2010

Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design

Meinhard Doelle

Meinhard Doelle

Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design

Meinhard Doelle*

***** Associate Professor, Dalhousie Law School, Associate Director, Marine and Environmental Law Institute, Halifax, Canada (Mdoelle@dal.ca). The author would like to thank Alexander Zahar and the anonymous reviews for their very helpful comments on earlier drafts.

I. INTRODUCTION

The Kyoto compliance system has long been recognized as a testing ground for compliance theory.[1] While compliance theorists continued to debate the relative merits of self-interest and norm-building in motivating countries to meet their international commitments, negotiators of the Kyoto compliance system sought to develop a compliance system that was capable of building norms and facilitating compliance while at the same time deterring parties that might be tempted make a calculated choice not to comply. The result of these negotiations from 1998 to 2001 was the Kyoto compliance system, including its facilitative and enforcement branches.[2]

The basic structure and procedures of the Kyoto compliance system are amply described elsewhere.[3] For the purposes of this article, a brief overview of its key elements is offered here. The Kyoto compliance system is enabled in the Kyoto Protocol itself.[4] The Compliance Procedures were adopted by way of a decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP).[5] This was followed, after some initial experience, by rules of procedure developed by the compliance committee and adopted by the CMP.[6] The resulting compliance system operates through its facilitative and enforcement branches, a plenary, and a bureau. Compliance issues can be referred either by a party or by an Expert Review Team (ERT). Matters referred are to be allocated by the bureau to the appropriate branch. The compliance procedures include detailed rules on the composition and functions of the two branches, the bureau, and the plenary. The

[1] See, for example, Jutta Brunnée, "A Fine Balance: Facilitation and Enforcement in the Design of a Compliance for the *Kyoto Protocol*" (2000) 13 Tul. Envtl. L.J. 223. See also Meinhard Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Carswell, 2005); Peggy Rodgers Kalas and Alexia Herwig, "Dispute Resolution under the *Kyoto Protocol*" (2000) 27 Ecology L.Q. 53; and David G. Victor, "Enforcing International Law: Implications for an Effective Global Warming Regime" (1999) 10 Duke Envtl. L. and Pol'y F. 147.
[2] Sebastian Oberthür and René Lefeber, "Holding countries to account: The Kyoto Protocol's compliance system revisited after four years of experience" (2010) 1 Climate Law 133-58.
[3] *Oberthür, Holding Countries to Account*, ibid.
[4] *Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol*, 10 December 1997, U.N. Doc. FCCC/CP/1997/L.7/add. 1, 37 I.L.M. 22 (1998), [hereinafter *Kyoto Protocol*], Article 18.
[5] Annex to Decision 27/CMP.1 on *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol*, 92, FCCC/KP/CMP/2005/8/Add.3 (30 March 2006) [hereinafter *Compliance Procedures*].
[6] See Annexes to Decisions 4/CMP.2 and 4/CMP.4 on the *Compliance Committee*, FCCC/KP/CMP/2006/Add.1 (2 March 2007), 17, and FCCC/KP/CMP/2008/11/Add.1 (19 March 2009), 14. [hereinafter *Rules of Procedure*]

compliance procedures furthermore outline the general process to be followed, and the powers of each branch. The rules of procedure, supplemented by working arrangements adopted by the plenary, detail the process implemented to give effect to the compliance procedures.[7]

Unfortunately for those looking to the Kyoto compliance system as an experiment on combining facilitation and enforcement, the entry into force of the Kyoto Protocol was delayed from 2001 until 2005.[8] As a result, the work of the compliance committee did not get underway until 2006, only two years before the start of the first commitment period.[9] This delay had particular implications for the work of the facilitative branch (FB), given that one of its main tasks was to assist parties in preparing for a range of obligations. Many of the obligations subject to facilitation in some way related to parties' commitments to report and reduce their greenhouse gas emissions for the first commitment period. The opportunity to actively work with parties to assist in this process was, as a result of the delay, reduced by six years.

It is therefore not surprising that the FB has been relatively inactive to date. It is unlikely that the FB will play a significant role for the remainder of the first commitment period. The enforcement branch (EB), on the other hand, has been relatively busy dealing with the estimation, reporting, and verification of emissions and credits of Annex I parties. The focus of the EB initially was on compliance with rules under Articles 5, 7, and 8 for initial eligibility to trade under the Kyoto mechanisms. It has since transitioned into the second phase of its work, the ongoing compliance with rules under Articles 5, 7, and 8. The third phase of its work, compliance with parties' emission-reduction obligations for the first commitment period, is not expected to start until sometime in 2015.

When it was first negotiated in 2001, the general expectation of parties was that the Kyoto compliance system would serve the climate change regime for a long time. While this is still possible, the future of the Kyoto compliance system is very much uncertain as a result of the ongoing negotiations of the post-2012 climate change regime. At the time of writing, it is unclear whether the post-2012 regime will be built around binding emission-reduction commitments by developed countries. Even if it includes binding commitments, it is unclear whether or under what circumstances those commitments will be subject to international enforcement. It remains to be seen, therefore, to what extent the experience to date will be considered and built upon in the design of the post-2012 compliance system.

The uncertainty over the future of the climate change regime also has more immediate implications for the current compliance system. First, the ultimate enforcement tool is a

[7] It is worth noting that the application of the current compliance system under Kyoto is focussed on developed countries, but there are elements that could be utilized for developing-country parties in the future. An interesting question in reviewing the current system, therefore, would be what adjustments would have to be made to expand the application of this kind of compliance system to address monitoring, reporting, and verification involving developing countries.

[8] See Meinhard Doelle, "The Kyoto Protocol; Reflections on its Significance on the Occasion of its Entry into Force" (2005) 27 Dalhousie Law Journal 556

[9] The fist commitment period under the Kyoto Protocol started on 1 January 2008 and runs until 31 December 2012.

requirement that parties make up missed emission reductions in the subsequent commitment period with a 1.3 multiplier. This is a meaningful enforcement tool only if there is a second commitment period. The closer we come to the end of the first commitment period before the post-2012 regime is finalized, the greater will be the temptation of parties at risk of missing their emission-reduction target to either reject a second commitment period altogether or to incorporate the expected consequence into their second commitment period targets. With every passing year of uncertainty, the risk of parties not taking the work of the compliance committee seriously increases. Much of the work of the EB is yet to come, and the uncertainty over the future of the climate regime is at risk of increasingly affecting its work.

Regardless of the future of the Kyoto compliance system, much of its work is on issues that will continue to be important both for the climate change regime and for other multilateral environmental agreements. While it is impossible to make accurate predictions about the substance of the climate change regime at the end of 2012, it is nevertheless important to reflect on the experience with the Kyoto compliance system to date, whether for improvements to the Kyoto compliance system itself or for MEA compliance more generally. Specific adjustments to the Kyoto compliance system necessitated by post-2012 changes to the substantive obligations can, of course, only be considered once those changes are known. The central question posed in this article is therefore the following: *Assuming the obligations under the climate change regime were to remain unchanged, what adjustments to the Kyoto compliance system would be warranted in light of the experience to date?*

In addressing this central question, the aim of this article is to consider how the experience with the Kyoto compliance system may help to inform the design of future compliance systems under the climate regime or any other future MEA, assuming that the value of seeking to combine facilitative compliance strategies with effective enforcement is accepted.

