

# Facilitating and Enforcing Compliance in International Law: MEA Experience with CPM's

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# Overview

- Traditional Compliance Approach
- Theoretical Context
- Key CPM Design Choices
- Emergence of Compliance Procedures & Mechanisms (CPMs)
- CPM Experience in MEA context
- The Kyoto CPM Experiment
- Conclusion



# Traditional Approach to Treaty Compliance



- Starting point is customary law obligation to comply with treaty commitments & Vienna Convention
- Traditional approach was to include a dispute settlement process
  - Tended to be Party to Party
  - Usually with an option to accept compulsory jurisdiction of the DSP
  - Often no power to impose consequences
  - Rarely applied in the context of MEAs
  - Reactionary
- CPMs a more recent tool

# Compliance Theories



## **Rational Choice Theories**

- States as rational actors
- Self-interest focussed
- Points to need for strong enforcement approach

## **Norm Driven Theories**

- Relationship building & transparency focused
- Legitimacy of rules & rule making process key
- Compliance is something to be managed

## **Parties as complex (non-unitary) actors**

### **Result:**

- Debate between facilitation and deterrence
- If Parties are complex actors, likely need both
- Challenging relationship among ambition of primary rules, agreement on compliance approach, and level of compliance



# Why do Parties fail to comply?

- Uncertainty about the obligation
- Lack of capacity, resources, technology etc.
- Lack of domestic public support
- Lack of support from affected non-state actors
- Lack of government support / commitment
- Change in government
- Federal state, constitutional challenges
- Other parties are not complying
- Obligations, on reflection seen as unfair (equity principles?)
- Science concludes issue no longer a problem
- Priorities have changed (i.e. a more immediate crisis)
- Economics

# Key Elements of CPM

- **Primary Rule System**
  - Ambition, enforceability
  - Allocation, equity
- **Compliance Information System**
  - Monitoring, reporting
  - Defining “non-compliance”
- **Non-compliance Response System**
  - Verification of compliance/non-compliance
  - Facilitation &/or enforcement



# Key Non-compliance Response Tools



## **Enforcement Tools:**

- Loss of Benefits under the Regime
- Loss of “Control” over Dom. Policies
- Financial Penalties
- Trade Sanctions, Economic Sanctions
- Other Penalties or Additional Obligations

## **Facilitative Tools**

- Transparency, Public Participation
- Early Detection, Capacity Building,
- Other Preventative Measures

# CPM Design Elements



- **Governance Arrangements**
  - COP, General Committee or Special Compliance Committee
- **Initiation of Compliance Procedures**
  - Party Triggers (self and party to party)
  - Automatic or institutional triggers (Secretariat, COP, CPM ERTs)
  - Non-party triggers
- **Principle Functions of Compliance Committee**
  - Procedures for gathering information and making findings
- **Non-compliance Response Measures**
  - Carrots and sticks (facilitation &/or enforcement)



# Early MEAs with Compliance Procedures & Mechanisms (CPMs)



- **Montreal Protocol on Ozone Depleting Substances**
  - Among the most active
  - Long standing facilitative process
  - Some consequences (trading in ODS)
  
- **CITES (Trade in Endangered Species)**
  - Quite active & long standing
  - Some consequences (trading in listed species)

# Other MEAs with Compliance Procedures & Mechanisms (CPMs)

- **Kyoto Protocol** under UNFCCC
- **Basel Convention on Transboundary Movement of Hazardous Waste**
  - Not very active to date
- **Cartagena Protocol on Biosafety under CBD**
  - No enforcement to date, focus on transparency and facilitation
- **POPs Convention (negotiations/adoption stalled)**
  - Draft compliance procedures focus on facilitation
- **Minamata Convention (Mercury)**
- **London Protocol (Ocean Dumping)**
- **Prior Informed Consent (PIC) Convention (negotiations/adoption stalled)**



# Highlights from MEA Compliance Experience



- Largely Facilitative
- Some momentum toward dual role CPMs following adoption of Kyoto Compliance System
- In the end, Kyoto still stands out as the only real dual CPM in an MEA
- Recent trend in CPM negotiations is back to focus on facilitation, capacity building and transparency
- Future of Kyoto CPM is uncertain



