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Key features of the Kyoto Protocol's compliance system

RENÉ LEFEBER AND SEBASTIAN OBERTHÜR*

1. Introduction

The compliance system of the United Nations Framework Convention on Climate Change (FCCC's) Kyoto Protocol is based on four layers of rules that have been developed in several steps. First, an enabling clause (Article 18) in the protocol mandates the Conference of the Parties serving as the meeting of the parties to the Kyoto Protocol (CMP) to approve appropriate and effective procedures and mechanisms to determine and address cases of non-compliance. On this basis, CMP-1 approved and adopted the procedures and mechanisms relating to compliance under the protocol (Compliance Procedures).[1] The Compliance Committee, established by the Compliance Procedures, then developed, and the CMP adopted, further rules of procedure (Rules of Procedure).[2] In addition, the committee has developed working arrangements to complement and give effect to the Rules of Procedure.[3]

In this chapter, we aim to demonstrate that the protocol's compliance system and the experience gained from its operation since 2006 constitute a landmark in international climate policy and global environmental

* René Lefeber and Sebastian Oberthür are both members of the enforcement branch of the Compliance Committee of the Kyoto Protocol. The chapter does not necessarily reflect the views of the aforementioned institution. This chapter is an abridged update of 'Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after Four Years of Experience', *Climate Law*, 1.1 (2010) 133–58, with permission from IOS Press.

[1] See Decision 27/CMP.1, 'Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol', Annex, FCCC/KP/CMP/2005/8/Add.3 (30 March 2006), 92.

[2] See Decision 4/CMP.2, 'Compliance Committee', Annex, FCCC/KP/CMP/2006/10/Add.1 (2 March 2007), 17, and Decision 4/CMP.4, 'Compliance Committee', Annex, FCCC/KP/CMP/2008/11/Add.1 (19 March 2009), 14.

[3] See Annual Report of the Compliance Committee to the Conference of the Parties serving as the meeting of the parties to the Kyoto Protocol, FCCC/KP/CMP/2006/6 (22 September 2006), para. 11.

governance more broadly. The compliance system forms an integral part of the governance system of the protocol and provides for an unprecedented administrative review, by an independent international body, of state action to implement the protocol. It is unique for multilateral environmental agreements (MEAs), especially because of its objective to enforce as well as to facilitate and promote compliance.[4] Beyond its role in ensuring compliance with the protocol's emission targets, it is an essential component in securing the accurate 'measurement, reporting, and verification' of greenhouse gas emissions under the protocol and the effective functioning of its carbon-market mechanisms. With more than five years of practical operation behind it since 2006, the compliance system has further matured and proved that an independent international review of state action can be efficacious in promoting compliance with an MEA – even though some weaknesses in the system have also become evident during this period.

We develop our argument by focusing on the main elements of the compliance system and its functioning.[5] Accordingly, Section 2 of the chapter addresses the rules and practice regarding the institutional set-up of the Compliance Committee. This is followed by an analysis of the general procedures of the committee, as well as the specific procedures applicable to its enforcement branch (Section 3), and the 'consequences' to be applied to resolve compliance problems (Section 4). Finally, we turn to an overall assessment of the operation of the compliance system until the beginning of 2011 (Section 5).

[4] See J. Brunnée, 'The Kyoto Protocol: A Testing Ground for Compliance Theories?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)*, 63 (2003), 255–80.

[5] A number of authors have analysed the Compliance Procedures themselves, but analyses of the subsequent development and operation of the compliance system are rare. For some of the relevant literature see: X. Wang and G. Wiser, 'The Implementation and Compliance Regimes under the Climate Change Convention and Its Kyoto Protocol', *Review of European Community and International Environmental Law*, 11 (2002), 181; O. Stokke, J. Hovi, and G. Ulfstein (eds), *Implementing the Climate Regime: International Compliance* (London: Earthscan, 2005); C. Holtwisch, *Das Nichteinhaltungsverfahren des Kyoto-Protokolls* (Berlin: Duncker & Humbolt, 2006); S. Oberthür and S. Marr, 'Das System der Erfüllungskontrolle des Kyoto-Protokolls: Ein Schritt zur wirksamen Durchsetzung im Umweltvölkerrecht', *Zeitschrift für Umweltrecht*, 13 (2002), 81; R. Lefeber, 'From The Hague to Bonn to Marrakesh and Beyond: A Negotiating History of the Compliance Regime under the Kyoto Protocol', *Hague Yearbook of International Law*, 14 (2001), 25; and R. Lefeber, 'The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)', in T. Treves *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague: T.M.C. Asser Press, 2009).

2. The institutional set-up of the Compliance Committee

The committee, which is at the centre of the compliance system, operates through four functional formations.[6] It has twenty full members, as well as an alternate for each member. It primarily operates through its two branches, the facilitative branch (FB), and the enforcement branch (EB), in each of which serve ten members with their corresponding alternate members. It is these branches that address 'questions of implementation' – that is, compliance problems. In addition, the chairpersons and the vice-chairpersons of the branches together form a four-member bureau; and all members (and alternate members) together form the plenary of the committee.

The bureau has an important overall guiding role. Pursuant to the Compliance Procedures, it is responsible for allocating questions of implementation to the appropriate branch, and for designating, as it considers necessary, one or more members of one branch to contribute to the work of the other branch on a non-voting basis.[7] Pursuant to the Rules of Procedure, the bureau furthermore determines the agenda of the meetings of the plenary in cooperation with the FCCC secretariat, which also serves the committee. Beyond what is provided for in the written rules, the bureau has proved crucial to the overall functioning of the committee, for it determines the timing and organization of meetings of the plenary and guides the preparation of associated documents.[8]

Although not explicitly foreseen in the Compliance Procedures themselves, the chairperson and the vice-chairperson of each branch form a *de facto* bureau for their branch. The Rules of Procedure provide that the secretariat is to draft the provisional agenda for each branch meeting 'in agreement with the chairperson and vice-chairperson of the relevant branch'.[9] In practice, however, the chairperson and vice-chairperson have a more far-reaching, crucial, role in the organization and preparation of the meetings. In order to facilitate decision-making of the branches, they have assumed responsibility for the production of the draft text of decisions. Through the exercise of an (unwritten) set of responsibilities, the chairperson and vice-chairperson guide the elaboration of decisions and reports.

[6] Decision 27/CMP.1, above note 1, section II.

[7] *Ibid.*, sections VII.1 and II.7, respectively.

[8] See also Lefeber, 'The Practice of the Compliance Committee', above note 5 at 304.

[9] Decision 4/CMP.2, above note 2 at Rule 7.2.