II. THE FACILITATIVE BRANCH

Until the Kyoto compliance system, facilitation had been the dominant approach to compliance in MEAs. These MEAs offer a rich experience with facilitation, though not in the context of the rigorous reporting and review requirements in Articles 5, 7, and 8 of the Kyoto Protocol.[10] One would expect the experience with the Kyoto compliance system to offer new insights into reporting and review, as well as on the more general experiment with the combination of facilitation and enforcement.

The FB was expected to play an important role in the Kyoto compliance system, both as an early-warning system for compliance matters which ultimately might be subject to enforcement, and to deal with the range of commitments not subject to the jurisdiction of the EB. Whether it lived up to expectations is considered in this section. The underlying question posed with respect to the FB is what changes are warranted to the

[10] See, for example, *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, amended at London on 29 June 1990, amended at Copenhagen on 25 November 1992, amended at Vienna in 1995, amended at Montreal on 17 September 1997, and amended at Beijing on 3 December 1999, 1522 U.N.T.S. 3, Can. T.S. 1989 No. 42, 26 I.L.M. 1550 (entered into force 1 January 1989)

FB in light of the experience to date. In addressing this question, lessons from this experience for compliance systems in other MEAs are explored.

The only substantive matter referred to the FB to date has been a submission filed by South Africa in its capacity as chair of the G-77/China bloc. The submission was filed with respect to Austria, Bulgaria, Canada, France, Germany, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Poland, Portugal, Russia, Slovenia, and the Ukraine. The focus of the submission was to bring to the attention of the FB a number of instances of late filing of reports on demonstrable progress by Annex I countries toward meeting their emission-reduction targets. The letter submitted by South Africa reads in part as follows:

South Africa, as Chairman of the Group of 77 and China, on behalf of the Group of 77 and China, is submitting a question of implementation to the Compliance Committee, for consideration by the Facilitative Branch. ... This question of implementation is raised against those Parties who have not provided their reports demonstrating progress, even after a period of nearly six months from the January 1 deadline.[11]

The submission requested the branch to investigate the alleged violations and to consider whether they were indicative of potential non-compliance with more substantive requirements, such as Article 3.1 of the Kyoto Protocol. The FB decided not to proceed against Latvia and Slovenia as both countries had submitted the required documentation by the time the branch met to consider the submission. This decision not to proceed was approved with two abstentions and one vote against.[12]

With respect to the other parties, the members of the branch could not agree on whether the submission in the form of a letter from South Africa on behalf of the G-77 and China properly brought the matter before the compliance committee. The dispute was over the requirement that questions of implementation be brought by a party or by an Expert Review Team. The branch was split on whether the submission by South Africa was properly filed by a party. As a result, the FB was not able to make a preliminary decision to proceed or not to proceed.

The branch failed to comply with the requirement to make a preliminary decision within three weeks of the referral of a question of implementation, and reported this failure to the compliance committee.[13] The Rules of Procedure approved by the CMP in Nairobi in 2006 now clarify the process for making submissions of this kind. To date, no further referrals have been made to the FB, either by a party of by an ERT. [14]

[11] Letter submitted by South Africa: CC 2006-1-1/FB, available at http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php

[12] See Decision not to proceed against Slovenia CC-2006-14-2/Slovenia/FB and Decision not to proceed against Latvia CC-2006-8-3/Latvia/FB , available at http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php

[13] See Report to the Compliance Committee on the Deliberations in the Facilitative Branch relating to the Submission entitled “Compliance with Article 3.1 of the Kyoto Protocol” (Party concerned: Canada), CC-2006-3-3/FB, available at: http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php

[14] The immediate concern raised by the South Africa submission was the split between Annex I and Non-Annex I parties on this issue. The broader concern is the difficulty of bringing matters before the FB. The

At the meeting of the plenary on 8 October 2008, members discussed the value of the ERT process in facilitating compliance, and suggested that ERT experts are perhaps in the best position to provide technical expert advice. It is clear from the experience to date that ERTs are fulfilling a significant part of the facilitative role of the compliance system.[15] Members of the FB were concerned, however, about their apparent inability to take action under Section IV(6)(a) of the Compliance Procedures, which mandates the FB to provide advice and facilitation with respect to compliance with Article 3.1 of the Kyoto Protocol before and during a commitment period. The concern was that there exist parties in need of advice and facilitation;[16] however, the mechanisms for engaging the FB have not been utilized by either a party or an ERT.[17] It is unclear whether ERT members have been trained to be cautious about referring matters to the FB, or whether they have largely been satisfied with their own ability to facilitate compliance informally through their engagement with parties.

It is noteworthy that the FB has not had any opportunity to facilitate compliance with emission-reduction targets of Annex I parties. Appling the FB process to Canada, for example, would have been an interesting test of facilitation for Annex I parties with respect to their emission-reduction targets. A possible trigger for the work of the FB with respect to Canada would have been the so-called demonstrable progress report or its national communications.[18] There might have been value in providing the FB with the opportunity to schedule a meeting or some form of consultation with a party that may be at risk of missing its target based on the demonstrable progress report filed.

III. THE ENFORCEMENT BRANCH

The work of the enforcement branch of the Kyoto compliance system is of particular interest for MEA compliance-system design because it is the first time that an MEA has taken enforcement seriously. The experience of the EB to date is therefore considered in some detail this section. The underlying issue explored is whether, in light of the experience to date, changes are warranted to the EB. As with the FB, the question is posed in the expectation that, in answering it, insights can be gained for compliance systems in other MEAs seeking to combine facilitation and enforcement.

fact that no party was willing to follow up the South Africa submission on its own is telling in this regard. It suggests a fear of reprisal by individual parties.

[15] The proceedings of the Plenary of the Compliance Committee in October 2008 are available as a webcast, at: http://unfccc.int/kyoto_protocol/compliance/plenary/items/3788.php

[16] Such as Canada, though Canada was not named in the course of the formal procedings.

[17] In response to these concerns about the triggering process, the secretariat agreed to review ERT reports to identify any reference to instances where a need for facilitation or advice may have been identified.

[18] Clare Breidenich, Daniel Bodansky, "Measurement, Reporting and Verification in a Post-2012 Climate Agreement" (2009 Pew Centeron Global Climate Change), available at: http://www.pewclimate.org/docUploads/mrv-report.pdf at page 15, where the authors discuss the difference in rigour of the reporting obligations for inventories and reporting on mitigation measures. The requirements for inventories are much more specific, making it much more likely that an ERT would trigger the compliance process for inventories than for mitigation measures including progress toward commitment-period targets. Clear standards for the reporting on mitigation measures would be an essential foundation for more effective facilitation and enforcement of compliance with mitigation commitments.

The EB has to date been confronted with four questions of implementation related to a party's compliance with its Kyoto commitments. The cases involve Greece, Canada, Croatia, and Bulgaria. All four cases have had to follow the expedited procedures in section X of the Compliance Procedures, set up to ensure the time-sensitive issue of eligibility to utilize the Kyoto mechanisms is dealt with in an expedited manner. Section X provides shorter timelines than the general procedures and establishes specific rules for the reinstatement of eligibility to participate in the mechanisms.

The case against Greece is considered in detail, as it offered the first opportunity to observe the functioning of the EB. As such, it provides a good opportunity to illustrate the general process followed by the EB. The cases against Canada, Croatia, and Bulgaria are utilized mainly to highlight new issues they raise about the functioning of the EB.[19] Significant changes to the process in these subsequent cases that signal an evolution of the process are also identified.

