

Flexibility and Legitimacy - The Emissions Trading System under the Kyoto Protocol

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A. Introduction

In the field of environmental law, be it on the domestic or the international level, it is especially difficult to develop effective regulatory systems and systems for sanctions to enforce obligations.¹ The legal solutions employed under the auspices of the United Nations Framework Convention on Climate Change, as well as the Kyoto Protocol, constitute a fascinating attempt to address these problems, providing "a huge testing ground for the legal instruments of environmental policy, at the international as well as on the lower levels," mirroring "enormous creativity in the design of regulatory approaches."² Even though the Kyoto Protocol, "if fully implemented, will not ... avert or even slow climate change,"³ it serves as a fine example of emerging international composite administrations,⁴ where multiple actors participate in transnational institutions of a multilevel system, serving the common goal of mitigating climate change. The climate change regime's unique regard to flexibility in fulfillment is particularly prominent. This is complemented by especially stringent and complex compliance mechanisms, which have no parallel in other international forms of cooperation. A further significant

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¹ Ulrich Beyerlin, *Rio Konferenz 1992: Beginn einer neuen globalen Umweltrechtsordnung?*, 54 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 124, 131 (1994).

² Michael Bothe, *The United Nations Framework Convention on Climate Change – an Unprecedented Multilevel Regulatory Challenge*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 239, 245 (2003).

³ Jutta Brunnée, *The Kyoto Protocol: A Testing Ground for Compliance Theories?*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 255 (2003).

⁴ On the concept of "composite administration," see Armin von Bogdandy & Philipp Dann, *International Composite Administration*, in this issue.

characteristic of the system is the high degree of legitimacy enjoyed by its institutional organization, its procedures and procedural outcomes. Thus, the international cooperation under the framework of the Kyoto Protocol is a landmark: it achieves not only flexibility but also a high degree of legitimacy and represents a more *mature* example of the exercise of public authority by international institutions.

The present paper attempts to highlight the main features of the Kyoto Protocol and its emissions trading system, describing the distinctive institutional law solutions which lie at the heart of the climate change regime. After a brief account of climate protection in the realm of international law, the context (chapter A) and main mechanisms of the Kyoto Protocol are introduced (chapter B) followed by conclusions (chapter C). A detailed analysis from the viewpoint of international institutional law is restricted to the Kyoto mechanism of emissions trading. This serves as a basis for examining not only the institutional and composite character, but also the hallmark of the system: its rigorous compliance regime is elaborated.

I. The Protection of the Climate System on the International Level

The world's climate system is under constant change.⁵ However, scientists have shown that a byproduct of the industrialization in the last centuries has been a rapid and drastic shift in the composition of gases constituting the atmosphere, leading to the phenomenon known as global warming. Addressing the consequences of global warming through climate change management is not a regulatory field that originally belonged to international law – there have been various attempts to tackle its symptoms on the domestic level.⁶ However, global warming induced by the burning of fossil fuels has proven to affect not only the domestic climate, but also the global climate system and through it the entire biosphere. The consequences include desertification, floods, rise of sea levels⁷ as well as the elevation of the average global temperature, thus eliminating the habitat of various species unable to adapt to changing circumstances in such a short time.⁸

⁵ SEBASTIAN OBERTHÜR & HERMANN E. OTT, *THE KYOTO PROTOCOL – INTERNATIONALE KLIMAPOLITIK FÜR DAS 21. JAHRHUNDERT* 27 (2000).

⁶ Examples include the Clean Air Act (1990) of the US and its amendments, as well as the South Coast Regional Clean Air Incentives Market (RECLAIM), also foreseeing pollution trading. See Micheal S. Smith, *Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative*, 34 *BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW* 387-416 (2007); PASCAL BADER, *EUROPÄISCHE TREIBHAUSPOLITIK MIT HANDELBAREN EMISSIONSRECHTEN* 56-97 (1999).

⁷ Kenneth D. Frederick & David C. Major, *Climate Change and Water Resources*, 37 *CLIMATIC CHANGE* 7-23 (1997).

⁸ Bothe (note 2), at 239.