Both branches are composed according to the same formula. That is, each branch has a member from each of the five UN regional groups, one nominated by a small island developing country, two nominated by developed countries (that is, parties listed in Annex I of the FCCC), and two nominated by developing countries (non-Annex I parties).[10] In effect, sixty per cent of the members of the committee and of each of its branches are nominated by developing countries.[11]

The functions of the EB are specifically and exclusively defined. The EB is responsible for addressing potential cases of non-compliance by developed countries with (a) their emission-limitation or reduction commitments under Article 3.1 of the protocol (their emission targets); (b) the key methodological and reporting requirements under Articles 5.1 and 5.2 and 7.1 and 7.4; and (c) the eligibility requirements for participation in the carbon-market mechanisms under Articles 6 (Joint Implementation), 12 (Clean Development Mechanism), and 17 (International Emissions Trading). In such cases, the branch has to determine whether the party in question is in non-compliance. In the case of a finding of non-compliance, it has to apply 'consequences' (see also Section 4 below). The EB is also mandated to decide on the application of adjustments to inventories (for example, where emission estimates are found to be lacking or incorrect[12]) and corrections to the database for the accounting of assigned amounts (for example, where transfers of emission units are found to be recorded inappropriately) in situations where a related disagreement between an expert review team (ERT) and a party could not be resolved during the review of national greenhouse gas emission inventories.[13] So far the EB has addressed questions of implementation with respect to four parties: Greece, Canada, Croatia, and Bulgaria. The questions of implementation involved the compliance of these states with the methodological and reporting requirements and related eligibility requirements.

The FB is essentially responsible for addressing any question of implementation that does not fall under the authority of the EB. This specifically includes an early-warning function with respect to questions of

[10] Decision 27/CMP.1, above note 1, sections IV.1 and V.1. We use the terms 'developed country' and 'Annex I party' as well as 'developing country' and 'non-Annex I party' interchangeably throughout this chapter.

[11] On the term of service of members and alternates (four years), see *ibid.*, sections IV.2 and V.2; see also Decision 4/CMP.4, above note 2.

[12] See Decision 20/CMP.1, 'Good Practice Guidance and Adjustments under Article 5.2, of the Kyoto Protocol', FCCC/KP/CMP/2005/8/Add.3 (30 March 2006), 21.

[13] Decision 27/CMP.1, above note 1, section V.4–6.

implementation regarding (a) emission targets prior to the end of the relevant commitment period and (b) methodological and reporting requirements prior to the first commitment period.[14] With respect to any question of implementation addressed by it, the FB, rather than determining non-compliance, is to provide advice and facilitation and promote compliance by applying a mix of consequences that could be described as 'soft'.[15] So far, the FB has not had occasion to apply any. A submission by South Africa on behalf of the G-77 and China in 2006 did not proceed to the merits (see further below), and a request for clarification of the action the committee could take in relation to its facilitative function has so far not been addressed by the CMP.[16] However, in 2010, the FB decided to develop its own practice and take proactive action with respect to parties that had not submitted their national communication on time.[17] It initiated correspondence with Monaco on the delay in the submission of its fifth national communication and enquired, so far to no avail, whether it could provide any advice and facilitation in order to help it implement its reporting obligations.[18]

Not being involved in deciding questions of implementation, the plenary of the Compliance Committee has a mainly coordinating and administrative function in providing a link to the CMP. The plenary (a) reports to the CMP annually; (b) applies any general policy guidance handed down by the CMP; (c) makes proposals on administrative or budgetary matters to the CMP; (d) develops further draft rules of procedure for adoption by the CMP; and (e) performs any other functions assigned to it by the CMP.[19] So far, the CMP has not given any policy guidance or assigned any other functions to the committee; it has adopted further rules of procedure on two occasions, decided on the length and number of terms for alternates, and taken note of proposals on administrative and budgetary matters.[20] In practice, the plenary has served as a forum for discussion

[14] *Ibid.*, section IV.4–7. [15] *Ibid.*, sections IV.7 and XIV.

[16] See Annual Report of the Compliance Committee to the Conference of the Parties serving as the meeting of the parties to the Kyoto Protocol, FCCC/KP/CMP/2009/17 (2 November 2009), para. 4(b).

[17] See Annual Report of the Compliance Committee to the Conference of the Parties serving as the meeting of the parties to the Kyoto Protocol, FCCC/KP/CMP/2010/6 (8 October 2010), paras. 45–6.

[18] See correspondence between FB chairperson and Monaco at http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php.

[19] Decision 27/CMP.1, above note 1, section III.

[20] See Decision 4/CMP.2, above note 2; Decision 5/CMP.3, 'Compliance under the Kyoto Protocol', FCCC/KP/CMP/2007/9/Add.1 (14 March 2008), 21; Decision 4/CMP.4, above

of general matters and for information sharing among members and alternates. The plenary has discussed procedural issues, such as participatory rights of alternates, privileges and immunities of members, conflict of interest, and the treatment of observers, as well as substantive issues, such as delays in the submission of reports by parties, the functioning of the ERT process, and consistency in the review of parties' reports by ERTs. Furthermore, the plenary has established a practice of exchanging information on the respective activities of the two branches so as to promote consistency in the application of the Compliance Procedures.[21]

The decision-making rules of the committee aim at a balance between enabling the committee to take decisions in cases where consensus cannot be reached and providing reassurance to developed countries, in particular, that the members nominated by them cannot be outvoted for political reasons. Accordingly, the committee, that is, all four functional formations, must endeavour to take decisions by consensus, but may as a last resort adopt a decision by a three-quarters majority. Decisions also require a quorum of at least three-quarters of the members. Decisions of the EB require, in addition, a simple majority among the members nominated by developed countries and a simple majority among the members nominated by developing countries.[22] The risk of a stalemate is therefore particularly pronounced in the EB, since the opposition of two members nominated by developed countries would suffice to block a decision.

The limitations of the committee's voting rules and the danger of politicization of its proceedings are illustrated by the failure of the FB to come to an agreement on how to address a question of implementation submitted on 26 May 2006 by South Africa as chair of the G-77 and China. It related to the alleged failure of fifteen developed countries to submit reports demonstrating progress in achieving their commitments under the protocol in accordance with Article 3.2. The FB failed to reach a decision during the preliminary examination on whether or not to proceed with the question in respect of thirteen of the fifteen countries in question. Members disagreed on the implications of the fact that the submission (a) was not by a party on its own behalf through a representative duly authorized for this purpose; (b) did not clearly and individually name the parties with respect to which it purported to raise a question of implementation; and

note 2; and Decision 6/CMP.5, 'Compliance Committee', FCCC/KP/CMP/2009/21/Add.1 (30 March 2010), 20.

[21] See agendas and reports of the meetings of the plenary available at http://unfccc.int/kyoto_protocol/compliance/plenary/items/3788.php.

[22] Decision 27/CMP.1, above note 1, section II.8–9.