1. Proceedings against Greece

This case represents the first question of implementation brought before the EB. For the reader not familiar with the role of the EB, I offer a brief reminder of the key steps in the process.[20] As noted above, a question of implementation can be brought before the compliance committee either by an ERT or by a party; the bureau determines whether it comes within the jurisdiction of the EB, the FB, or both. Once the EB receives a question of implementation from the bureau, it conducts a preliminary review of the issue raised and makes a determination on whether to proceed. If the EB decides to proceed, the party under investigation is informed of this decision. It then has the right to request a hearing and make written submissions. The party can also request under section VIII(6) of the compliance procedures that information be kept private until the conclusion of the proceedings. The EB will usually hear from the party, the ERT, any other party, as well as from any independent experts it feels are needed to resolve the issue raised. The EB can also request specific information from the party under investigation, and can consider submissions from non-parties. There are set timelines for the major steps in the process.

After the hearing, the EB makes a preliminary finding as to whether the party is in compliance. The party has an opportunity to comment on the preliminary finding. If it does not, the preliminary finding stands as the final decision of the EB. If the party submits comments on the preliminary finding, the EB issues a final decision in light of the comments filed. The EB has to give reasons for its decisions. A finding of non-compliance will result in a range of consequences depending on the nature of the violation. A key part of the process is the preparation of a compliance plan within three months of the determination of non-compliance, with regular updates thereafter on the implementation of the compliance plan. Key substantive requirements for the compliance plan are set out in Section XV (2) of the Compliance Procedures.

[19] The cases against Croatia and Bulgaria were, at the time of writing, not completed, but had progressed sufficiently to warrant their inclusion.
[20] For a comprehensive overview of the process, see *Oberthür, Holding Countries to Account*, supra note 2

The case of Greece was the first opportunity to test this process. It resulted from the ERT's review of the initial report filed by Greece and from the ERT's in-country review of Greece's national system for the estimation of emissions and the preparation of information required under Article 7 of the Kyoto Protocol. [21] The ERT summed up the situation as follows:

The ERT concludes from the information contained in the initial report and the additional information received during and after the in-country review that the national system of Greece does not fully comply with the guidelines for national systems under Article 5, paragraph 1 of the Kyoto Protocol (decision 19/CMP.1) and the guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol (decision 15/CMP.1). In particular, the ERT concludes that the maintenance of the institutional and procedural arrangements; the arrangements for the technical competence of the staff; and the capacity for timely performance of Greece's national system is an unresolved problem, and therefore lists it as a question of implementation.[22]

The ERT report was received by the compliance committee on 31 December 2007. It was allocated by the bureau to the enforcement branch on 7 January 2008. On 22 January 2008, the EB decided unanimously, by way of an electronic system for taking decisions outside of a conventional meeting, to proceed with the case against Greece.[23] A number of steps followed in short order. Greece was informed of the decision to proceed. It requested a hearing and filed a written submission in February 2008.[24] The EB requested expert advice from members of the ERT and from independent experts. The request for expert advice included a list of specific questions to be addressed by the experts.

A hearing of the EB was held in March of that year, followed by a preliminary finding of non-compliance. [25] Greece filed further written submissions in response to the preliminary finding. At a further meeting of the EB in April, the preliminary finding was confirmed. No submissions were filed by non-parties. Once the EB made its finding of non-compliance, the process shifted to the consequences of non-compliance and Greece's efforts to remedy the problems identified. Greece filed two successive compliance plans and made a formal request to the EB for eligibility to use the Kyoto mechanisms. This process took until November 2008, when the EB decided that Greece had come into compliance.

The key steps in this process are now considered in more detail.

[21] *Kyoto Protocol*, supra note 4, Articles 5, 7
[22] See Report of the Review of the Initial Report of Greece: CC-2007-1-1/Greece/EB, 8 January 2008, par. 244, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php. (See also par. 5-10 of the ERT Report, including table 1).
[23] Decision on Preliminary Examination: CC-2007-1-2/Greece/EB, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php
[24] Written Submission of Greece: CC-2007-1-5/Greece/EB, 26 February 2008, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php
[25] See Preliminary Finding: CC-2007-1-6/Greece/EB, 6 March 2008, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php

A. First Hearing Regarding Greece

The third meeting of the EB served as the first hearing in the case against Greece.[26] It was held on 4 and 5 March 2008, in accordance with Rule 9 of the Rules of Procedure. Most of the meeting was held in public, but the deliberations on the preliminary finding were held in private. The public portions of the hearing are accessible by webcast. Greece did not seek to prevent disclosure of information to the public, nor did the EB.

Substantively, the focus of the question of implementation raised by the ERT was on the transition of the role of "technical consultant" from the National Observatory of Athens (NOA) to the National Technical University of Athens (NTUA). Greece appears to have relied heavily on the NOA in establishing its national system. While the ERT had no concerns with the work done by the NOA, the heavy reliance on an outside consultant raised concerns about the capacity of the government officials responsible for the national system. It also raised concerns about the decision to switch consultants from the NOA to the NTUA. Throughout the EB proceedings, there was disagreement over the actual extent of the responsibility of the technical consultant. At least some of the ERT members were of the view that the consultant had overall responsibility for Greece's national system and that government officials lacked the capacity to oversee the work of the consultant.[27] Greece took the position that the responsibility throughout rested with the responsible Ministry, not with either the old or the new technical consultant.

Knowledge transfer was a central concern for the ERT, both with respect to the transfer from the NOA to the NTUA and for possible future transfers of responsibility. A key problem appears to have been that the description of the organizational structure, and the role of the consultant in maintaining Greece's national system ignored the fact that the consultant's responsibility was to be transferred from NOA to NTUA. Greece's response appears to have been that it would ensure the transition would take place properly, but without providing the detail necessary to satisfy the ERT with respect to knowledge transfer.[28]

The new system was first explained by Greece in its written submission to the EB. The experts invited to the March 2008 meeting of the EB, some of whom were members of the original ERT, seemed pleased with the new system as described by Greece, but felt that the capacity of the new Greek team (consisting of new Ministerial staff and the NTUA) could not be assessed based on the submission. The invited experts, including the ERT members, felt that a further in-country review was required to confirm the capacity of the new team.

The timing of the transition of responsibility had not enabled the ERT members to meet with the NTUA who had taken over responsibility for the maintenance of the national

[26] The meeting was held on March 4, 5, 2008 in Bonn. The webcast is available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php
[27] See webcast of March 4, 5, 2008 meetings in Bonn. The webcast is available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php
[28] The capacity of the new responsible entity was an issue at least in principle, in that the ERT was not able to verify its capacity during the in-country review.

GHG inventory system after the ERT's in country visit. Therefore, the ERT members felt that they could not conclude that the maintenance of Greece's national system was in good hands with the NTUA. The concern appeared in part to be a result of discussions with the original technical consultant involved, the NOA, during the in-country review. NOA staff had indicated that they had not been engaged in any knowledge transfer to NTUA.

The contract between the Ministry for the Environment, Physical Planning and Public Works of the Government of Greece and NOA ended in April 2007. An agreement between the Ministry and the NTUA to take over as technical consultant was not reached until December 2007. In the interim, the Ministry had sole responsibility for the maintenance of the national system. During the course of the EB hearings, Greece indicated that it had increased the capacity of the Ministry by hiring six new staff, that the new technical consultant would play a less prominent role than the previous consultant, and that a workshop would be held to ensure knowledge transfer from NOA to NTUA.

