

Compliance was the last area that kept Parties apart throughout the marathon negotiating session of July 22-23. Japan, Canada and Australia were the final holdouts. Nevertheless, when agreement was eventually reached, we achieved a compliance system for the Protocol that will stand out as the “cutting edge” for compliance in international environmental law. Moreover, it will provide a strong basis for facilitating and evaluating compliance, as well as responding to cases of non-compliance, during the first commitment period and beyond.

What the Agreement Does

The agreement provides solutions to the key issues that the technical negotiators had been unable to resolve. It establishes that:

- β There will be a **compliance committee** comprised of two “branches.” The **facilitative branch** will be available to assist all Parties—both developed (Annex I) and developing (non-Annex I)—in their implementation of the Protocol. Importantly, it will serve as an “early warning system” for Annex I Parties that may have trouble meeting their emissions targets.

The **enforcement branch** will serve as a judicial-like forum for determining whether an Annex I Party has (1) met its target, (2) complied with its monitoring and reporting requirements and (3) met the eligibility tests for participating in the mechanisms. When the enforcement branch finds that a Party has failed to comply with one of these obligations, the enforcement branch will decide upon the appropriate consequence(s) for the Party.

- β The **membership** of both the facilitative and enforcement branches will be based upon equitable geographical representation. This was a dramatic victory for the G-77 and China. “Composition” of the enforcement branch was the final, seemingly most intractable issue for negotiators to agree upon. We had predicted that the Umbrella Group would never consent to equitable geographic representation; yet, in the final moments, Australia finally conceded and the Pronk political agreement became a reality.
- β There will be specific **consequences** when an Annex I Party fails to comply with its emissions target: (1) For every tonne of emissions by which a Party exceeds its target, 1.3 tonnes will be deducted from its assigned amount for the subsequent commitment period. That rate may be increased for future commitment periods. (2) The Party will prepare a detailed plan explaining how it will meet its reduced target for the subsequent commitment period. The enforcement branch will have the power to review the plan and assess whether or not it is likely to work. (3)

The Party will not be able to use Article 17 emissions trading to sell parts of its emissions allocation (“assigned amount”).

- β After the enforcement branch determines that a Party has exceeded its target, the Party will have the right to **appeal** the decision to the supreme body of the Protocol, the COP/MOP. The branch’s decision will stand unless a _ majority of the COP/MOP votes to overturn it. The appeal provision was a significant concession to the G-77 and China, who wanted assurances that decisions of the enforcement branch could not be made completely independently from COP/MOP oversight.

What the Agreement Does Not Do

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

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

Our opinion, which is shared by most of the experts on this issue with whom we have spoken, is that we should not get too “hung up” on whether the non-compliance consequences are “legally binding” in the Article 18 amendment sense, or whether they are in fact binding in a political sense. Under international law, the extent to which something is “legally binding” relies upon the expression of political will by the Parties. There is no way to *force* Parties who exceed their targets to remedy the problem. Military force or trade sanctions would be the only ways to attempt that. Neither of those remedies is under discussion at this time.

The issue of “legally binding” consequences of non-compliance is not yet resolved. We should work hard to get it resolved as soon as we can. An amendment or other formally ratified legal instrument would provide the highest possible expression of the intent of Parties to respect the results of an enforcement branch proceeding. But we should keep in mind that the agreement we have won establishes the procedures and institutions for the compliance system as well as the consequences for an Annex I Party’s failure to honor its target. That is a politically potent accomplishment that makes the Protocol’s compliance system the most robust ever adopted for a multilateral environmental agreement.