(c) was not supported by concrete corroborating information and did not substantiate how the question related to any of the specific commitments of the relevant parties under the protocol.[23]

The failure of the FB to reach agreement regarding the South African submission had an important learning effect on the committee and contributed to preventing repetition of such a stalemate. An in-depth discussion of the FB's failure resulted in an enhanced awareness of members that stalemates in decision-making constitute a serious threat to the credibility of the committee. The discussion also led to provisions being included in the Rules of Procedure concerning minimum procedural standards for submission of questions of implementation (see Section 3.1 below). There has been no subsequent stalemate in decision-making in the committee, with the overwhelming majority of decisions adopted by consensus.

Driven by the desire to minimize political interference, the functioning of the committee is based on the independence and impartiality of its members and alternates. According to the Compliance Procedures, members and alternates 'shall serve in their individual capacities',[24] and the Rules of Procedure further specify that both members and alternates shall 'act in an independent and impartial manner and avoid real or apparent conflicts of interest'.[25] Members and alternates may continue to be a member of a delegation to meetings under the convention or the protocol, but the committee has recognized that there may be circumstances in which this situation could lead to due process concerns and, therefore, due diligence should be exercised.[26]

With a view to ensuring the independence and impartiality of members and alternates, the plenary of the committee has also repeatedly, but unsuccessfully, requested the CMP to provide funding for the regular participation of all members and alternates.[27] At present, only members and

[23] The FB was able to decide by majority not to proceed with respect to two developed countries which had in the meantime submitted their reports (Latvia and Slovenia); see Report of the Compliance Committee on the Deliberations in the Facilitative Branch Relating to the Submission Entitled 'Compliance with Article 3.1 of the Kyoto Protocol', reproduced in Annex IV of the First Annual Report of the Compliance Committee, above note 3. See also Lefeber, 'The Practice of the Compliance Committee', above note 5 at 314–15.

[24] Decision 27/CMP.1, above note 1, section II.6.

[25] Decision 4/CMP.2, above note 2 at Rule 4.1.

[26] See Fifth Annual Report of the Compliance Committee, above note 17 at para. 50.

[27] See Annual Report of the Compliance Committee to the Conference of the Parties serving as the meeting of the parties to the Kyoto Protocol, FCCC/KP/CMP/2007/6 (26 September 2007), para. 5; Annual Report of the Compliance Committee to the Conference of the Parties serving as the meeting of the parties to the Kyoto Protocol,

alternates from developing countries and from some low-income countries with economies in transition are eligible for reimbursement by the secretariat of their travel and subsistence expenses. The members and alternates from most developed countries depend for their expenses on the party that nominated them. Some governments have questioned whether they should provide such reimbursement if they cannot instruct the member or alternate nominated by them to serve the interests of that state.[28]

The Rules of Procedure have further reinforced the importance of the independence and impartiality of members and alternates by requiring each of them to take a written oath of service before assuming their duties, and establishing a complaint procedure for alleged conflicts of interest or incompatibility with the requirements of independence and impartiality. The oath requires members and alternates to declare any relevant interest in any matter under discussion before the committee and to refrain from participating in the work of the committee in relation to such a matter. The complaint procedure may result in the plenary suspending, or recommending to the CMP to revoke, the membership of a member or alternate who has been found to have materially violated the requirements of independence and impartiality.[29] A complaint was, for the first time, lodged on 28 December 2009 by Croatia in its comments on the final decision of the EB; in September 2010, the committee agreed to refrain from considering the complaint on the merits pending its consideration by the CMP in the context of Croatia's appeal against the final decision (see further below).[30]

The role of alternate members has been further clarified in the Rules of Procedure so as to enable them to fully support an effective functioning of the committee. All alternate members are entitled to participate in the proceedings of the plenary and the branch to which they belong on an equal footing with members, except that they may not cast a vote if the associated member votes.[31] This entitlement – and encouragement – aims to ensure that alternates are fully informed and have full ownership of the proceedings in order to be able to effectively replace a member whenever this may be required. The active participation of alternate members

FCCC/KP/CMP/2008/5 (31 October 2008), para. 4(f); and Fourth Annual Report of the Compliance Committee, above note 16 at para. 4(c).

[28] Personal experience of the authors. [29] Decision 4/CMP.2, above note 2 at Rule 4.

[30] See Fifth Annual Report of the Compliance Committee, above note 17 at paras. 53–63 and Annex II.

[31] Decision 4/CMP.2, above note 2 at Rule 3.

has had, overall, a positive impact on the consideration of questions of implementation and the other business of the plenary and the branches.

Further accentuating the objective to shield the quasi-judicial decision-making of the committee from political interference, the Compliance Procedures confer on the committee far-reaching powers, thus limiting the residual powers of the CMP to interfere with its operations. As indicated earlier, the CMP, which has delegated final decision-making authority on questions of implementation to the branches, is limited to considering the committee's reports, adopting further rules of procedure, providing general policy guidance, adopting decisions on proposals on administrative and budgetary matters, and deciding appeals.[32] Besides the narrowly defined exception of appeals (further discussed below), the CMP is not required to confirm the decisions of the branches on questions of implementation, and, in contrast with the compliance systems of several other MEAs, cannot overrule such decisions.[33]

3. Procedures of the committee and its branches for the consideration of questions of implementation

The committee must observe detailed procedural prescriptions, including strict timelines for the EB (see Figure 4.1 below), when it considers a question of implementation. In exchange for the committee's independence, negotiators were eager to ensure a high level of automaticity and due process for the party with respect to which a question of implementation has been raised, especially as regards the proceedings of the EB.[34]

3.1 Triggering, allocation, and preliminary examination

The method of triggering a compliance procedure is fundamental to any compliance system.[35] One must ensure that compliance problems are actually brought to the attention of the compliance system if it is to

[32] Decision 27/CMP.1, above note 1, sections XII and III.2 (d).

[33] See Treves *et al.* (eds), above note 5; U. Beyerlin, P. T. Stoll, and R. Wolfrum (eds), *Ensuring Compliance with Multilateral Agreements: A Dialogue Between Practitioners and Academia* (The Hague: Martinus Nijhoff, 2006); and United Nations Environment Programme, *Compliance Mechanisms under Selected Multilateral Environmental Agreements*, 2007).

[34] Rule 24 of Decision 4/CMP.2, above note 2, contains limited further provisions with respect to the FB, which are not analysed in this chapter.

[35] See F. R. Jacur, 'Triggering Non-Compliance Procedures', in Treves *et al.* (eds), above note 5.

address them. Without appropriate triggering provisions, the effectiveness of a compliance system will be curtailed. In this respect, the experience with compliance mechanisms under other MEAs and international institutions suggests that states rarely trigger judicial or quasi-judicial proceedings, in the 'public interest', against other states. Instead, empowering actors other than states to trigger the compliance procedure will increase its usage.[36]

The compliance procedure of the Kyoto Protocol is triggered when the committee receives a question of implementation. It may receive questions of implementation from: (a) an ERT, (b) a party with respect to itself (the so-called 'self-trigger'), and (c) a party with respect to another party ('party-to-party trigger').[37] Furthermore, the committee has defined minimum procedural standards for submissions of questions of implementation by parties, including that they must be signed by a duly authorized representative of the submitting state and may not be submitted by one state on behalf of a group of states.[38] These standards also apply to other official submissions and comments made during proceedings. They were included in the Rules of Procedure after the above-mentioned failure of the FB to reach agreement regarding the submission of South Africa on behalf of the G-77 and China, a case in which lack of clarity on the applicable standards contributed to a stalemate in the FB.