The key issue in the end seemed to be whether another full in-country review or some other process (such as a modified in-country review, a centralized review, or a desk review) was needed to ensure that there was now capacity to manage the inventory going forward. In this regard, Greece pointed out that if the transition had happened after a successful initial in-country review, the transition would have triggered a desk review, not another in-country review. This raised the question for the EB whether in light of the ERT's findings (including the finding that the NOA process had been adequate and that the problem really had to do with the transition), there was still a need for an in-country review of the national GHG inventory system.

As this was the first hearing involving the EB, a few comments on the process are warranted. In-session documents, including working drafts of reports and decisions were not available from the UNFCCC website, and requests for these documents were denied, making it difficult at times to follow the work of the EB in detail through the webcasts.[29] Electronic communications among members of the EB were also not available, even though the EB did conduct some of its formal business electronically to reduce travel time and cost.[30] This leaves the impression that decisions on what information to make public were based in part on when and how it was generated, rather than based on whether the content requires that it be treated confidentially.[31] No observers registered to attend the March 2008 meeting of the EB.[32]

It appears from the webcast that a number of EB members did not have the expertise to fully engage with the issues raised by the ERT report and the submission filed by Greece. Some members of the EB only asked very general questions, or did not seem to participate in the discussions. Some seemed to focus on one or two areas, perhaps

[29] E-mail communications requesting these documents on file with author.
[30] Such as the preliminary decision to proceed made on 22 January, 2008.
[31] In other words, there is no indication that the EB considered whether electronic exchanges, if made at an ordinary meeting rather than through electronic means, would have been available to the public.
[32] The author was the first registered observer at the April 2008 meeting of the EB.

consisting of matters they were more comfortable with. Others were clearly able to engage with detailed discussions with the independent experts.

The process used by the EB is not an adversarial process with both sides represented and the EB playing the role of judge. Neither the UNFCCC secretariat not the ERT is playing the role of prosecutor. This suggests that members of the EB need to take a pro-active role in bringing out and exploring critical issues. Based on the level of engagement in this case, it appears that not all members of the EB were comfortable with the responsibility this places on them.[33]

There was considerable discussion among members of the EB about the role of the UNFCC secretariat in the work of the branch at this hearing. Some members wanted the secretariat to review the submission filed by Greece and provide a preliminary response to the issues raised. Other members felt that it was the role of the EB with assistance from the independent experts to review and respond to the issues raised by Greece in its submission, not the role of the secretariat. In light of the technical nature of many of the issues likely to be brought before the EB, especially with respect to estimation, reporting, and verification under Articles 5, 7, and 8, this seems to be an important issue to resolve.

More generally it seems that, for some EB members, having the secretariat provide input into the review of parties' submissions is a way to ensure parties are treated fairly when compared to others who may have failed fully to comply with the rules but for whom ERTs nevertheless did not bring questions of implementation before the compliance committee. The secretariat is seen by those members as a source of consistency, because the secretariat works with all ERTs in the preparation of ERT reports. Some EB members also appear to see the secretariat as a source of expertise—perhaps a way to fill gaps in the expertise on the EB.

Other members of the EB were resistant to the idea of a more involved secretariat, perhaps in part out of concern about the independence of the EB. The secretariat itself resisted requests from individual members of the EB to provide comments on the submission from Greece prior to the March 2008 hearing.[34] It is not clear from the webcast whether the secretariat took this position out of concern over the workload, or as a matter of principle to safeguard its impartiality in the eyes of the parties. It is difficult to get a complete picture of the concerns on all sides of this issue given that it is clear from the webcast that the issue was discussed privately in advance of the meeting through electronic means.[35]

B. Preliminary Finding

[33] The conclusions reached here are based on personal observations from the webcast of the meetings of the EB. To verify these preliminary observations, interviews with members of the EB would have to be conducted. This was not possible in the context of this research project.
[34] This was apparent from discussions at the April 2008 meeting of the EB, which the author attended as an observer.
[35] Further research, perhaps through structured interviews of EB members, the secretariat, and parties, would be required to fully explore the concerns about the role of the secretariat.

After the public meeting reviewed in the previous section, the EB went into a private session for its deliberations. The result was a preliminary finding of non-compliance. Reasons for the decision are somewhat limited, making it difficult to determine how the range of issues discussed in the hearings were resolved in reaching the decision. The following are some of the key provisions of the preliminary finding:

16. The information submitted and presented has not been sufficient for the enforcement branch to conclude that the question of implementation has now been fully resolved. Additional information is required that specifically addresses whether and how the national system is maintained through transitions. The enforcement branch agrees with the expert advice provided that a further in-country review of Greece's new national system, in conjunction with a review of an annual inventory report generated by this national system, is required for the enforcement branch to assess present compliance with the guidelines.
17. The enforcement branch determines that Greece is not in compliance with the guidelines for national systems under Article 5, paragraph 1, of the Kyoto Protocol (decision 19/CMP.1) and the guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol (decision 15/CMP.1). Hence, Greece does not yet meet the eligibility requirement under Articles 6, 12 and 17 of the Kyoto Protocol to have in place a national system in accordance with Article 5, paragraph 1, of the Kyoto Protocol and the requirements in the guidelines decided thereunder.
18. In accordance with section XV, the enforcement branch applies the following consequences:
(a) Greece is declared to be in non-compliance.
(b) Greece shall develop a plan referred to in paragraph 1 of section XV and submit it within three months to the enforcement branch in accordance with paragraph 2 of section XV. The plan should demonstrate measures to ensure the maintenance of the national system through transitions and include appropriate administrative arrangements to support an in-country review by the expert review team of the new national system of Greece, coordinated by the secretariat in conjunction with a review of an annual inventory report generated by this national system.
(c) Greece is not eligible to participate in the mechanisms under Articles 6, 12 and 17 of the Protocol pending the resolution of the question of implementation.
19. These findings and consequences take effect upon confirmation by a final decision of the enforcement branch. [36]

C. Written Submissions

On 8 April 2008, Greece filed a written submission in response to the preliminary finding of the EB.[37] The main point made in the submission is that regardless of the difficulties at the time of the ERT review, the transition in Greece was complete as of the date of the 8 April submission. The Ministry had improved its capacity, the new technical consultant had been hired, and the workshop between the NOA and NTUA had been held. Greece stated, moreover, that it had submitted its new inventory. Greece

[36] See Preliminary Finding: CC-2007-1-6/Greece/EB, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php
[37] Further Written Submission of Greece: CC-2007-1-7/Greece/EB, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php

took the position that the quality of the new inventory should answer any question about its national system and that in these circumstances it would be inappropriate to hold up its access to the Kyoto mechanisms for the purpose of conducting an in-country review.

The submission filed by Greece also raised a question about the consistency in ERTs' approaches to referrals to the EB. The submission made the point that many of the issues raised regarding Greece had been raised by other ERTs in other initial reviews conducted for other parties without raising questions of implementation. Greece argued that as a matter of consistency, therefore, these issues should not delay Greece's eligibility to use the mechanisms.

D. Further Hearing

The main purpose of the second hearing on 16 and 17 April was to review the preliminary finding in light of the comments from the party.[38] The EB considered whether Greece's submissions warranted any change to the preliminary decision or whether it should be adopted as final. The Chair clarified at the outset that Greece was not yet required to comply with the terms of the preliminary decision. Specifically, Greece was not yet required to submit a compliance action plan on how Greece would bring its national system into compliance. Greece was required to act only if the preliminary finding of non-compliance were affirmed through a final decision.