This way the causes of climate change boomerang on mankind by posing health risks, deteriorating the environment and disrupting traditional employment structures⁹ dependent on the natural environment,¹⁰ which in turn may lead to poverty, mass migration and crime constituting threats to both national and international security.¹¹ Gradually, members of the international community realized that, due to the transboundary nature of air pollution and its ensuing consequences as well as the high costs involved in mitigation,¹² climate change may only be effectively addressed by complementing domestic measures through institutionalized forms of transnational collaboration.¹³ As a consequence, combating climate change has spilled over from the realm of domestic regulation into the field of international cooperation.

Already the 1979 *Geneva Convention on Long-Range Transboundary Air Pollution* as well as the 1985 *Vienna Convention for the Protection of the Ozone Layer* and its 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer* constituted serious international efforts to face the problem of climate change, adopting novel solutions under international environmental law. However, these conventions targeted only specific aspects of the problem of climate change. In 1990 the Intergovernmental Panel on Climate Change published its influential *First Assessment Report* on the condition of the global climate system, which served as a starting point for comprehensive UN General Assembly negotiations. By way of Resolution 45/212 the General Assembly set up the Intergovernmental Negotiating Committee for a

⁹ For an economic assessment see Gary Yohe & Michael Schlesinger, *The Economic Geography of the Impacts of Climate Change*, 2 JOURNAL OF ECONOMIC GEOGRAPHY 311-341 (2002).

¹⁰ OBERTHÜR & OTT (note 5), at 29; FARHANA YAMIN & JOANNA DEPLEDGE, THE INTERNATIONAL CLIMATE CHANGE REGIME 22 (2004).

¹¹ Victoria Dawson, *Environmental Dispute Resolution: Developing Mechanisms for Effective Transnational Enforcement of International Environmental Standards*, BERKELEY ELECTRONIC PRESS PAPER 1, 2 (2004); Stavros Dimas, *Climate Change: The Reality, the Risks and the Response*, 13 IRISH JOURNAL OF EUROPEAN LAW 5, 6-8 (2006).

¹² M. J. Mace, Chris Hendriks & Roger Coenraads, *Regulatory Challenges to the Implementation of Carbon Capture and Geological Storage Within the European Union under EU and International Law*, 1 INTERNATIONAL JOURNAL OF GREENHOUSE GAS CONTROL 253 (2007); Dennis Leaf, Hans J. H. Verolme & William F. Hunt, *Overview of Regulatory/Policy/Economic Issues Related to Carbon Dioxide*, 29 ENVIRONMENT INTERNATIONAL 303, 305 (2003).

¹³ BARBARA PFLÜGLMAYER, VOM KYOTO-PROTOKOLL ZUM EMISSIONSHANDEL - ENTWICKLUNG UND AUSGEWÄHLTE RECHTSFRAGEN 5 (2004); Marta D'Auria, *Emissions Trading and Polycentric Negotiation*, 6 GLOBAL JURIST ADVANCES 1 (2006).

Framework Convention on Climate Change, which completed its task of drawing up the Convention by May 1992.¹⁴

The *United Nations Framework Convention on Climate Change* (UNFCCC, Convention) was adopted in 1992 at the so-called 'Earth Summit' held in Rio de Janeiro, "[a]cknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind." With the goal of mitigating potential risks posed by climate change¹⁵ the Convention adopted a "double track approach"¹⁶ aimed at stabilizing greenhouse gas (GHG) concentrations in the atmosphere to prevent dangerous changes in the climate system as well as to enable ecosystems to adapt to changes already taking place. On 21 March 1994 the UNFCCC entered into force. One year later the Conference of the Parties (COP), the central body of the Convention, held its first meeting (COP 1). Already in its first session the COP 1 found that the commitments under the Convention were insufficient to meet the challenges posed by climate change. Negotiations were commenced to supplement the Convention in accordance with Article 17¹⁷ with a protocol laying down further commitments for meeting UNFCCC goals. As a result, the Kyoto Protocol (KP) was adopted in 1997 by COP 3.¹⁸ It entered into force on 16 February 2005 after States accounting for over 55 % of global emissions of GHGs had ratified it. The KP thereby became "the sole instrument for the implementation"¹⁹ of the UNFCCC.