The practice of the compliance system confirms the broader experience with comparable mechanisms under other MEAs and international institutions, in that Kyoto's non-state ERT trigger has proved crucial. This quasi-automatic channel has become the most important: all questions of implementation on which the committee has so far proceeded to the merits were received from ERTs. That is, by early 2011, no other trigger had been used, with the exception of the above-mentioned South African submission that was not addressed on the merits.

The significance of the ERT system for its own operations has led the committee to keep the functioning of the system under close review. Since 2008, the committee has addressed the issue of a consistent operation of the ERT process itself so that different ERTs would apply the same standards

[36] See M. Ehrmann, 'Procedures of Compliance Control in International Environmental Treaties', *Colorado Journal of International Environmental Law and Policy*, 13 (2002), 377 at 382; R. O. Keohane, A. Moravcsik, and A.-M. Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', *International Organization*, 54 (2000), 457.

[37] Decision 27/CMP.1, above note 1, section VI.1. On triggering of non-compliance procedures of MEAs, see Jacur, above note 35.

[38] Decision 4/CMP.2, above note 2 at Rules 2 and 18; see also Rules 14–17.

during the review.[39] On the occasion of the ERT report that provided the basis for the request by Bulgaria for reinstatement of its eligibility in 2010, the EB found a lack of clarity in the ERT report, which did not clearly explain why unresolved problems did not result in the listing of questions of implementation. As a consequence, the EB called for enhanced coordination between the review process and the compliance system to secure consistency in the interpretation of the provisions governing the listing of unresolved problems as questions of implementation.[40]

Two steps need to be taken before the committee can proceed to the merits of any question of implementation it receives. First, the bifurcation of the committee requires the allocation of a question of implementation to the appropriate branch in accordance with the mandates of each branch; this is to be done by the committee's bureau within seven days.[41] Second, the responsible branch conducts a 'preliminary examination' of the question within three weeks in order to ensure that the question (a) is supported by sufficient information, (b) is not *de minimis* or ill-founded, and (c) is based on the requirements of the protocol. These criteria were designed as a further insurance against a potential misuse of the Compliance Procedures. In the case of the party-to-party trigger, the preliminary examination should also include a check of the aforementioned standards established in the Rules of Procedure. No preliminary examination is required in the case of a self-trigger. Only once the preliminary examination has led to a decision to proceed with a question of implementation may the actual proceedings in a case start.[42]

3.2 *General procedures*

The general procedural provisions to be followed by both branches are concerned, in particular, with due process, information sources and expert advice, transparency, and public participation.

[39] See the Annual Reports of the Compliance Committee, above notes 3, 16, 17, and 27; Description of the Elements of the Review Process under Article 8 and Synthesis of the Information Regarding the Review of National Systems, Plenary of the Compliance Committee, CC/5/2008/2 (1 October 2008).

[40] See Decision under Paragraph 2 of Section X (Party concerned: Bulgaria), Enforcement Branch of the Compliance Committee, CC-2010–1–17/Bulgaria/EB (4 February 2011), para. 14; Report on the Meeting, Enforcement Branch of the Compliance Committee, Twelfth meeting, CC/EB/12/2011/2 (25 February 2011), paras. 14–15.

[41] Decision 27/CMP.1, above note 1, section VII.1; Decision 4/CMP.2, above note 2 at Rule 19.

[42] Decision 27/CMP.1, above note 1, section VII.

Several provisions aim at ensuring due process for the party concerned.[43] It is entitled to be represented during the consideration of any question of implementation. However, it may not be present during the elaboration (that is, the process of discussion and drafting) and adoption of a decision, when only the membership of the committee and staff of the secretariat may be present.[44] The party concerned is entitled to all of the information considered by the branch and may comment in writing on such information, as well as on any decision of the branch. Any comment on a final decision submitted within forty-five days is to be annexed to the annual report of the committee to the CMP. Up to the beginning of 2011, Canada, Croatia, and Bulgaria had availed themselves of this right. In the case of Canada, it involved a submission by Canada challenging an aspect of the EB's decision not to proceed further, after that decision had been taken. Since the case was closed and there was no legal basis for reopening the proceedings, Canada followed the suggestion that its submission be treated as a comment on the decision not to proceed further.[45] Additional due-process provisions relate to the handling of information provided by the party concerned and to the use of languages other than English.[46]

As regards information sources, the branches are to base their deliberations on information provided by reports of ERTs, the party concerned, the party that has submitted the question of implementation (if such is the case), the Conference of the Parties to the FCCC, the CMP, the subsidiary bodies, and the other branch of the Compliance Committee.[47] Competent intergovernmental and non-governmental organizations may also submit relevant factual and technical information;[48] by early 2011, no such organizations had availed themselves of the opportunity.

The branches may also seek expert advice.[49] If a branch decides to do so, it must define the questions on which the expert opinion is sought,

[43] *Ibid.*, section VIII.2 and VIII.6–9; Decision 4/CMP.2, above note 2 at Rules 9, 13, and 22.2.

[44] Decision 27/CMP.1, above note 1, section VIII.2; Decision 4/CMP.2, above note 2 at Rule 9.2.

[45] Third Annual Report of the Compliance Committee (2008), above note 27, at para. 30 (author) and Annex V. For the comments by Croatia and Bulgaria, see Fifth Annual Report of the Compliance Committee, above note 17 at para. 30 and Annex II, and para. 38 and Annex III, respectively.

[46] Decision 27/CMP.1, above note 1, section VIII.6 and VIII.9; and Decision 4/CMP.2, above note 2 at Rule 13.

[47] Decision 27/CMP.1, above note 1, section VIII.3.

[48] *Ibid.*, section VIII.4. They should do so in writing after the preliminary examination: Decision 4/CMP.2, above note 2 at Rule 20.

[49] Decision 27/CMP.1, above note 1, section VIII.5.

identify the experts to be consulted, and lay down the procedures to be followed.[50] Given the technical nature of many issues to be addressed by the branches, such expert advice has proved to be crucial in the operation of the committee. The EB sought expert advice in all four of the cases it had addressed until the beginning of 2011, and the advice given played an important role during the EB's consideration of the questions of implementation with respect to Greece, Canada, and Bulgaria.[51]

As for transparency, all decisions of the branches are made public. The same is true of all information considered by the relevant branch, although the branch may, of its own accord or at the request of the party concerned, decide to make certain information available only once the proceedings have been concluded. All preliminary and final decisions are required to contain a list of specific elements, in particular conclusions and reasons for the decision.[52] With respect to confidentiality, each member and alternate member has a sworn duty under the Rules of Procedure not to disclose confidential information.[53] While confidential information is not exhaustively defined, it arguably includes information disclosed in closed meetings of the committee in confidence; information received upon request of the committee that is subject to other confidentiality protections; and information about the details of the discussion of a decision in closed meetings (bearing in mind that the voting will be recorded and made public in the decision itself).