The EB went through Greece's April 2008 submission in detail to consider whether the submission warranted a change to the preliminary finding. Concerns raised by EB members focused on the fact that there was no information on how Greece would better prepare for the eventuality of another transition in the future, and that experts at the April hearing continued to take the position that some form of in-country review would be needed to confirm that the new team (consisting of the new Ministry staff and NTUA) had the capacity and had effected the transfer of the relevant knowledge to properly maintain the national system.

The Chair expressed the view that the issue of consistent approaches by ERTs is not an EB issue, but should be addressed by the plenary of the compliance committee or even the COP. Another EB member felt that consistency is the responsibility of ERT chairs and the secretariat, while others seemed to think that the EB had a role to play in addressing this issue. It is not clear from the discussion whether any EB members agreed with Greece that this issue was relevant to the question of implementation raised with respect to Greece. One member of the EB made the point that there was no evidence before the EB that a case identical to Greece was treated differently; therefore, according to this member, the issue of consistency in ERT treatment should not influence the treatment of this case by the EB. EB members did appear to agree in the end that a possible inconsistency in the treatment of parties should not be used as an

[38] The meeting was held on April 16, 17, 2008 in Bonn. The webcast is available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/3785.php

excuse for non-compliance by an individual party. The issue has since been taken up by the plenary.[39]

E. Final Decision

The final decision of the EB, released on 17 April 2008, confirms the preliminary finding of non-compliance as well as the consequences identified in the preliminary finding.[40] As of the date of the final decision, Greece was declared to be in non-compliance, was required to submit a compliance plan within three months, and was declared ineligible to participate in the mechanisms.

As with the preliminary finding, the reasons for the decision are insufficient to identify whether and how the EB resolved the issues raised at the hearings, other than the specific question of implementation raised by the ERT report. For example, it seems from the report of the meeting that the consistency concern raised by Greece may not have been factored into the decision, but this is not reflected in the reasons for the decision.[41]

Another point to note is that the decision was not unanimous. Unfortunately, there are no reasons given for the one dissenting vote. At the October 2008 meeting of the compliance committee, the plenary clarified that, in the future, members of either branch who cast a dissenting vote will be able to provide an explanation in the report of the meeting, but that that explanation will not be part of the decision. It remains to be seen whether members will avail themselves of this opportunity in a meaningful way.

F. Greece's Compliance Plan

In accordance with the 17 April decision of the EB, Greece filed its compliance plan on 16 July 2008.[42] The plan contemplated an in-country review to take place in September 2008, and otherwise indicated that Greece's current system was adequate to address the concerns expressed by the EB in the 17 April decision.

At the meeting of the EB on 6 and 7 October 2008, Greece's compliance plan was reviewed and found to be inadequate in addressing the issues raised in the April decision and the requirements in Section IV(2) of the Compliance Procedures. In particular, the branch noted that the document contained no plan on how to improve future transitions of responsibility for components of its national system. The report was also found to be inadequate in its form, in that it did not specifically respond to each of the issues raised in the April decision. Furthermore, the EB clearly did not accept

[39] See Annual report of the Compliance Committee to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (2008), FCCC/KP/CMP/2008/5, available at: http://unfccc.int/kyoto_protocol/compliance/plenary/items/3788.php
[40] See Final Decision: CC-2007-1-8/Greece/EB, 17 April 2008, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php.
[41] See Report on the 4th Meeting of the EB: CC/EB/4/2008/2, dated 19 May 2008, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/3785.php.
[42] See Plan Pursuant to Final Decision CC-2007-1-9/Greece/EB, 16 July 2008, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5455.php.

Greece's position that everything was in order and that the in-country review was the only event that stood in the way of having its eligibility reinstated.

The EB confirmed that it could not make a final decision about Greece's state of compliance without access to the written report from the ERT on its follow-up in-country review of Greece's national system in September. There was some discussion at the EB's October 2008 meeting about the time-delay in reviewing the compliance plan submitted by Greece, and there was general agreement that in the future the EB should endeavour to respond within four weeks. The EB noted that the Rules of Procedure with respect to the review of compliance plans were inadequate, and proposed amendments.[43]

G. Final Resolution

Greece filed a revised compliance plan on 27 October 2008. The matter was finally resolved on 13 November 2008, when the EB, on a request by Greece, decided to grant it eligibility to participate in the mechanisms. The decision is based on the written report of the ERT following its in-country review in September 2008 and the revised compliance plan. The ERT report concluded that Greece had made considerable improvements in the implementation of its national system, and that it had addressed the EB's and ERT's concerns about future transitions in responsibility for maintaining its national system. The revised compliance plan was found to be in compliance with the formal requirements set out in the EB's 17 April decision. On this basis, Greece was found to be in compliance and it was declared eligible to use the Kyoto mechanisms.

2. Proceedings against Canada

The case against Canada followed the same basic process. The trigger, again, was an ERT report that raised a question of implementation. The case centered on the failure of Canada to establish its national registry. The matter was referred to the EB by the bureau on 17 April 2008. The branch decided to proceed on 2 May. It notified the party and sought expert advice. Upon a request by Canada, a hearing was held on 14 and 15 June. Following the hearings, the EB decided not to proceed any further because Canada had come into compliance by the time of the hearing.

At the heart of the question of implementation before the EB with respect to Canada was a delay in establishing Canada's national registry. A national registry is a computerized system used to track holdings of greenhouse gas credits, and is a requirement for all Annex I parties. The question of implementation did not extend to any actual accounting of emissions. As discussed in Part IV below, Canada's declared intention not to meet its emission reduction target by the end of 2012 was not before the EB.[44]

Canada's approach in its written and oral submissions was not to dispute the question of implementation raised, but to point out that the problem had been addressed and that the

[43] See Compliance Committee 2008 Annual Report FCCC/KP/CMP/2008/5, Annex I, available at: http://unfccc.int/kyoto_protocol/compliance/plenary/items/3788.php.
[44] See *Oberthür, Holding Countries to Account*, supra note 2, at 154

registry was now in place. Canada took the position that it was in compliance at the time of the hearing, and that there was therefore no point in the EB proceeding further with the question of implementation raised. The EB agreed not to proceed, but to Canada's displeasure made a point of noting Canada's past non-compliance.

The key new issue raised by the proceedings against Canada was whether it is appropriate for the EB to make reference to past non-compliance of a party or whether, in the instant case, it should have simply found Canada to be in compliance because the registry was established by the time the hearings were held. It seems clear that if the EB is to serve its role of motivating parties to comply by bringing instances of non-compliance to the attention of the public, being able to bring attention to past non-compliance may be a valuable tool.

It is important to note that ERTs already give parties an opportunity to remedy certain issues of implementation identified by the ERTs. Consistency of treatment by ERTs in granting these opportunities prior to deciding which issues to bring before the EB is critical. This was not challenged by Canada. Assuming the existence of consistency of treatment, there should be no difficulty with the EB treating seriously any issue of implementation brought before it, regardless of whether or not it has been addressed by the time of the hearing.

