

Kyoto Compliance Mechanism

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Introduction

1. The Kyoto Protocol sets binding targets for 37 industrialised countries and the European community for reducing greenhouse gas emissions.

2. All parties to the Kyoto Protocol have agreed to meet various rules laid out in the Protocol. Their agreement is summarised in Article 2 of the Kyoto Protocol:

“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”

3. The Kyoto Protocol commits countries to limit or reduce greenhouse gas emissions, providing all Annex I Parties with targets (quantified emission limitation and reduction commitments or “QELRCs”). Parties should meet these targets by domestic action. Parties’ efforts to meet their targets can be supplemented by accessing and using the flexible mechanisms established by the Kyoto Protocol

4. There are various implications if a party to the Kyoto Protocol does not meet its assigned targets. These are not restricted to penalties as the Protocol operates to aid those that do not have the ability to meet their required targets. The Compliance Committee which was set up to review non-compliance was established under Article 18 of the Kyoto Protocol:

“The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.”

5. This paper sets out the operation of the Kyoto Compliance Mechanism including a brief overview of the facilitative and enforcement branches, how non-compliance with QELRC is determined and the consequences of non-compliance with those targets.

Role of the Compliance Committee

6. Non-compliance can be a challenging issue to address in an international agreement. States sign agreements voluntarily and are usually free to withdraw at any time in accordance with the specified procedure for withdrawal. The approach to non-compliance in international agreements has generally been through the use of non-coercive means to bring Parties into compliance (and to prevent them from getting into non-compliance in the first place). The Protocol is relatively rare in having enforcement mechanisms that can invoke sanctions.
7. The Compliance Committee for the Kyoto Protocol was established in October 2001, at Conference of the Parties (COP) 7 by the Marrakech Accords. There was considerable debate as to the powers it should have. It established a compliance framework with a head bureau and two further committees (the Facilitative Branch and the Enforcement Branch).
8. The aim of the Committee is the verification of Annex I Party compliance with the targets set out in the Kyoto Protocol. The Committee also has the ability to assess the quality and reliability of national inventories and emissions, how comparable they are, and take any action needed in respect of these should it be required. It can also determine whether the QELRCs imposed by the Protocol were attainable and realistic, in order not to penalise States that were not realistically able to meet their targets.
9. The Committee process is not permanent and neither are the procedures related to it. These will be reassessed in 2012 where it will be decided, by a meeting of parties to the Kyoto Protocol, if they have operated successfully or need alteration or need to be entirely changed.

Procedures

10. The Compliance Committee is made up of 20 members elected from the Montreal 2005 COP and has been active since 2006. It oversees non compliance issues and directs issues to the relevant branch of the Committee. Elected members of the Compliance Committee must be scientific experts and must have experience in a legal field.

The Facilitative Branch

- (A) The Facilitative Branch is made up of 10 members to the Protocol, including 1 member from each of the 5 official UN regions, one from Small Island Developing States and two each from Annex 1 and non-Annex 1 parties.
- (B) The Facilitative Branch is primarily for developing countries and provides assistance to promote compliance. It operates not to penalise states but to help them meet future targets. It provides assistance and help for those States who do not have the technology or ability to meet the targets that have been imposed on them.
- (C) To pass a finding of non compliance by the Facilitative Branch the committee requires a $\frac{3}{4}$ vote majority. The Facilitative Branch also operates to warn States of the potential of future non-compliance.
- (D) The Facilitative branch has a 3 week deadline to complete preliminary examinations of a non-compliance, after this initial investigation no time limit applies. The lack of time scale leaves the possibility for actions of the branch to be continually extended so to be practically ineffective.

The Enforcement Branch

- (E) The Enforcement Branch has the same set up as that of the Facilitative Branch. It is made up of 10 members to the Protocol, including 1 member from each of the 5 official UN regions, one from Small Island Developing States and two each from Annex 1 and non-Annex 1 parties.
- (F) The Enforcement Branch has the responsibility, amongst other things, to determine consequences for not meeting commitments under the Protocol.
- (G) It requires a $\frac{3}{4}$ vote majority to determine non-compliance but it also needs a majority of Annex 1 and non-Annex parties to be allowed to take action. Each type of non-compliance results in a specific course of action.
- (H) Where the Enforcement Branch has determined that the emissions of a Party have exceeded its assigned amount, it must declare that that Party is in non-compliance and impose penalties.
- (I) It should however be noted that the Enforcement Branch has no power of sanction or coercion over noncompliant parties.
- (J) The time period for action of the Enforcement Branch is 35 weeks from receipt of record of non-compliance. Time sensitive matters will however, be completed in shorter time periods.