II. The Relationship Between the Convention and the Kyoto Protocol

The Kyoto Protocol reflects an attempt to 'harden' and 'widen' commitments foreseen under the UNFCCC. Together they constitute the so-called climate change treaty regime. The relationship between the KP and the Convention is marked by

¹⁴ Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE JOURNAL OF INTERNATIONAL LAW 461-474 (1993).

¹⁵ Art. 2 UNFCCC.

¹⁶ Bothe (note 2), at 240.

¹⁷ Art. 17 UNFCCC allows for the adoption of protocols by the Conference of the Parties by consensus; the Conference of the Parties is open only to the Parties of the Convention.

¹⁸ By decision 1/CP.3. So far the Kyoto Protocol has received 170 ratifications (18 April 2007). For the reasons behind the resistance of one of the most substantial GHG emitter, the United States, see Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARVARD ENVIRONMENTAL LAW REVIEW 1-65 (2007).

¹⁹ D'Auria (note 13), at 4; Richard L. Ottinger & Mindy Jayne, *Global Climate Change Kyoto Protocol Implementation: Legal Frameworks for Implementing Clean Energy Solutions*, 18 PACE ENVIRONMENTAL LAW REVIEW (Pace Envtl. L. Rev.) 19-86 (2000-2001).

both differences and similarities: The KP is an international agreement that stands on its own in the sense that it constitutes a self-contained regime with its own mechanisms and compliance systems. However, emanating from the Convention it is linked to it in several ways, such as by sharing its aims, principles, certain institutions and partly even reproducing its very text. At the same time, the KP adds new and more stringent commitments to the existing ones, revamping the overall effort of mitigating climate change.

As does the Convention, the KP effectively applies the *principle of common but differentiated responsibilities*.²⁰ According to this principle all signatory States share the same responsibility of contributing to combating climate change, while at the same time, there is a differentiation in the allocation of commitments between developed countries (Annex I Parties) and developing countries (non-Annex I Parties). The Annex I Parties commit to binding obligations under the KP while the non-Annex I Parties are free to voluntarily bind themselves²¹ to these.²²

Furthermore, instead of simply 'dictating conduct', the KP's regulatory approach marks a move toward novel, *flexible* methods characterized by economic incentives and relying upon the self-interest of actors.²³ Although sanctions and prescriptions do play a certain role in this regulatory system, the overall approach is to enable public and private parties to identify their individual interests and to act upon them.²⁴ As regards further principles, the fourth recital of the Preamble of the Kyoto Protocol affirms its adherence to the principles of the Convention as set forth in Article 3 of the Convention. The legal status of these principles (e.g., sustainable development, intergeneration equity, etc.), however, is a contentious issue: although they do not constitute precise obligations²⁵ but merely guide the Parties, they do go beyond being mere tools of interpretation. At the same time, the wording "being guided by" suggests that these principles are intended to be political in nature, instead of having legal force under the Kyoto Protocol.²⁶

²⁰ Art. 10 KP.

²¹ Art. 4(2)(g) UNFCCC.

²² This denotation stems from the country lists in Annex I and Annex II of the UNFCCC. Both Annexes list developed States (as well as those, with economies in transition, EIT). Annex II contains those Annex I countries that further undertake to financially assist developing countries in combating climate change. Thus, while all Annex II countries are Annex I countries well, the reverse is not true.

²³ D'Auria (note 13), at 6.

²⁴ *Id.* at 1, 7.

²⁵ See Bodansky (note 14), at 502.

²⁶ OBERTHÜR & OTT (note 5), at 142.

III. A System of Incremental and Differentiated Commitments

Guided by the goal of the Convention to stabilize the concentration of GHGs in the atmosphere, the KP commits the Annex I Parties to implement *inter alia* national measures which promote sustainable development through improving energy efficiency, enhancing GHG 'sinks' that trap harmful emissions and promoting scientific research on new clean technologies.²⁷ Most importantly, however, the Annex I Parties agree to reduce their aggregate emissions of specific GHGs²⁸ by five percent below 1990 levels. Therefore each Annex I Party undertakes to reduce its emissions during the first commitment period (2008 to 2012) by a certain percent.²⁹ Each Annex I Party is assigned a maximum amount of emission allowances,³⁰ which represent the amount of emissions the Party may emit during the commitment period. They may decide to fulfill their commitments either individually or jointly ('bubble'), an approach best exemplified by the European Union and its Member States.³¹ Meeting these commitments may, however, prove burdensome from an economic perspective.³² Therefore, to facilitate compliance with the aims laid down in Article 3, the KP also envisages three economically viable, flexible supplementary mechanisms to reduce the emission of certain harmful antropogenic gases: the emissions trading system (ETS), the clean development mechanism, (CDM) and joint implementation (JI). The ETS, applicable