In the end, while Canada had already publicly stated that it did not intend to comply with its emission-reduction target, it was interesting that it was nevertheless concerned about a finding of non-compliance by the EB. It was concerned even though it was clear that the non-compliance had in the meantime been resolved. The position of Canada would appear to suggest that a finding of non-compliance does have an impact. In this particular case, a partial explanation for Canada's sensitivity on this issue is that the Canadian government had publicly stated sometime after it came into power in 2006 that it would meet all its Kyoto commitments other than the emission-reduction target.[45] The proceedings before the EB, and in particular the finding of past non-compliance with the registry requirements under the Kyoto rules, were of concern to the Canadian government because they undermined this claim.

3. Proceedings against Croatia

The proceedings against Croatia were initiated, as has been the standard practice to date, as a result of an issue of implementation raised in an ERT report. In this case the issues raised by the ERT centered on an attempt by Croatia to add 3.5 megatonnes of CO_2 eq. to its assigned amount. The ERT concluded that the 3.5 Mt enlargement was not in accordance with modalities established under decision 13/CMP.1 and raised this as an issue of implementation.

The matter was referred to the EB. In the course of the proceedings, Croatia advanced a number of arguments in support of its position. First, it argued that the dissolution of Yugoslavia in 1991 left Croatia in a situation where much of its electricity was

[45] See Meinhard Doelle and Dennis Mahony, "A Shift in the Legal Climate: The Emergence of Climate Change as a Dominant Legal Issue across Canada", in S. Berger, D. Saxe, *Environmental Law: The Year in Review* (Aurora: Canada Law Book, 2008) 1

generated in power plants outside its new borders. This had forced Croatia to increase its emissions by developing its own sources of electricity. Second, it argued that its special circumstances in this regard were noted by the COP in its decision 7/CP.12, and that this recognition was a precondition for Croatia's ratification of the Kyoto Protocol. Third, Croatia argued that Article 4.6 of the UNFCCC and Article 3.5 of the Kyoto Protocol afford economies in transition flexibility in meeting their commitments. Finally, Croatia argued that other parties (Iceland, Bulgaria, Hungary, Poland, Slovenia, and Romania) were granted similar flexibility, either by way of allowing them to choose a more favourable base year, or, in the case of Iceland, by a special rule to allow Iceland to exclude emissions from a large single project from its emissions, resulting in a 1.6 megatonne credit to Iceland.[46]

The EB concluded that the flexibility provided for in Articles 4.6 of the UNFCCC and 3.5 of the Protocol does not extend to additions to the assigned amount. Furthermore, the recognition of Croatia's special circumstances in 7/CP.12 was made by the UNFCCC's COP prior to Croatia joining the Kyoto Protocol, and not by the Protocol's CMP. Thus the EB concluded that there was no basis on which Croatia could claim special treatment for the determination of its assigned amount under the rules of the Protocol.[47]

The EB essentially decided that any recognition of special circumstances under the UNFCCC had to be confirmed by the CMP to be applicable to Croatia's Kyoto obligations. With respect to the treatment of other parties, the EB repeated its position from the case against Greece that it had to deal with the matters properly before it. It further concluded in paragraph 3(e) of the final decision that the single-project exception for Iceland was not before it. The EB also concluded that the flexibility for EITs under the Kyoto Protocol is limited to the choice of base year. Decision 7/CP.12 is based on the Convention, which allows for more flexibility with respect to EITs. Essentially, the EB acknowledged Croatia's special circumstances, but concluded that it was up to the CMP to consider these circumstances and take appropriate action in light of the more limited flexibility under the Kyoto Protocol.

The decision of the EB on this matter is currently under appeal. It represents the first time the compliance mechanism's appeal provisions have been used. Part XI of the Compliance Procedures provide for appeals in cases where parties believe that they have been denied due process in proceedings related to Article 3.1. An important preliminary question will be whether the proceedings against Croatia are considered to be related to Article 3(1). Croatia's appeal is to the CMP at its next meeting in Mexico. The CMP can overturn the decision of the EB with a three-quarters majority. In such a case, the matter would have to be referred back to the EB, presumably with some direction from the CMP. The CMP cannot change the EB's final decision; its choices are to endorse the decision by the EB or to ask it to re-consider the matter.

[46] See Further Written Submissions by Croatia: CC-2009-1-7/Croatia/EB, 13 November 2009, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5456.php.
[47] See Final Decision: CC-2009-1-8/Croatia/EB, 26 November 2009,, available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5456.php.

Croatia's Notice of Appeal includes the following grounds: violation of Article 31, paragraphs 1, 2, and 3(b), as well as Article 32 of the Vienna Convention on the Law of Treaties; improper application of Article 3, paragraph 5, of the Kyoto Protocol; violation of COP and CMP decisions and provisions of the Kyoto Protocol; violation of the equal-treatment principle; and violation of the procedures and mechanisms relating to compliance, in particular: indication of information relevant to the decision; the right to respond; and the independence, impartiality, and conflict-of-interest principles.[48]

A detailed assessment of the grounds of appeal is beyond the scope of this article; however, a few comments are warranted. The appeal will serve as an important test of the CMP in a number of ways. First and foremost, it will be interesting to see whether the CMP will limit itself to the scope of appeals under the compliance mechanism in section XI of 27/CMP.1, namely whether there was a denial to the party of due process. Of the grounds of appeal advanced by Croatia, only the last mentioned would appear to clearly raise issues that are within the scope of appeal. The challenge for the CMP, in the end, will be to resolve important legal issues in a political forum.

The due-process issues raised in Croatia's grounds raise important points. In particular, the allegations regarding the independence, impartiality, and conflict of interest of the EB need to be carefully assessed. The claim is that an alternate (non-voting) member of the EB had previously expressed views on the issue before the EB in his capacity as an EU negotiator. As a starting point, more detailed conflict-of-interest rules than those included in Rule 4 of the Rules of Procedures are needed to ensure a clear understanding of how to balance the need for expertise on the compliance committee with the need for impartial decision-making. In the absence of such rules, apart from evidentiary challenges, it will be difficult for the CMP to rule on whether the involvement of an alternate who may have previously expressed a view on the issue before the EB constitutes a conflict of interest. From a due-process perspective, a reconsideration of the matter without the involvement of that alternate member would appear prudent depending on the exact circumstances. However, it is difficult to see how this would change the substantive conclusion reached by the EB with respect to Croatia.

4. Proceedings against Bulgaria

The case against Bulgaria was triggered as a result of a question of implementation raised in the 2009 ERT report on Bulgaria.[49] In this case, the ERT concluded that Bulgaria's national system did not operate in accordance with the Guidelines for National Systems for the Estimation of Emissions by Sources and Removals by sinks under Article 5, paragraph 1, of the Kyoto Protocol.[50] The ERT was also not satisfied with institutional arrangements and arrangements for technical competence of staff

[48] See Notice of Appeal filed by Croatia, available online at http://unfccc.int/resource/docs/2010/cmp6/eng/02.pdf.
[49] See Report of the Review of the Initial Report of Bulgaria: FCCC/ARR/2009/BGR, available at: http://unfccc.int/kyoto_protocol/compliance/questions_of_implementation/items/5538.php. (hereinafter "Bulgaria ERT Report")
[50] 19/CMP.1

within the national system involved in the inventory-development process.[51] The problems identified were not new; nevertheless, in-country and desk reviews carried out in previous years had not resulted in issues of implementation with respect to these ongoing problems. The ERTs had, of course, fulfilled their role in facilitating compliance by making recommendations for improvements to Bulgaria's national system. A change in government in Bulgaria in July 2009 seems to have provided an opening to address these ongoing concerns in a constructive manner.

