MOP. The appeal provision was a significant concession to the G-77 and China, who wanted assurances that decisions of the enforcement branch could not be made completely independently from COP/MOP oversight.

II. The Question of “Legally Binding Consequences”

The last sentence of Article 18 of the Kyoto Protocol provides that “binding consequences” of non-compliance may be adopted only by a Protocol amendment. That requirement reflects the inability of the Parties to agree at Kyoto upon the issue of non-compliance consequences.

Japan, Russia and Australia have long resisted the efforts of most other Parties to adopt “legally binding” consequences. In order to win agreement on the Pronk package in Bonn, it was necessary to delete the political commitment to adopt an instrument that would have established the “legally binding” character of the consequences. Yet the text that was agreed upon established what the consequences will be and gave the enforcement branch the power to apply them.

In Marrakech, these members of the Umbrella Group, supported by Canada and assisted by the United States, continued to try to manipulate the compliance text and compliance-related linkages in other texts to strengthen their argument that the COP and the rules it has agreed

upon are neutral on the question of legally binding consequences. While most of their efforts were rebuffed, they did succeed in two important areas.

First, they won language in the decision, or political, portion of the compliance text stating that it is the “prerogative” of the COP/MOP “to decide on the legal form of the procedures and mechanisms relating to compliance.” This language, which does little more than paraphrase parts of Article 18 of the Protocol, suggests that the COP will not concentrate on the questions of whether, when, or how an Article 18 legal instrument might be adopted, but will instead leave those questions primarily to the COP/MOP. However, the language leaves open the opportunity for the COP promptly to begin the preparatory work for establishing the compliance system’s institutions and for further developing its procedures. Such preparatory work would, of course, be subject to final approval by the COP/MOP.

Second, the rules in the mechanisms texts now require all Parties to accept the authority of the enforcement branch to verify whether they satisfy certain eligibility criteria for participating in joint implementation (art. 6), the Clean Development Mechanism (art. 12), or emissions trading (art. 17). These are important provisions. Yet they were adopted at the price of the Umbrella Group successfully diluting the earlier mechanisms eligibility requirement that a Party would have to be subject to all of the compliance rules or have accepted an Article 18 legal instrument before it could begin trading. The environmental integrity of the mechanisms—and their potential for instilling confidence in the markets—will be significantly predicated on the ability of the Kyoto regime to ensure that its members comply with their emissions reduction targets. To accomplish that, Parties will eventually need to agree that every mechanisms participant must be subject to all of the Protocol’s compliance rules.

Nevertheless, our opinion, which is shared by most of the experts on this issue with whom we have spoken, is that we should not get too preoccupied at this time with whether the non-compliance consequences are “legally binding” in the Article 18 amendment sense, or whether they are in fact binding in a political sense. Under international law, the extent to which something is “legally binding” depends primarily upon the expression of political will by the states party to international agreements like the Kyoto Protocol. There is no realistic way to *force* Parties who exceed their targets to remedy the problem. Trade sanctions have sometimes been used to attempt to compel action. This is not contemplated in the Kyoto regime at this time.

In sum, the issue of “legally binding” consequences for non-compliance is not yet resolved. We should work hard to create the political will among all Parties to resolve it successfully at the first session of the COP/MOP. An amendment or other formally ratified legal instrument would provide the highest possible expression of the intent of Parties to respect the results of an enforcement branch proceeding. But we should keep in mind that the agreement we have won in Marrakech establishes the procedures and institutions for the compliance system as well as the consequences for an Annex I Party’s failure to honor its obligations, including its emissions target. That is a politically potent accomplishment that makes the Protocol’s compliance system the most robust ever adopted for a multilateral environmental agreement.

III. Analysis of the Compliance Text

This analysis identifies and briefly discusses key ways in which the final compliance text that was adopted as part of the Marrakech Accords differs from the earlier draft text that emerged from Bonn and that provided the initial basis for negotiations at COP7.⁴ The compliance text, like most of the other texts in the Accord, is divided into two parts: a decision and an annex. The decision contains two operative paragraphs, in which the COP (1) adopts the annex and (2) recommends that the COP/MOP adopt the annex at its first session. The rest of the decision text includes statements of a political nature. The annex contains the actual rules that will define how the compliance system works.

Decision: Operative Paragraphs

Para 1: This paragraph closely follows Para 8 (a) of the Bonn Agreement and reads, [the COP] “*Decides* to adopt the text containing the procedures and mechanisms relating to compliance under the Kyoto Protocol annexed hereto.” The paragraph differs from earlier drafts with its insertion of the words, “the text containing” and “annexed hereto.”