²⁷ Art. 2 KP.

²⁸ See Annex A KP.

²⁹ See Annex B KP.

³⁰ The KP's base units for emission allowances are the so-called Assigned Amount Units (AAUs). Further 'emission credits' are generated privately, such as the Certified Emission Reductions (CERs), Emission Reduction Units (ERUs) and Removal Units (RMUs), depending on the nature of the mechanism under which the unit is generated or transferred; each equivalent to one metric ton of CO₂. Matthieu Wemaere & Charlotte Streck, *Legal Ownership and Nature of Kyoto Units and EU Allowances*, in LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK 5, 43 (David Freestone & Charlotte Streck eds., 2005).

³¹ Art. 4 KP. The possibility of joint fulfillment enables Member States of the EU to construct a regional system of burden-sharing in achieving KP commitments while at the same time avoiding distortions of competition in the internal market. Ludwig Krämer, *Grundlagen aus europäischer Sicht – Rechtsfragen betreffend den Emissionshandel mit Treibhausgasen der Europäischen Gemeinschaft*, in KLIMASCHUTZ DURCH EMISSIONSHANDEL 1-45 (Hans-Werner Rengeling ed., 2001). See Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

³² DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO STOP GLOBAL WARMING* 3 (2001).

to certain emissions,³³ is linked with the compensatory systems of the transnational CDM and JI.³⁴ The ETS mechanism permits developed States to cooperate with developing countries, promoting technology transfer and at the same time providing an economically appealing common framework for collectively meeting Kyoto commitments.

As the aims and advantages of the flexible mechanisms can only be realized through securing the observance of all related provisions,³⁵ it is important to note the "close design link between the strength of the compliance procedure and the effective operation of the KP's market-based mechanisms."³⁶ This design link led to the establishment of the KP's most remarkable feature: a stringent compliance regime.³⁷ In the analysis of the Kyoto regime the present paper shall restrict itself to the examination of the flexible mechanism of the emissions trading system. The compact, highly elaborate compliance procedures and monitoring of outcomes makes the ETS a fine example of a mature form of international composite administration.

IV. "Composite" Features and Actors' Interests

The KP establishes a composite system of governance by distributing specific competences between the international and national levels and allowing for the participation of 'regional economic integration organizations' such as the European Community.³⁸ Although significant regulatory power is transferred to the international plane,³⁹ it is characteristic of the KP's approach that it is well balanced and non-intrusive by offering flexible implementation schemes. The Parties thus

³³ Namely: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), sulphur hexafluoride (SF₆) as well as two groups of gases: hydrofluorocarbons (HFCs), and Perfluorocarbons (PFCs). In reality, not emissions, but much rather the "right to emit specified substances of a certain quantity over a defined period of time" is traded. Rutger de Witt Wijnen, *Emissions Trading under Art. 17 of the Kyoto Protocol, in LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK* 403 (David Freestone & Charlotte Streck eds., 2005).

³⁴ Art. 6 KP.

³⁵ OBERTHÜR & OTT (note 5), at 260.

³⁶ Jakob Werksman, *The Negotiation of a Kyoto Compliance System, in IMPLEMENTING THE CLIMATE CHANGE REGIME* 17, 19 (Olav Schram Stokke, Jon Hovi & Geir Ulfstein eds., 2005).

³⁷ "[W]hat emerged ... from these negotiations is a remarkable compliance system drawing on precedent from, and yet unique to, international law." *Id.* at 17, 19.

³⁸ Art. 20 UNFCCC and Art. 24(1) KP on the accession of regional economic integration organisations.