To enhance public participation, meetings of the plenary and the branches (but not the bureau) are open to the public, except as otherwise decided for 'overriding' reasons. The main restriction to public participation is that only members, alternates, and secretariat officials may be present during the elaboration and adoption of a decision. The committee has, since 2007, admitted registered observers to attend the open parts of its meetings, recorded its proceedings, and broadcast them on the internet.

[50] Decision 4/CMP.2, above note 2 at Rules 20 and 21.

[51] See Final Decision (Party concerned: Greece), Enforcement Branch of the Compliance Committee, CC-2007–1–8/Greece/EB (17 April 2008); Decision not to Proceed Further (Party concerned: Canada), Enforcement Branch of the Compliance Committee, CC-2008–1–6/Canada/EB (15 June 2008); Final Decision (Party concerned: Croatia), Enforcement Branch of the Compliance Committee, CC-2009–1–8/Croatia/EB (26 November 2009); Final Decision (Party concerned: Bulgaria), Enforcement Branch of the Compliance Committee, CC-2010–1–8/Bulgaria/EB (28 June 2010); and Decision under Paragraph 2 of Section X (Party concerned: Bulgaria), above note 40.

[52] Decision 27/CMP.1, above note 1, section VIII.6–7; Decision 4/CMP.2, above note 2 at Rules 12 and 22.

[53] Decision 4/CMP.2, above note 2 at Rule 4.2.

Any member of the public may register as an observer.[54] An 'overriding' reason for closing a meeting has not been defined. A vote on a proposed decision to hold a meeting of the plenary in private that would address the alleged conflict of interest of an alternate member in June 2010 did not achieve a quorum and was therefore not adopted.[55]

The use of electronic means of decision-making has inevitably meant that observation of the process by the party concerned and the general public has been somewhat restricted. Electronic means are used not only for the transmission, distribution, and storage of documentation, but also for the elaboration and adoption of decisions.[56] It was only after long internal debates that the committee agreed to permit the use of electronic means for elaborating and taking decisions, in order to facilitate its work between scheduled meetings. The provision for electronic decision-making was seen as necessary in order to comply with the tight timelines applying to the allocation of a question of implementation,[57] the preliminary examination, and the special procedures for the EB addressed below.

Electronic means of decision-making had, by 2010, become the regular means of taking decisions on allocation, preliminary examination, and the determination of expert advice. Electronic decision-making has further reinforced the important role of the chairperson and vice-chairperson of each branch in leading the drafting of proposed decisions to be adopted by electronic means, mindful of the limited scope for discussion of a draft text via that method. It should be noted, however, that decisions on the substance of a question of implementation have generally been drafted and discussed in face-to-face meetings. Occasionally, decisions drafted and discussed in a meeting have been adopted through the use of electronic means where there was no quorum for the adoption of the decision at the meeting itself. Such electronic decision-making occurred in the case of the preliminary examination of the aforementioned submission by South Africa, as well as in the case of the final decision on Croatia.[58]

[54] *Ibid.* at Rule 9. For working arrangements, see Second Annual Report of the Compliance Committee (2007), above note 27 at paras. 15–17. On the review and the continued application of these arrangements, see Fifth Annual Report of the Compliance Committee, above note 17 at para. 16.

[55] See Report on the Meeting, Plenary of the Compliance Committee, Seventh meeting, CC/7/2010/5 (7 July 2010), para. 3; see also above section 2.

[56] Decision 4/CMP.2, above note 2 at Rule 11.

[57] See also *ibid.* at Rule 19.1.

[58] First Annual Report of the Compliance Committee, above note 3 at paras. 19–25; Report on the Meeting, Enforcement Branch of the Compliance Committee, Eighth meeting, CC/EB/8/2009/2 (4 December 2009), para. 6.

3.3 *Procedures of the enforcement branch*

The EB procedures are set up as a two-stage process. First, the party concerned has the opportunity to make its case in written form and, on request, through a hearing; on this basis, the EB either makes a preliminary finding of non-compliance or takes a decision not to proceed further. In the case of a preliminary finding of non-compliance, the party concerned can ask for a review of the preliminary finding by providing further written arguments, which leads to a final decision of the EB.[59] The possibility of asking for a review of the preliminary finding provides an additional procedural safeguard to the party concerned under the EB's procedures. Although not explicitly foreseen in the Compliance Procedures, the EB has furthermore, in the cases of Greece, Croatia, and Bulgaria, established a practice to allow the party concerned to present its further written submission, and to respond to any related questions of the branch, at the meeting of the branch convened to elaborate and adopt the final decision.[60] However, the EB decided that it could not take into consideration any issues raised during the presentation of the further written submission which were not raised in that submission.[61] The EB also allowed Bulgaria to make a presentation in support of its request for reinstatement of eligibility.[62]

There exist two main kinds of EB procedure, distinguishable according to the strictness of the timeline applicable in each case. The overall time limits of the regular EB procedures add up to a maximum of approximately thirty-six weeks. For questions of implementation related to the eligibility for participation in the carbon-market mechanisms, expedited time frames apply, totalling around seventeen weeks at most.[63] Whereas the EB may extend any of its normal timelines 'when the circumstances of an individual case so warrant',[64] an extension is not possible for the

[59] Decision 27/CMP.1, above note 1, section IX.

[60] Report on the Meeting, Enforcement Branch of the Compliance Committee, Fourth meeting, CC/EB/4/2008/2 (19 May 2008), para. 5; Report on the Meeting, Enforcement Branch of the Compliance Committee, above note 58 at para. 5; and Report on the Meeting, Enforcement Branch of the Compliance Committee, Tenth meeting, CC/EB/10/2010/2 (6 July 2010), para. 7.

[61] Report on the Meeting, Enforcement Branch of the Compliance Committee, Tenth meeting, above note 60 at para. 9.

[62] Report on the Meeting, Enforcement Branch of the Compliance Committee, Twelfth meeting, CC/EB/12/2011/2 (25 February 2011), para. 8.

[63] Decision 27/CMP.1, above note 1, sections X and X.1; Rule 10 of decision 4/CMP.2, above note 2, grants additional time for the notification of and receiving communications from the party concerned.

[64] Decision 27/CMP.1, above note 1, section IX.11.