Opinion: Acceptable. Those added words eliminated confusion as to what, exactly, the COP was expected to adopt.

Para 2: This paragraph is nearly identical to Para 8 (b) of Bonn Agreement, but it recommends that the COP/MOP adopt “the procedures and mechanisms relating to compliance annexed hereto . . .”

Opinion: Good. The added words clarified that the COP’s intent is to request the COP/MOP to adopt the same rules adopted by the COP in the annex, and not simply to adopt any rules relating to compliance.

No Para 3. The draft COP/MOP decision that was referred to in Para 3 of the October 29 Non-Paper, and which contained a commitment to bring the compliance procedures and mechanisms “into operation,” has been deleted.

Opinion: This was the price of obtaining clean Paras 1 and 2.

Decision: Preambular Paragraphs

Three new paragraphs added. They (1) recall KP Art. 18, (2) state that the decision respects the compliance section of the Bonn Agreement, and (3) state that it is the “prerogative” of the COP/MOP to decide on the “legal form” of the compliance procedures and mechanisms.

Opinion: Acceptable. The “prerogative” language was politically necessary to assure the Umbrella Group that the COP would not attempt to adopt an Article 18 legal instrument (as Pronk suggested in the draft package he originally submitted to Ministers in Bonn). The language restates the obvious and, in our view, does not prejudice the COP/MOP against the adoption of legally binding consequences.

⁴ The analysis is based upon the November 6, 2001 draft, as amended, accepted by the Compliance Group, and subsequently adopted by the COP as part of the Marrakech Accords. *See* Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, Conference of the Parties, 7th Sess., Agenda Item 3 (b) (iv), U.N. Doc. FCCC/CP/2001/L.21 (2001); *see also* *The Marrakech Accords and the Marrakech Declaration*, version 10-11-01, available at http://www.unfccc.int/cop7/documents/accords_draft.pdf (visited December 6, 2001).

Annex: Section IV (Facilitative Branch)

Para 5 (Facilitative branch mandate): Compromise text confirms in fairly imprecise language that issues relating to **Art. 3.14** and **supplementarity** will fall within the mandate of the facilitative branch and “outside the mandate of the enforcement branch.”

Reference to the review of **demonstrable progress** (Art. 2.3) has been deleted from the facilitative branch mandate. Instead, Para 5 (b) provides that “any reporting under” Art. 2.3 will be “taken into account” in the context of supplementarity review.

Opinion: Acceptable. Annex I will never agree to Art. 3.14 review under the enforcement branch, so we are glad to see this part of the text resolved. Demonstrable progress was not mentioned in the Bonn Agreement, so it was foreseeable that it would be deleted from the facilitative branch mandate (this may have been what the Japanese received in return for giving up their demand to delete the Art. 5 & 7 compliance action plan). We should continue to press for review of demonstrable progress by the facilitative branch or another appropriate fora such as the COP/MOP.

Annex: Section V (Enforcement Branch)

Para 5 (Enforcement branch mandate): The text on the enforcement branch mandate closely mirrors that in the Bonn Agreement.

Annex: Section VI (Submissions)

Para 1 (b) (Party-to-Party trigger): The ability of a Party to initiate a compliance proceeding against another Party is retained.

Opinion: Good. This was a clear defeat for Australia and Russia, who had tried to have this provision deleted. As this is a standard provision in many multilateral agreements, it was important that a bad precedent not be set by its deletion.

Annex: Section VIII (General Procedures)

Para 4 (Right of NGOs to submit relevant information during compliance proceeding):

This important paragraph was not challenged by any Party during COP7, and was retained.

Opinion: Good. However, the specific terms of how this provision and others relating to transparency and public participation should be implemented will be defined under the compliance committee’s rules of procedure, which will be negotiated in the future. We will want to take an early and proactive role in those negotiations.

Para 6 (Public access to information during compliance proceedings): Russia was successful in winning an early concession from the EU and others that will allow the Party subject to a compliance proceeding to request that any information *it* submits may be withheld from the public until a final decision is taken on the case. The temporary withholding of this information would be subject to approval by the compliance body.

Opinion: Not good. This language allows less public access to information than the original compliance text from Bonn did. However, the language is not as restrictive as what Russia was demanding during the first week at Marrakech. While we are not pleased with the inclusion of this language, and we believe that the EU prematurely caved in to Russia’s demands, we are satisfied that the language clearly provides the enforcement branch with discretion over whether to grant the request.