³⁹ D'Auria (note 13), at 1.

retain considerable freedom in deciding exactly how they prefer to fulfill their commitments.⁴⁰ This new system of exercising public authority not only establishes relations between international institutions, regional economic integration organizations and national governments⁴¹ but also builds upon the horizontal cooperation of national governments in the ambit of the various Kyoto mechanisms. Furthermore, it involves the private sector, relying on entrepreneurial interest, and actively seeks input from the scientific community and civil society,⁴² which participate in the Kyoto system both vertically (observers, advisers) and horizontally (allegiances).⁴³ The KP thereby promotes the development of a complex, non-hierarchical, cooperative⁴⁴ network of international, regional and national institutions, and public and private actors.

Actors involved in the climate change regime pursue different interests.⁴⁵ Civil society, NGOs⁴⁶ and certain States promote environmental interests,⁴⁷ pressing for an overall reduction of harmful emissions. On the other hand, many in the private

⁴⁰ "Emissions trading may be viewed as 'regulation lite' by critics because it frequently involves controls and allocations that are designed not to frighten the horses of the incumbents. That, 'lite' quality, however, may be welcomed by many governments on the grounds that, at least on the world stage, we face global warming issues of such urgency that the best regulatory method for controlling greenhouse gases is the one that has the best chance of implementation." Robert Baldwin, *Regulation Lite: The Rise of Emissions Trading*, 3 LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS 27 (2008).

⁴¹ An important aspect of this multilevel system of climate management is the mutually reinforcing empowerment of the international administrative entity and the national governments. Together, they gain control over the regulatory field of GHG emissions with each level acquiring a new role: international institutions gain regulatory power and national governments, though bound by international prescriptions, also gain regulatory and implementation powers over subjects potentially transcending their respective boundaries. Through this new system of administration new competences open up for all participating levels and the efficiency of each level as well as the overall project is enhanced. D'Auria (note 13), at 2.

⁴² "Informational cross-linkage." See Armin von Bogdandy & Philipp Dann, *International Composite Administration*, in this issue.

⁴³ Joyeeta Gupta, *The Role of Non-State Actors in International Environmental Affairs*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 459, 467 (2003).

⁴⁴ D'Auria (note 13), at 17.

⁴⁵ Farhana Yamin, *The Kyoto Protocol: Origins, Assessment and Future Challenges*, 7 REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW (RECIEL) 113, 114 (1998).

⁴⁶ OBERTHÜR & OTT (note 5), at 58-61. Perhaps the most prominent example is the world-wide Climate Action Network International integrating over 300 NGOs concerned with climate change.

⁴⁷ For example, the Alliance of Small Island States (AOSIS) face great risks of inundation induced by climate change and are therefore assiduous negotiators endorsing emissions reductions within the climate change regime.

sector as well as some developing countries⁴⁸ and countries with old, inefficient industries or high fossil fuel production⁴⁹ follow predominantly economic pursuits.⁵⁰ They insist on the use of cheap fossil fuels, fearing that the high costs of restructuring such industries to make them more efficient and environmentally sound may be damaging to economic growth and harm their competitiveness on the global market. Developed countries are interested in preserving a high standard of living, which entails high energy consumption contributing to relatively high emission rates even in countries where environmentally friendly fuels and means of energy production exist. Finally, all States strive to retain considerable sovereignty over the field of environmental regulation; thus, stringent, unilateral international obligations excluding leeway for national divergence remain unpopular among members of the global. As will be shown below, cleavages between the interests of developed and developing countries have been internalized in the institutional organization as well as the decision-making rules foreseen for both the legislative and the enforcement bodies. The preference for consensus guarantees that interest-coalitions play a marginal role in the decision-making process. Excluding the possibility of making reservations,⁵¹ the UNFCCC and the KP are regarded as a successful effort in accommodating the above interests, providing an attractive treaty regime⁵² characterized by differentiated responsibilities of the Parties and flexible mechanisms for fulfilling international obligations in a cost-effective way.

B. Legal Assessment

I. Organizational Setting

The organizational setting of the emissions trading system is the climate change treaty regime consisting of the UNFCCC and the KP. Although it has been set up under the auspices of the United Nations, except for its Secretariat,⁵³ the treaty

⁴⁸ Often referred to as the Group of 77; OBERTHÜR & OTT (note 5), at 55-58.