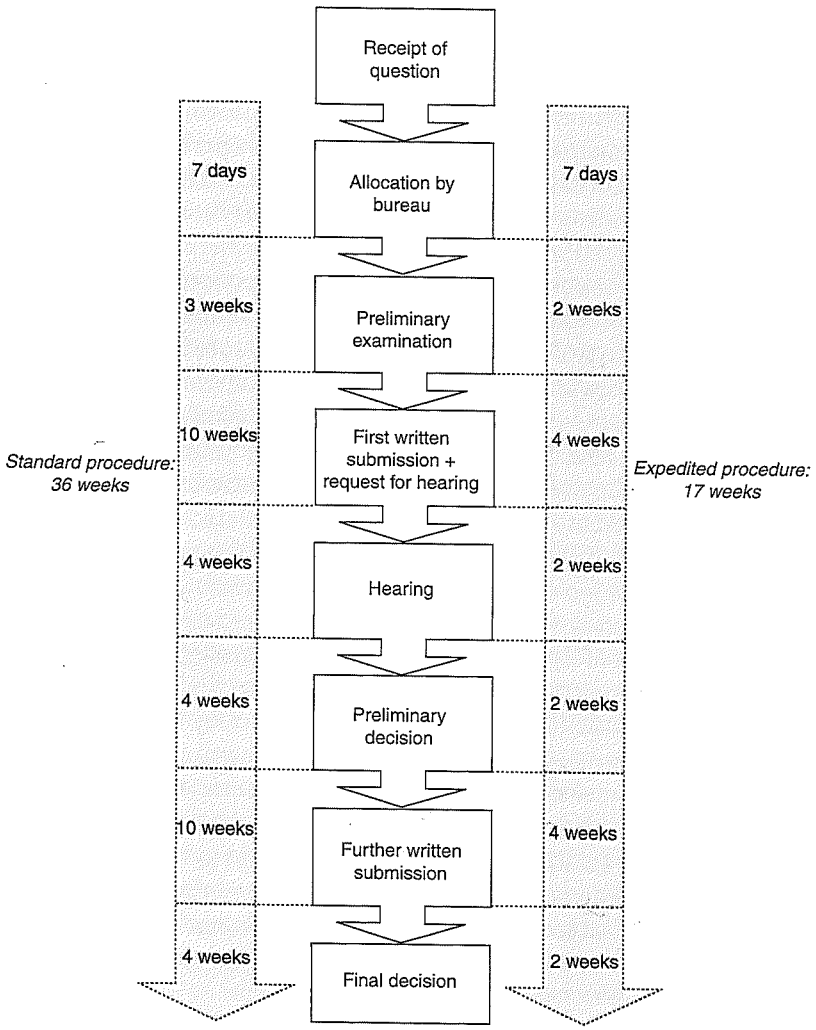

Figure 4.1. The enforcement branch procedures.
Source: René Lefeber and Sebastian Oberthür

expedited procedures. In the cases of Greece, Croatia, and Bulgaria, which utilized the full expedited procedures, the final decision was adopted within, respectively, sixteen, fourteen, and seventeen weeks. The timelines applicable to the various steps of the EB's regular and expedited procedures are depicted in Figure 4.1.

The timelines given are net of the time required for notification of the party concerned (preliminary examination, preliminary decision) and for receipt of communications from the party concerned (first and further written submission, request for hearing) in accordance with Rule 10 of the Rules of Procedure. Some of the timelines are conditional on previous steps (see the Compliance Procedures, sections IX and X). In practice, the EB has held the meetings for the hearing and for the elaboration and adoption of the preliminary decision in combination.

The EB procedures contain three additional 'expedited procedures' that are not as precisely defined. First, a party may, through an ERT or directly, request the EB to reinstate its eligibility if it has been rendered ineligible to participate in the carbon-market mechanisms following a decision of the EB.[65] If the EB receives an ERT report indicating that the party meets all eligibility requirements, it is to reinstate the party's eligibility unless the branch considers that a question of implementation continues to exist. The relevant ERT report may issue from a regular review, or, at the request of the party concerned, from an expedited review for the reinstatement of eligibility.[66] As above-mentioned, the party may also request the EB directly to reinstate its eligibility. By early 2011, this reinstatement procedure had been invoked by Greece and Bulgaria; these parties successfully applied for such reinstatement on the basis of an ERT report resulting from a regular review.[67] In the case of Bulgaria, a meeting was convened to consider the request for reinstatement. Given the concerns raised in the recommendations of the ERT, the branch considered that it required additional information. The information received from invited experts and from Bulgaria in the course of the meeting was then considered sufficient for the branch to reinstate Bulgaria's eligibility.[68]

Second, a party may request the EB to reinstate its eligibility if it has been disentitled to transfer emission units following a decision of the

[65] *Ibid.*, section X.2.
[66] See Decision 22/CMP.1, 'Guidelines for Review under Article 8 of the Kyoto Protocol', Annex, FCCC/KP/CMP/2005/8/Add.3 (30 March 2006), 52, especially Part VIII.
[67] See Decision under Paragraph 2 of Section X (Party concerned: Greece), Enforcement Branch of the Compliance Committee, CC-2007-1-13/Greece/EB (13 November 2008); Decision under Paragraph 2 of Section X (Party concerned: Bulgaria), above note 40.
[68] See Decision under Paragraph 2 of Section X (Party concerned: Bulgaria), above note 40 at para. 5; Report on the Meeting, Enforcement Branch of the Compliance Committee, above note 62 at para. 11.

EB that it is in non-compliance with its emission target.[69] The party concerned may request reinstatement of eligibility on the basis of its compliance action plan (see Section 4 below) and of additional information submitted to demonstrate that it will meet its emission target for the commitment period subsequent to the one for which it was found to be in non-compliance. If the party has demonstrated that it has met its emission target in the subsequent commitment period, the EB is to reinstate its eligibility. As the EB will receive any questions of implementation regarding non-compliance with emission targets from ERTs no earlier than in the second half of 2015, this procedure has not yet been applied. Its full application, relevance, and effectiveness depend on whether further commitment periods will follow the first.

Finally, the EB has been mandated to decide, within twelve weeks, any disagreement between the ERT and the party concerned about whether to apply adjustments to greenhouse gas emission inventories or a correction to the database for the accounting of assigned amounts.[70] In contrast to the other parts of the mandate of the EB, its primary task with respect to such disagreements is not to determine whether the party concerned is not in compliance, but to resolve the disagreement by determining the correct amount. By early 2011, no such question of implementation had arisen, as the ERTs and the parties had been able to resolve such disagreements between themselves. For example, the Netherlands eventually accepted a significant adjustment of its estimate of net CO_2 emissions from deforestation for the base year during the review of its initial report.[71] It is reasonable to assume that the very existence of a formal, high-level compliance system contributes to the parties' resolve to settle their differences with the ERTs.

4. 'Consequences' for the resolution of compliance problems

The FB and the EB have at their disposal different sets of 'consequences' – sticks as well as carrots – to resolve compliance problems. These consequences have been designed to utilize the incentives and disincentives that are built into the protocol and its implementing decisions. The FB has more discretion in applying consequences that are 'softer' in nature than the EB has in applying consequences that are 'stronger' in nature.