Determining non-compliance with QELRCs

11. Pursuant to Article 7(1) of the Kyoto Protocol and Decision 15/CMP1, Parties are required to submit to the secretariat an annual report for the purposes of ensuring compliance with Article 3 of the Kyoto Protocol. In particular, Parties must include information relating to the amount of greenhouse gases emitted from sources (less removals by sinks) and any flexible mechanism transactions in each year of the commitment period. The first annual report, relating to the year 2008, was due on 15 April 2010.
12. These annual reports are then subject to review by expert review teams (Article 8). These check the reports to make sure they are complete, accurate and conform to the guidelines. If any problems are found, the expert review team may recommend adjusting the data to make sure that emissions during any year of the commitment period are not underestimated. If there is disagreement between a Party and the expert review team about the adjustment that should be made, the Compliance Committee will intervene.
13. Aside from recommending data adjustments, the expert review team has the mandate to raise any apparent implementation problems with the Compliance Committee. Once the compliance procedures have been finalised, the compilation and accounting database will be updated with a record of the Party's emissions for that year.
14. Any questions of implementation raised by the expert review teams will be referred by the Compliance Committee to the appropriate branch depending on the nature of the issue raised by the teams. Matters of non-compliance can also be referred to the Compliance Committee (and through it to either the Facilitative or Enforcement Branch) by submissions by "any party with respect to itself" or by "any party with respect to another party supported by corroborating information" (Decision 27/CMP1, Annex, V.1(b)).

15. An opportunity is given to the concerned Party to make representations as to the alleged breach. So far 5 specific cases have been dealt with by the Compliance Committee: 1 by the Facilitative Branch and 4 by the Enforcement Branch. These cases all relate to national reporting and registry systems and not QELRCs:
 - (A) Greece – 17th April 2008 – first country to be found in non-compliance by the Enforcement Branch.
 - (B) Canada – 5th May 2008 – found to be in compliance of implementation by the Enforcement Branch.
 - (C) Croatia – 26th November 2008 – found to be in non-compliance by the Enforcement Branch.
 - (D) Bulgaria – 28th June 2010 – found to be in non-compliance by the Enforcement Branch.
16. Breaches of Article 3(1) commitments (i.e. emissions reductions) will not be dealt with by the Compliance Committee until after the end of the first commitment period. The final annual report, in respect of the last year of the commitment period (2012), is due to be submitted in 2014.
17. Following the submission and review of the final annual report (due sometime in 2015), the end of commitment period accounting phase will begin. This phase provides a final tally of the Party's total emissions and associated flexible mechanism transactions (the assigned amount) for the commitment period and enables determination of whether a Party is in compliance with its QELRCs.
18. After completion of the review of the final annual report, the Parties have an additional 100 days in which they can continue to buy or sell AAUs, ERUs, CERs (relating to emissions reductions in the first commitment period) for the purpose of 'truing up' any differences between their total emissions in the commitment period and the amount of units they have retired for compliance purposes.
19. At the end of this true-up period, each Party must submit a final report which contains a list of all units that have been retired by that Party to meet its QELRC and the quantity of units retired will be compared against that Party's total emissions during the commitment period.
20. The expert review teams will review this final report and, in their report, will include an assessment of whether a Party's total emissions for the commitment period are less than or equal to the quantity of units retired by that Party.
21. If the units retired appear to be less than total emissions, the matter will be referred to the Enforcement Branch of the Compliance Committee (whether by the expert review team, the Party in breach, or by another Party alleging the breach) to make a determination on non-compliance.

Consequences of non-compliance

22. If the Enforcement Branch determines that a Party is in non-compliance with its QELRCs, the Compliance Committee will apply consequences pursuant to Decision 27/CMP1, annex, part XV, paras 5 and 6:

- (A) first, the amount by which that Party's emissions have exceeded the available assigned amount, multiplied by 1.3, will be deducted from that Party's assigned amount in the subsequent commitment period;
 - (B) second, the Enforcement Branch will request that Party to prepare and submit a compliance action plan which assesses the reasons for non-compliance and indicates actions (with a timetable) to show how it intends to meet its QELRCs in the subsequent commitment period; and
 - (C) third, the Enforcement Branch will suspend the Party's eligibility in the second commitment period to transfer units to other Parties through emissions trading until the compliance action plan has been submitted (unless the enforcement branch determines that the Party will not meet its QELRC for the second commitment period).
23. In respect of decisions made in relation to breaches of emissions reductions targets, there is no right of appeal unless a Party believes it has been denied due process.
24. As set out above, the main sanction for exceeding emissions targets is the requirement to make up a shortfall (plus a 30% penalty) in a later commitment period. However, in the absence of a second commitment period, this is relatively toothless since the impacts of action by the Enforcement Branch only take effect when a second commitment period exists.