⁴⁹ Such as those participating in the Organization of the Petroleum Exporting Countries (OPEC) or the informal alliance JUSSCANNZ, an acronym which stands for Japan, the US, Switzerland, Canada, Australia, Norway and New Zealand. Iceland, Mexico, the Republic of Korea and other invited States, all of which are either great consumers and/or producers of fossil fuels, may also attend meetings.

⁵⁰ OBERTHÜR & OTT (note 5), at 39.

⁵¹ Art. 24 UNFCCC, Art. 26 Kyoto.

⁵² As Baldwin puts it, emissions trading yields *political advantages*: "Trading mechanisms offer a means of introducing controls but also of avoiding major opposition from entrenched incumbents." Baldwin (note 40), at 7.

⁵³ Decision 6/CP.6, Institutional linkage of the Convention secretariat to the United Nations.

regime is both institutionally as well as financially highly independent from the UN,⁵⁴ which may only participate as an 'observer' at the COP meetings.⁵⁵ The status of the treaty regime is not equivalent to that of an intergovernmental organization. However, as an entity *superiorem non recognoscentes* it is able to act effectively and independently on the international plane by way of its own bodies.⁵⁶ In this respect it shows traits similar to more traditional subjects of international law.⁵⁷ The institutional structure of the Kyoto regime is partly predetermined by the UNFCCC, from which the KP 'borrows' some of its bodies, while at the same time it also establishes its own institutions.

II. Institutional Framework

Albeit being 'own' institutions of the KP, the bodies 'shared' with the Convention do exhibit hybrid qualities, having both similarities and differences in composition and decision-making. This hybrid character is the result of the lack of identity of Contracting Parties and the independence of the two international treaties.⁵⁸ All measures taken under the KP are adopted by KP bodies of the signatory States, whereas Convention bodies have no or little influence on such measures.⁵⁹ The ETS is steered by the Conference of the Parties, which in turn serves as the Meeting of the Parties (COP/MOP) to the Kyoto Protocol.⁶⁰ This COP/MOP is a KP body, and should not be confused with the COP, the supreme authority of the Convention. Although the COP/MOP creates the substantive framework of the trading system, the Secretariat, the Compliance Committee, the Expert Review Teams (ERTs) and the subsidiary bodies are principally responsible for managing the trading system and for enforcement issues.

⁵⁴ GEF, established under the auspices of the World Bank with the participation of the UNEP as well as the United Nations Development Programme (UNDP) serves as an interim financial mechanism of the Convention; Decisions 10/CP.1 and 3/CP.4.

⁵⁵ Art. 13(8) KP.

⁵⁶ Memorandum of Understanding on the determination of funding necessary and available for the implementation of the Convention, Decisions 1/SBI 4 and 12/CP.3.

⁵⁷ Guido Acquaviva, *Subjects of International Law: A Power-Based Analysis*, 38 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 345, 383 (2005); MICHAEL HEMPEL, DIE VÖLKERRECHTSSUBJEKTIVITÄT INTERNATIONALER NICHTSTAATLICHER ORGANISATIONEN 57-60 (1999).

⁵⁸ OBERTHÜR & OTT (note 5), at 305-306.

⁵⁹ *Id.* at 309.

⁶⁰ Art. 13(1) KP.