[69] Decision 27/CMP.1, above note 1, section X.3–4. [70] *Ibid.*, section X.5.

[71] See Report of the Review of the Initial Report of the Netherlands, Docs. FCCC/IRR/2007/NLD (2 November 2007) and CC/ERT/IRR/2007/12 (2 November 2007), especially para. 189.

In line with its mandate, the FB can apply consequences only of a facilitative kind.[72] These consequences are permutations on the provision of advice and the facilitation of assistance. The strongest of these measures would seem to be the formulation of recommendations. Since no cases have been considered by the FB on substance, no practice had emerged by early 2011.

In contrast, the EB has little discretion in the application of the consequences at its disposal. In line with its mandate, it must apply the consequences tied to three possible kinds of non-compliance:[73]

(1) Where the non-compliance relates to methodological and reporting requirements, the EB has to declare the party concerned non-compliant and request it to submit a 'plan' for coming back into compliance.
(2) Where the non-compliance concerns the eligibility requirements, the EB has to suspend a party's eligibility or, in the case of initial eligibility, decide that a party is not eligible 'in accordance with relevant provisions under those articles'.
(3) In case of non-compliance with the party's emission target, the EB has to declare the party's non-compliance, deduct 1.3 times the excess tonnes from the party's assigned amount for the second commitment period,[74] request the submission of a 'compliance action plan', and suspend the party's eligibility to sell emission units.

The Compliance Procedures make similar provision for the 'plan' to remedy non-compliance with methodological and reporting requirements and the 'compliance action plan' to remedy non-compliance with an emission target. The EB is tasked to review and assess the plans as well as their implementation. The plans must contain the following elements: (a) an analysis of the causes of non-compliance; (b) a description of the measures taken to restore compliance; and (c) a timetable for the implementation of the measures, which must not exceed one year for plans to comply with methodological and reporting requirements or three years for plans to comply with an emission target.[75]

Until the EB receives a question of implementation related to emission targets, only the consequences for non-compliance with the

[72] Decision 27/CMP.1, above note 1, section XIV.

[73] *Ibid.*, section XV.

[74] The rate for subsequent commitment periods remains to be determined: see *ibid.*, section XV.8.

[75] See Decision 27/CMP.1, above note 1, section XV.2–3 and XV.6–7; see also Decision 4/CMP.2, above note 2, Rule 25bis.

methodological, reporting, and eligibility requirements are relevant. Since the questions of implementation addressed by the EB up to the beginning of 2011 all concerned eligibility requirements and, by implication, methodological and reporting requirements, the EB applied the consequences for both forms of non-compliance in the cases where it adopted a final decision of non-compliance (namely Greece, Croatia, and Bulgaria).

The Compliance Procedures provide for a limited possibility of appeal. A party may appeal to the CMP against a final decision of the EB relating to that party's emission target; it may do so within forty-five days of notification of the final decision.[76] Apart from the time limit, any appeal must relate to the appealing party's emission target and involve a violation of due process. A disagreement of the party concerned with the substance of the decision of the EB is thus insufficient for an appeal. Moreover, the bar for a successful appeal to the CMP has been set quite high: a CMP decision overriding the EB decision requires a three-quarters majority of the parties present and voting. The appeal does not suspend the decision, a feature that avoids the creation of a perverse incentive to appeal against EB decisions. If the CMP considers that the party concerned has indeed been denied due process, it does not have authority to decide the question of implementation. Instead, the question must be referred back to the EB.[77]

A question of interpretation has arisen with respect to the admission of appeals, mentioned above, that the appeal needs to 'relate to' the appealing party's emission target. There can be no doubt that an appeal against a final decision establishing a party's non-compliance with its emission target after the end of a commitment period would 'relate to' the emission target of the party concerned. It is, however, debatable whether a final decision that affects the establishment of the assigned amount of a party (for example, in the case of Croatia) or the eligibility of a party (such as in the case of Greece) may also be considered as 'relating to' a party's emission target and may thus be appealed. This question of interpretation formed part of the consideration of Croatia's appeal against the final decision of the EB concerning the calculation of its assigned amount which the CMP initiated but did not conclude in December 2010.[78]

[76] Decision 27/CMP.1, above note 1, section XI. [77] *Ibid.*, section XI.3 and XI.4.

[78] See Appeal by Croatia against a Final Decision of the Enforcement Branch of the Compliance Committee, FCCC/KP/CMP/2010/2 (19 February 2010); Appeal by Croatia against a Final Decision of the Enforcement Branch of the Compliance Committee in Relation to the Implementation of Decision 7/CP.12, Draft conclusions proposed by the President, FCCC/KP/CMP/2010/L.7 (9 December 2010).

Although the binding nature of the consequences may have become the subject of debate,[79] the design of the system warrants that the application of consequences by the EB is effective. The suspension of eligibility, as for example in the case of Greece in 2008, Croatia in 2009, and Bulgaria in 2010, means that the party concerned is no longer able to clear transactions of emission units through the International Transaction Log, administered by the secretariat, and as a result the party is no longer able to use such transactions for the purposes of meeting its emission target. An attempted transaction of this kind could not be officially processed, and would be ignored by ERTs and the committee. Moreover, where the party concerned does not meet its emission target for the commitment period, the committee will apply the aforementioned deduction rate, which will lead to an automatic deduction from the party's assigned amount for the subsequent commitment period.[80] Similar reasoning applies to the resolution by the committee of a disagreement between an ERT and a party. Hence the compliance system utilizes the incentives and disincentives that the protocol and its implementing Decisions have generated. Its consequences are self-enforcing, even though their continued effectiveness depends on the creation of subsequent commitment periods and their ratification by all relevant parties – which would be the case even if the Compliance Procedures had been adopted by means of an amendment to the protocol.[81]

5. An assessment after more than five years of practice

Since the commencement of its operation in 2006, the Compliance Committee has gained important experience in the application of its

[79] For some contributions to the debate on this aspect, see Brunnée, above note 4 at 277–8; G. Ulfstein and J. Werksman, 'The Kyoto Compliance System: Towards Hard Enforcement', in Stokke, Hovi, and Ulfstein (eds), above note 5 at 57–8; and A. Halvorssen and J. Hovi, 'The Nature, Origin and Impact of Legally Binding Consequences: The Case of the Climate Regime', *International Environmental Agreements: Politics, Law and Economics*, 6.2 (2006), 157–71.

[80] The deduction would occur irrespective of whether the party concerned might, as has been suggested, have a legal basis for arguing that they are not bound by the deduction; see Ulfstein and Werksman, above note 79 at 58.