# The Kyoto CPM Institutions

- Plenary
  - Rules of Procedure
  - Annual report to COP
- Bureau
  - Determines which branch has jurisdiction
- Facilitative Branch
  - Most commitments, no enforcement powers
- Enforcement Branch
  - Focus on Article 3.1, 5, 7, 8
- Composition of each branch
  - 1 from each UN regions, 2 A I, 2 Non-A I, 1 Small Island

# The Kyoto Compliance Process



- **Expert Review Teams (ERTs)** set up for each A1 country at critical times to review compliance with key obligations
- Detailed monitoring & reporting obligations on Parties, results form starting point for ERTs
- Referral to Compliance System by ERT, or any Party
- Bureau decides which branch has jurisdiction



# The Two Branches

## ■ **Facilitative Branch (FB)**

- Most commitments (except those given to EB)
- No enforcement powers

## ■ **Enforcement Branch (EB)**

- Focus on emissions reductions (Art.3.1)
- Monitoring and Reporting Obligations on credits & emissions (Art.5, 7, 8)
- Automatic consequences (next slide)

# Non-compliance Response Tools



## EB's Automatic Consequences

- In Case of Article 3.1:
  - Missed Ton Restoration in 2<sup>nd</sup> Commitment Period with 1.3 Multiplier (2<sup>nd</sup> CP target?)\
- In all Cases:
  - Loss of Eligibility to Sell Credits
  - Compliance Action Plan



# Early “EB” Cases

- Greece 2008
  - National system for estimating emissions
- Canada 2008
  - National registry for tracking credits
- Croatia 2009
  - Flexibility regarding AAU assignment to EITs
  - Appeal to Kyoto Conference of Parties (withdrawn)
- Bulgaria 2010
  - National system for estimating emissions



# Role of the Facilitative Branch (FB)



- Early detection of problem
- Provision of advice and facilitation of assistance
  - Facilitation of financial and technical assistance, including technology transfer and capacity building
- Formulation of recommendations to a Party on what could be done to address concerns about a Parties ability to comply with its obligations
- Even facilitation only triggered by ERT or a Party



# Work of the Facilitative Branch (FB)

## 1 Case, brought by SA on behalf of G-77

- Dealt with failure of many A1 to report on “demonstrable progress” in 2005
- FB split on whether the case was brought properly before it by a “Party”
- A1 members of FB opposed taking case on
- Case could not proceed
- Plenty of other matters have come up (ex Canada), but not brought before FB by ERT or a Party



# 1<sup>st</sup> CP Target Review by ERT

- A1 Party will report emissions & credits (AAUs, CERs, ERUs RMUs) once it has completed accounting of what happened during the 1<sup>st</sup> CP (Should be completed)
- An ERT will review Party's submission of emissions and credits for consistency with Articles 5, 7, & 8. (Ongoing)
- ERT will file report and identify any "questions of implementation", i.e. any compliance issues. (Spring 2015)



# 1<sup>st</sup> CP Target Review by EB

- Bureau will assign to EB
- EB will review “questions of implementation” and make finding of compliance or non-compliance.
- Party will be given a chance to come into compliance by purchasing credits to make up any gap (100 day True-up Period)
- Final compliance finding made and consequences imposed.
  - Assigned 1.3t penalty for each ton missed,
  - Required to submit compliance action plan
  - Would lose eligibility to sell credits

# Conclusion: Key Design Challenges for CPMs



- **The context of & connection to “Primary Rule System”**
- **Effectiveness of “Information Gathering System”**
- **Triggering**
- **Transparency**
- **Resources to address capacity issues?**
- **Responsive to multiple causes of non-compliance?**
- **Roles of Key Actors: Parties, Institutions, Non-state Actors**

# Possible Design Questions

- Is the primary rule system in place?
  - How will choice of compliance system affect strength &/or acceptance of primary rule system?
- Who is worried about their own ability to comply?
- Who is worried about compliance by other parties?
- Who is most likely to have a poor compliance record?
  - For what reasons?
- Who is affected by non-compliance?
- What are the key elements of a CPM to maximize compliance while supporting a strong and widely accepted primary rule system?