The EB followed the same general process illustrated above. Bulgaria filed a detailed submission prior to the EB's preliminary finding of non-compliance. After a hearing on 10 May 2010, the EB issued its preliminary finding, essentially confirming the findings of the ERT with respect to Bulgaria's inventories of emissions and sinks, particularly with respect to institutional arrangements and staff. The conclusions of the EB were confirmed in its final decision rendered at the conclusion of the meeting of the EB on 28 June. The focus of the decision is the requirement of a compliance plan, regular updates, and a further in-country review. The expectation clearly is that it will take Bulgaria some time to come into compliance. In the meantime, the party is not eligible to use the Kyoto mechanisms.

The extent of Bulgaria's difficulties and the length of time it has already taken to try to resolve them are perhaps the key aspects of this case. The fact that this matter had not previously come before either the FB or the EB must be considered a shortcoming of the process, even if ERTs have been diligent in working with Bulgaria to resolve these issues. At a minimum, the FB should have been engaged much earlier. Furthermore, this is a case where both branches could have been engaged. The EB in its findings limited itself more or less to a finding of non-compliance and to identifying a process of determining when Bulgaria has come into compliance. While this is entirely appropriate for the EB, it would seem that Bulgaria is in need of more detailed advice on the steps it needs to take. The EB could have referred the matter to the FB to fill this gap. Bulgaria's willingness to address the issues raised is clearly a factor in favour of engaging the FB. It seems, however, that the process is currently implemented to avoid parallel processes before both branches. This means that in circumstances where a party before the EB is in need of facilitative assistance, the EB may have to become actively involved in facilitating compliance.

This case serves to illustrate the problem of triggering primarily through ERT referral. It seems clear that ERTs reviewing Bulgaria's inventory system have had concerns and have identified problems for some time, but decided, until this year, not to raise them as questions of implementation. The first in-country review likely should have resulted in referral to the FB or perhaps even the EB. If the FB had the responsibility to review each ERT report and the power to initiate proceedings on its own, it would seem likely that this would have led to a pro-active approach to this matter years earlier. The end result is that this ongoing problem is coming before the EB with only two years left before the end of the commitment period.

IV. Observations on the Experience to Date

[51] Bulgaria ERT Report, at Par 194

Overall, the Kyoto compliance system has performed remarkably well under the circumstances, particularly with respect to the requirements for initial eligibility and the establishment of national systems and inventories by Annex I parties. Considerable facilitation appears to have occurred at the ERT level with respect to the requirements of Articles 5, 7, and 8. It seems that the threat of formal proceedings before the compliance committee has been an effective motivator for parties to cooperate with ERTs.

A few key shortcomings of the Kyoto compliance system can nevertheless be identified based on the experience to date. They are discussed below. The most obvious is that the triggers for proceedings before the two branches have proven to be inadequate. The adequacy of the "consequences" has also been brought in doubt, largely by Canada's declared intention not to work toward its emission-reduction target, but also, as explained below, by the inactivity of the FB. Transparency is a third key area. I lastly consider the role of the key players in the compliance system to offer some final thoughts on possible adjustments to the system.

1. Triggering

Triggering is perhaps the most obvious shortcoming of the current system. The compliance system allows self triggering by parties, party to party triggering, and triggering by ERTs. The self trigger has not been used. The party to party trigger was attempted once and failed. The limitation of self triggering and party to party triggering was, of course, recognized in the design of the system. Triggering by ERTs was offered as the solution. This solution will likely prove adequate with respect to the emission-reduction obligations at the end of the first commitment period. It is less clear that it has been adequate in allowing the compliance committee to act early to encourage compliance in a pro-active, preventative manner.

The ERT process has not been an adequate triggering process to date. In particular, the triggering of proceedings before the FB has been practically non-existent, in spite of clear evidence of numerous concerns and violations under the jurisdiction of the FB. The most notable example is the inability of either branch of the compliance system to take any action before 2015 in response to Canada's declared intention not to meet its emission-reduction target. The stakes for the compliance system are particularly high with respect to Canada, as its current position strikes at the core of the Kyoto Protocol. Yet, the compliance committee cannot act, and must rely on the threat of the ultimate consequences to be applied in 2015 as the only tool within the system to encourage Canada to change its position. Its inability to act before 2015 also means a loss of valuable time to reduce emissions in Canada. It leaves the purchase of credits or acceptance of the consequences of non-compliance as the only feasible compliance options for Canada.[52]

[52] One might be inclined to take the view that even with an appropriate trigger, there is nothing the compliance committee could do to convince an unwilling party to change its position. In the end, however, this is an unanswered question. Would proceedings before the compliance committee have an impact on the position of the current Canadian government? Would it affect its relationship to other

For any MEA trying to build on the experience with the Kyoto compliance system, careful thought will therefore have to be given to the triggering process. A small but important step forward would be to allow the branches to review specific reports, in particular the ERT reports, and themselves trigger the process if they identify issues of concern within their jurisdiction. This might help to overcome the concern which individual states might have that they will be singled out for retaliation for initiating proceedings against another party.

The FB could be given the responsibility to carry out periodic consultations with parties with respect to their commitments without the need for a trigger. The consultations could be automatic, and the expectation could be that the FB would comment on what is being done well, identify areas that require improvements, offer ideas on how to move forward, such as sharing best practices identified elsewhere, and generally function as a conduit for effective policies.[53] This approach could also usefully be combined with a formal trigger in the context of a review part-way through a commitment period, essentially an enhanced "demonstrable progress" review.

An interesting question with respect to the FB is whether it should be able to refer matters to the EB. While such a power may seem appealing on the surface, there is a risk that this would undermine the effectiveness of the FB. It would certainly undermine any hope of party self-triggering, something that might hold promise if the FB were given resources to assist parties struggling with compliance.[54]

Finally, the most daring step forward would be a non-party trigger process, which would allow civil society to initiate proceedings before the compliance committee. A non-party trigger would certainly be an effective solution to the current system's triggering problem.[55] A reasonable safeguard to protect parties from unwarranted claims would be to give the compliance committee the discretion to determine whether to proceed with a matter brought before it by civil society.

2. Consequences

On the enforcement side, the main question regarding consequences is whether Canada's decision to ignore its emission reduction obligations warrants a reconsideration of the adequacy of the ultimate consequences of non-compliance. Leaving aside the immediate problem of the uncertain future of the Kyoto Protocol and the fact that targets for a second commitment period are uncertain as a result, what could be done to increase the likelihood that parties acting out of short-term self-interest are nevertheless motivated to comply with their obligations?

parties? Would it affect the credibility of the current government domestically? Would it affect the domestic debate on this issue?

[53] This concept was, at the time of writing, under consideration for the post-2012 climate change regime.

[54] See discussion on consequences below

[55] Non-party triggers are not without precedent in international law. See, for example, Svitlana Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 Colo. J. Int'l Envtl. L. and Pol'y 1

One step forward would be a safeguard against using the compliance process to continuously borrow from future commitment periods. Parties could be prevented from borrowing in two sequential commitment periods, and instead be required to pay a financial penalty. The 1.3 rate could be increased in case of repeated failure to meet emission-reduction targets. The compliance action plan could be made subject to more rigorous international review and approval for repeat offenders. An international compliance fund could be reconsidered as a means of preventing repeated borrowing, particularly in light of the need to finance mitigation and adaptation in developing countries.[56] Such a compliance fund could, for example, require payment for each ton of carbon missed at a rate equal to or higher than the cost of achieving the reductions during the commitment period, and make the funds available to non-Annex I parties for mitigation or adaptation purposes.