[81] S. Oberthür, 'Die Wirksamkeit von Verrechtlichung: Die Compliance-Mechanismen internationaler Umweltregime', in K. Jacob, F. Biermann, P.-O. Busch, and P. H. Feindt (eds), *Politik und Umwelt. Politische Vierteljahresschrift Sonderheft*, 39 (2007), 73 at 88; Lefeber, 'From The Hague to Bonn', above note 5 at 52–4. For a similar line of argument, see Brunnée, above note 4 at 278.

rules. It has realized significant achievements, including the full development and putting into operation of the compliance system that existed only on paper in 2006. However, the operation of the committee during this period has also revealed several difficulties and weaknesses that point to a potential for further improvement of the international compliance system. While a full assessment of the operation of the system is beyond the scope of this chapter, in the following we highlight what we believe are major considerations.

The first two years of the committee's operation were mainly taken up with the elaboration of further Rules of Procedure to fine-tune the functioning of the committee. This process was influenced by the lessons learned from the experience of the FB with the submission of South Africa, on behalf of the G-77 and China, in 2006. The Rules of Procedure and accompanying working arrangements breathed further life into the Compliance Procedures and prepared the ground for an effective functioning of the committee.

Since the end of 2007, the EB has proved its ability to effectively address and resolve cases of non-compliance within the framework of the applicable rules. As already indicated, until the beginning of 2011 the EB had addressed questions of implementation with respect to Greece, Canada, Croatia, and Bulgaria. Greece and Bulgaria made a successful effort to come back into compliance, and the EB reinstated their eligibility and closed the cases.[82] Canada was able to resolve the issue at hand before a preliminary decision was adopted.[83] The resolution of the question of implementation in the case of Croatia is pending at the time of writing (as a result of the aforementioned undecided appeal).

The Compliance Procedures have also constituted an important incentive for parties to avoid compliance problems and to try to resolve problems during the ERT process. No question of implementation has arisen from ERTs with respect to the reporting deadlines regarding the initial report and subsequent annual inventory submissions. This pattern contrasts with the more common disregard of reporting deadlines for national communications under the FCCC and the protocol, which does not in itself constitute a question of implementation to be indicated by ERTs

[82] See Decision under Paragraph 2 of Section X (Party concerned: Greece), above note 67; and Decision under Paragraph 2 of Section X (Party concerned: Bulgaria), above note 40.

[83] See Decision not to Proceed Further (Party concerned: Canada), above note 51.

(but which could be raised by the parties using the triggering avenues).[84] Furthermore, a document on the working of the ERT process prepared for the committee (focusing on national systems) confirmed that parties have in general worked hard to resolve implementation problems identified by the ERTs during the review stage. It is worth reiterating that only in a few instances could these problems not be resolved, turning into questions of implementation that were listed in ERT reports and forwarded to the committee.[85] We have also noted that no disagreement between an ERT and a party regarding actual emission figures and their adjustments had reached the committee up to the beginning of 2011. Arguably, the temptation of states to insist on favourable estimates has been tempered by the prospect of having to defend those estimates before the committee.

The major gap and weakness in the operation of the compliance system can be seen in the lack of mobilization of its facilitation function. As noted above, the FB has not had to address any question of implementation in substantive proceedings. It may be that part of the facilitative function of the overall system is being effectively discharged through the ERT process. However, the FB has not been able to address the potential non-compliance by Canada with its emission target, an issue that appears to fall squarely under its 'early-warning' function. Only parties can trigger that early-warning function (through the self-trigger or the party-to-party trigger) leaving no basis for ERTs to indicate in their reports a question of implementation that relates to potential or likely future non-compliance. No party has so far raised a question of implementation of this kind. The resulting inability of the FB to address, let alone resolve, Canada's potential non-compliance has led to heavy criticism of the compliance system as a whole, including in the corridors during conferences held pursuant to the FCCC and the protocol.[86]

While developed country parties to the protocol, as a group, seem to be on track to achieving the overall target of reducing their greenhouse gas emissions 'by at least 5 per cent below 1990 levels in the commitment period 2008–12', as required by the protocol's Article 3.1, only Canada

[84] Delays in the submission of national communications by developed country parties to the Protocol are notified to the Committee under Decision 22/CMP.1, above note 66 at para. 139.

[85] Description of the Elements of the Review Process under Article 8 and Synthesis of the Information Regarding the Review of National Systems, CC/5/2008/2, Note by the Secretariat (1 October 2008).

[86] See also P. J. Murtha, 'Effective International Compliance Is Needed to Avoid "Dangerous Anthropogenic Interference" with the Climate System', *INECE Special Report on Climate Compliance* (December 2009), 8–9.

has publicly declared that it does not plan to meet its emission target. The Canadian government has made clear that it does not intend to give effect to the necessary domestic policies and measures to achieve its target and has voiced reservations about using the carbon-market mechanisms to this end.[87] According to data released by the FCCC in 2010, the 2008 emissions of the developed country parties to the protocol with emission targets were almost 17 per cent below 1990 levels. As a result of the economic downturn in the late 1980s and early 1990s, the level of emissions in Central and Eastern European countries 'with economies in transition' was almost 37 per cent below 1990 levels. Other developed country parties taken together were slightly above 1990 levels (less than 1 per cent). Of these, the fifteen states which were members of the European Union in 1997 appear to be heading towards the fulfilment of their joint emission target as notified under Article 4 of the protocol. Among the remaining developed country parties to the protocol – Australia, Canada, Japan, Liechtenstein, Monaco, New Zealand, Norway, and Switzerland – none is as far away from compliance with its emission target as Canada. Significantly, apart from Canada, none of the parties in this category has publicly backed away from its Kyoto target by calling it 'unrealistic' and 'unachievable' and by putting forward an emission target for 2020 that is less ambitious than its Kyoto target.[88]

We offer two final observations on the future relevance of the compliance system under a scenario in which (a) no second commitment period is established under the Kyoto Protocol, and (b) its provisions are not incorporated into a new post-2012 agreement. First, even in such a scenario there is little reason to abandon the compliance system of the protocol before the completion of the current compliance cycle. Parties continue to have commitments under the protocol and the compliance system can continue to hold them accountable (even though the deduction rate would lose much of its effectiveness) and can continue to fulfil its other important functions (including resolving disagreements between ERTs and parties and checking eligibility to participate in the carbon-market mechanisms). Second, any alternative to the Kyoto Protocol that contains international commitments would also face the challenge of holding parties accountable (with respect to their emission mitigation

[87] See Minister of the Environment, *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act* (2007); see also R. Lefeber, *An Inconvenient Responsibility* (The Hague: Eleven International Publishing, 2009), 10–11.

[88] For 2008 emission figures see National Greenhouse Gas Inventory Data for the Period 1990–2008, Note by the Secretariat, FCCC/SBI/2010/18 (4 November 2010).

and reporting); that alternative may also have to resolve disagreements about reported data; and it is likely to have to ensure the functioning of the carbon-market mechanisms. The Kyoto Protocol's compliance system has proved its ability to significantly contribute to meeting the related functional demands. Its overall design and its individual elements thus establish an important benchmark.