Annex: Section IX (Procedures of the Enforcement Branch)

Para 2 (Public access to enforcement hearings): The final rule for public access to hearings is similar to the rule regarding access to information (i.e., the enforcement branch may decide to close a hearing at the request of the Party concerned). Accordingly, the comments regarding VIII, Para 6 above apply here.

Annex: Procedures of the Facilitative Branch (no section number)

Throughout the negotiations, Parties concentrated on developing the procedures of the enforcement branch, not the facilitative branch. Aside from the general procedures of Section VIII, there are not yet any specific procedures for facilitation. The general procedures do not address the issue of hearings. However, the facilitative branch should not institute rules or develop practices that are more restrictive than those of the enforcement branch. More detailed rules for the facilitative branch will need to be developed as part of the compliance committee's rules of procedure.

Annex: Section X (Expedited Procedures for the Enforcement Branch)

Paras 2-4 (Reinstatement of eligibility to participate in the mechanisms): These new paragraphs establish procedures by which a Party can have its eligibility to participate in the mechanisms reinstated after it has been suspended (a) under the mechanisms rules (Para 2); or (b) because it failed to comply with its emissions target (Paras 3 and 4). Earlier drafts of the Annex contained no reinstatement procedures at all, other than the requirement that the enforcement branch had to decide upon a reinstatement request "as soon as possible."

Opinion: Acceptable. Most Umbrella Group members in Marrakech identified elaboration of the reinstatement procedures as one of their many "ratification issues." The EU had in the past also suggested that such procedures might be needed. All three of the paragraphs (especially Para 3) are written so that they create a presumption that the enforcement branch will reinstate a Party's eligibility after the Party requests it to do so. However, they clearly allow the enforcement branch to deny reinstatement if it believes the Party has not complied, or will not be able to comply, with its emissions target for the subsequent commitment period.

Annex: Section XI (Appeals)

Para 4 (Status of the enforcement branch decision pending an appeal): At the insistence of the EU, new text was inserted into this paragraph providing that "the decision of the enforcement branch shall stand pending the decision on appeal."

Opinion: Good. Without this provision, Parties found to be in non-compliance would probably have argued that the enforcement branch decision must be stayed (i.e., stopped or suspended) until the appeal was concluded. While we would have preferred language explicitly stating that, pending an appeal, the decision would remain in effect *including the application of any consequences*, the adopted language should accomplish the same thing.

Annex: Section XIII (Additional Period for Fulfilling Commitments)

The "true-up" period has been extended from one month to one hundred days.

Opinion: Ambivalent. This compromise is one of many examples of incremental backsliding from the compliance draft that came out of Bonn. However, the additional two months will not significantly extend the already very long time for post-commitment period compliance evaluation, and they are not as bad as the six months the Umbrella Group was demanding.

Annex: Section XIV (Consequences Applied by the Facilitative Branch)

Subpara (b): New text allows the facilitative branch to help “any Party concerned” (i.e., both Annex I and non-Annex I) to obtain financial and technical assistance from sources other than those established under the Convention and Protocol to assist developing countries.

Opinion: Acceptable. This subpara represents a compromise between the insistence of Russia and other EITs that they should be eligible for financial assistance through the facilitative branch and the fear of the G-77 and China that such assistance would be provided at their expense.

Annex: Section XV (Consequences Applied by the Enforcement Branch)

Paras 1-3 (Requirement to prepare a compliance action plan as consequence for non-compliance with Arts. 5 and 7): This provision remains virtually intact, despite heavy pressure from Japan, which wanted the requirement to be deleted or watered down. The only concessions Japan won were in Para 3, so that (1) compliance action plan reports regarding Arts. 5 and 7 must be submitted on a “regular” instead of quarterly basis, and (2) the vague language that would have allowed the enforcement branch to “decide on the application of further consequences” based on the reports has been deleted.

Opinion: Acceptable. (1) The enforcement branch will be competent to determine the timing for the “regular” submission of reports, so this provision should not become a source of abuse from the non-compliant Party. (2) The vague language allowing the enforcement branch to “decide on the application of further consequences” could have provided the branch with powers that none of the Parties ever intended it to have. It was foreseeable and prudent that the Umbrella Group demanded that the language be deleted.

The rest of Section XV remains intact, with slight edits to reflect the new eligibility reinstatement provisions of Section X.