The Meeting of the Parties is the supreme body, the highest decision-making authority of the KP. The COP/MOP's responsibility is to regularly review the implementation of the KP and to make decisions necessary for its effective implementation.⁶¹ The COP/MOP has thus functions that could be characterized as both administrative and legislative.⁶² It also has coordinating and organizational functions, since it coordinates national measures to combat climate change, but it also establishes subsidiary bodies to further the aims of the KP when necessary.⁶³ A link between the supreme authorities of the Convention and the KP is established by entrusting the COP/MOP with "consider[ing] any assignment resulting from a decision by the Conference of the Parties" of the Convention⁶⁴ without granting powers of decision to the COP over the COP/MOP.⁶⁵ The COP/MOP comprises the representatives of the governments of signatory States and is therefore a highly political institution. Representatives of non-party States⁶⁶ as well as the UN and its specialized agencies may participate in an observer status.⁶⁷ Finally, also other bodies qualified in matters covered by the KP may participate as observers, unless at least one-third of the Parties present at the COP/MOP meeting object.⁶⁸ Ordinary sessions are held annually, while extraordinary sessions are convened when necessary or upon request of the Parties.⁶⁹ Political weight and bargaining power of the individual Parties are leveled by employing consensus as the general rule in COP/MOP decision-making procedures, except in very few, albeit important cases where a 3/4 majority on a one State-one vote basis is required.⁷⁰ The relative independence of the COP/MOP from the COP of the Convention, the equal standing of Parties and the general rule of consensus in decision-making processes provides a high degree of legitimacy not only as regards the institutional design of the supreme authority of the KP but also its decisions. The COP/MOP

⁶¹ Art. 13(4) KP.

⁶² OBERTHÜR & OTT (note 5), at 310.

⁶³ Art. 13(4)(d),(h) KP.

⁶⁴ Art. 13(4)(j) KP.

⁶⁵ OBERTHÜR & OTT (note 5), at 312.

⁶⁶ Art. 13(2) KP.

⁶⁷ "Institutional cross-linkage" in the form of observational participation, see Armin von Bogdandy & Philipp Dann, *International Composite Administration*, in this issue.

⁶⁸ Art. 13(8) KP.

⁶⁹ Art. 13(6)-(7) KP.

⁷⁰ Art. 20(3) and Art. 21(4) KP (amendment of the Protocol and its Annexes as well as the adoption of Annexes).

and the Parties are further assisted in their functions by the Bonn based Secretariat.⁷¹ The Secretariat's Methods, Inventories and Science branch secures the backbone of ETS by advancing technical methods for reporting and inventory compilation as well as by organizing the review of national inventories.

The Compliance Committee and especially its so-called Enforcement Branch play a crucial role in the operation of the emissions trading system. The Compliance Committee, a genuine Kyoto body with no Convention equivalent, was established by Decision 27/CMP.1⁷² with the aim of facilitating, promoting and enforcing compliance with Kyoto commitments. Unlike the COP/MOP it is not a plenary institution, but much rather an expert body organized into different sub-divisions. It consists of a Bureau entrusted with allocating Parties' reports and questions, as well as two branches: the Facilitative and Enforcement Branch. Each branch consists of ten members who are elected by the COP/MOP from both Annex I and non-Annex I countries. The complicated decision-making procedure of the branches requires a quorum of $\frac{3}{4}$ of its members being present. If no consensus is reached, decisions are taken by a $\frac{3}{4}$ majority of members present with the additional requirement of a majority among both Annex I and non-Annex I Parties. Such a requirement of parity reflects equal consideration of the interests of both developed and developing countries, furnishing Compliance Committee decisions with further legitimacy. With regard to emissions trading, the Facilitative Branch provides advice, information and facilitation on implementation to the Parties. This reflects an approach of assisting instead of sanctioning Parties with the overall aim of successfully implementing the KP. In contrast, the Enforcement Branch is responsible for determining whether a Party in question is eligible for participation in the emissions trading system, makes corrections to the Parties' accounting of emission allowances when necessary, and applies so-called 'enforcement consequences' in cases of non-compliance.⁷³

The Compliance Committee is assisted by Expert Review Teams (ERTs). The ERTs have been modeled on the Convention's so-called In-Depth Review Teams⁷⁴ and are entrusted with the "thorough and comprehensive technical assessment" of the

⁷¹ Pursuant to Art. 14(1) KP "the secretariat established by ... the Convention shall serve as the secretariat of this Protocol." Note, that by Decision 6/CP.6 the Secretariat has been institutionally and financially linked to the UN.

⁷² Decision 27/CMP.1, (Procedures and mechanisms relating to compliance under the Kyoto Protocol).

⁷³ Werksman (note 36), at 19.