On the facilitative side, the main issue regarding consequences is whether the FB should have access to concrete tools and resources to assist parties in their effort to meet commitments, particularly with tracking of emissions, sinks, credits, and reporting. The FB should be able to offer help in the form of funding and expertise, certainly in the context of EITs. In situations where facilitation extends to developing countries, this becomes even more important. Providing the FB with such tools may encourage less developed parties that experience compliance difficulties to self-report to the branch.

Having briefly considered consequences on the facilitation and enforcement side, it is worth considering how well the combination of consequences for facilitation and enforcement is working. Would stronger consequences be the top priority for improving the effectiveness of the compliance system? Alternatively, is more active facilitation and more facilitation-support the priority? Are these options mutually exclusive or supportive? It seems clear from the experience to date, that the ERT process has been supported, not hampered, by the existence of the EB and its reasonably strong consequences. It does appear from the case against Canada, for example, that the shame of being brought before the EB was a motivator in Canada's establishing its registry by the time it did. As already noted, it is clear that the threat of consequences has been insufficient to date to motivate Canada to take its mitigation obligation seriously. In the end, there is little indication so far that enforcement comes at the cost of facilitation, suggesting that both enforcement and facilitation consequences should be strengthened in parallel.

3. Transparency of the Process

When the compliance system was negotiated, there were legitimate concerns that transparency had been weakened in the late stages of the negotiations with the inclusion of section VIII(6), which allows information to be kept from the public until the conclusion of the proceedings on request by the party being investigated at the discretion of the EB.[57] It is encouraging that this mechanism has not been used, and that the committee and its two branches have made considerable efforts toward transparency. Examples include webcasting proceedings other than deliberations on

[56] For a discussion of the consideration of a compliance fund in the negotiations of the Kyoto compliance system, see *Doelle, From Hot Air To Action*, supra note 1, at 60.
[57] See *Doelle, From Hot Air to Action*, supra note 1, at 136

decisions, a straightforward mechanism for observers to attend public meetings, and full access to all key documents on the UNFCCC website.[58] Nevertheless, a few transparency issues have arisen from the experience to date. They are briefly explored here.

One limitation of the current process is that public proceedings frequently make reference to working documents that are not publicly accessible, making it difficult to follow the discussions taking place. In order for the webcasts to truly create transparency, working documents that are the subject of discussion should be provided, unless there is an overriding reason why they cannot be made available to the public.

A second issue relates to the increasing use of electronic means of communication, in place of meetings. While this practice should be encouraged, exchanges by electronic means that otherwise would be public should be made publicly available. In essence, e-mail exchanges should be treated like in-person meetings—they should be public unless there is a reason to keep them confidential. Currently, the form instead of the substance of communication dictates whether information is accessible.

A third issue relates to the level of detail offered in annual reports and decisions of the committee and its branches. The EB has gradually provided more detail in its decisions, and this trend should be encouraged and continued. More detailed reasons can help fill in some of the gaps left by the inaccessibility of working documents and e-mails.

4. Roles of Key Actors

The ERT process generally appears to be working well. It is, however, not consistently bringing issues of implementation before the compliance committee. This has been a concern from the time of the first case against Greece. The case against Bulgaria would seem to reinforce the point. Consistency is clearly an issue for the ERT process. Whether the review by ERTs, in particular through in-country reviews, is sufficiently detailed and frequent for the credibility and integrity of the reporting system is unclear based on the experience to date. It may be worth considering complementary ways to review and verify emissions and credits, such as through direct engagement of civil society in reporting methodological issues.[59]

As a group, the members of the compliance committee appear to have served the process reasonably well. There are few indications of voting along party lines.[60] The expertise of members appears to vary, resulting in some members being very engaged while others seeming to limit their involvement to a narrow range of issues. It is noteworthy that some members appear to have technical expertise, whereas others seem to have legal expertise. To deal with technical issues, the EB has made extensive use of

[58] Surprisingly, to date no submission has been made by civil society, and there have only been very few registered observers.

[59] For example, there could be a formal process through which civil society could be encouraged to register to review and publically comment on ERT reports. These comments could then be considered by the appropriate branch, and could potentially even feed into a branch-based triggering process.

[60] The South Africa submission to the FB on behalf of the G-77, and the one abstention on the final decision in the Croatia case are perhaps worth noting here. One issue to watch in this regard are the voting rules, which can serve to encourage block voting along Annex I/non-Annex I lines.

outside experts, being careful to draw on ERT members and independent experts. Legal issues, however, have not been resolved through the use of outside experts. This may need to be rethought if legal disagreements continue to arise within the EB.[61] One solution would be to provide the compliance committee with access to independent legal advice.

The CMP has to date been relatively unengaged with the work of the compliance committee. This may be partly due to its focus on the post-2012 negotiations. As a general rule, this may be a good thing, as it will limit political interference in the work of the committee. It will be interesting, however, to see whether this trend continues in case of the appeal filed by Croatia. In defining an appropriate role for the CMP, timing, the number of parties, and the political nature of the CMP all need to be taken into consideration. Its role as the ultimate overseer of the process without much direct involvement generally seems appropriate.

The role of secretariat has been the subject of some discussion within the EB. The secretariat has been resistant to requests from members of the EB to provide preliminary analysis of cases that come before it. The impartiality of the secretariat and the independence of the compliance committee appear to be the main reasons. On balance, it would seem that the secretariat's approach has generally been appropriate. Limits in the capacity, resources, and expertise of members of the branches should be addressed directly, rather than blurring the line between the secretariat and the members of the compliance committee. However, a review of ERT reports for consistency by the secretariat would seem appropriate.

V. CONCLUSION

Much of the focus of the work of the compliance committee to date has been on developing and testing its basic rules of procedure. The cases against Greece, Canada, Croatia, and Bulgaria before the EB, and the case brought by South Africa on behalf of the G-77/China before the FB, stand out as the main sources of experience with the Kyoto compliance system to date. These are early days for the Kyoto compliance system, and one would be well advised not draw firm conclusions about the effectiveness of the compliance system based on this limited experience. Nevertheless, it is clear that the EB is off to a promising start. At the same time, the experience does suggest that the compliance system is underutilized. A number of issues, ranging from delays in reporting to methodological issues and Canada's decision to abandon its emission-reduction obligation, have either not come before the branches or have not done so in a timely manner.

Overall, the Kyoto experiment to combine facilitation and enforcement shows considerable promise. The main task ahead is to encourage more and better facilitation, and to adjust the consequences as needed. The good news is that the experience to date suggests that enforcement can and does encourage constructive facilitation, even if the facilitation to date has been carried out by ERTs rather than the FB. On the enforcement

[61] One prominent example was a discussion of the Plenary in 2007 on an issue related to the timing of early eligibility. The webcast of the October 2007 annual meeting is available at http://unfccc.int/kyoto_protocol/compliance/plenary/items/3788.php.

side, the process seems to be reasonably effective, efficient, and fair. There are still details to be worked out, but the current system offers a strong basis to work from. In short, the Kyoto compliance system offers a good starting point for any MEA interested in combining facilitation and enforcement for an effective compliance system that deals with the range of motivations, from self-interest to lack of capacity.