⁷⁴ Geir Ulfstein & Jakob Werksman, *The Kyoto Compliance System: Towards Hard Enforcement*, in *IMPLEMENTING THE CLIMATE CHANGE REGIME* 39, 43 (Olav Schram Stokke, Jon Hovi & Geir Ulfstein eds., 2005).

information submitted⁷⁵ by the Parties as well as the identification of 'questions of implementation'. To this end they assess national reports, evaluate information deriving from various sources and conduct in-country visits, whereas the Parties undertake to "make every reasonable effort to respond to all questions and requests from the Expert Review Teams."⁷⁶ ERTs thus carry out the groundwork necessary for the decisions of the Compliance Committee. They are coordinated by the Secretariat, while its members are selected by the Parties and intergovernmental organizations.⁷⁷ To ensure the unbiased and efficient operation of the ERTs, members of the individual teams act in their personal capacity and must possess qualifications in the areas under review. The composition of each team must reflect a balance between Annex I and Annex II Parties; nationals of the Party under review are not eligible to be members of the team.⁷⁸ ERTs are to "refrain from making any political judgements" in their reports.⁷⁹ Instead, they are to "play an innovative and important part in the enforcement of the climate commitments"⁸⁰ by submitting technical information on the respective Party's compliance to the Compliance Committee. The information assists the Compliance Committee in determining whether there has been a violation of obligations under the KP.

Finally, the Subsidiary Body for Scientific and Technological Advice as well as the Subsidiary Body for Implementation play an important role in the design of the trading system by providing technical advice⁸¹ that forms the basis of various COP/MOP decisions or by compiling manuals and other documents intended for assisting implementation.

III. The Emissions Trading System

1. Main Features

The emissions trading system is a flexible mechanism under the Kyoto Protocol aiming at minimizing the costs of compliance with reduction commitments and

⁷⁵ UNFCCC guidelines for the technical review of greenhouse gas inventories from Parties included in Annex I to the Convention.

⁷⁶ Decision 23/CP.7, (Guidelines for review under Art. 8 of the Kyoto Protocol).

⁷⁷ Art. 8(3) KP.

⁷⁸ Decision 22/CMP.1, paras. 31-35.

⁷⁹ Decision 22/CMP.1, para. 22.

⁸⁰ Ulfstein & Werksman (note 74), at 43.

⁸¹ Also established under Arts. 9 and 10 UNFCCC.

making improvements to the environment profitable in the future:⁸² "Through emissions trading, a market price for emissions abatement will emerge which reflects the marginal cost of emissions abatement across all market participants. When participants have exhausted the opportunities available for domestic emission reductions ... they can elect to purchase the requisite 'assigned amounts' from other Parties (or entities). In this way, the environmental benefits are achieved, irrespective of where the reductions take place, and at a lower cost than if trading was not available."⁸³ The rationale of the system is that investing in clean technology may prove to be cheaper in the long run than purchasing emission allowances, and at the same time the surplus allowances may be sold for a high market price to Parties over-emitting and otherwise not meeting their reduction commitments.⁸⁴

The trading system implies the creation of an emission allowances market determined by commitment periods, individual emissions caps and tradable emission allowances that constitute economic assets in the form of pollution rights. Thus, a regulatory framework had to be established to govern the main features of the flexible mechanism in terms of both its substantive and procedural aspects. The rules adopted to this end secure the functioning of the system by creating a common space in which regulation takes place at various levels, where the conditions of competition are approximated,⁸⁵ and where actors meet to interact with each other.

2. Substantive Rules

The emissions trading regime is based on the common rules relating to registries, transfers of allowances between these registries and the review of such transfers. The legal basis of the emissions trading system is found in Article 17 KP⁸⁶ and is

⁸² Non-Paper on Principles, Modalities, Rules and Guidelines for an International Emissions Trading Regime, 3 June 1998, available at: <http://www.med.govt.nz/upload/24427/umbrellagroup.pdf>. According to Pflüglmayer, the price of emission allowances will not be determined by the market, but much rather by way of political agreement. PFLÜGLMAYER, (note 13), at 5.

⁸³ Non-Paper on Principles, Modalities, Rules and Guidelines for an International Emissions Trading Regime, 3 June 1998, available at: <http://www.med.govt.nz/upload/24427/umbrellagroup.pdf>.

⁸⁴ "Low cost abaters will be incentivised to reduce pollution levels and sell permits to higher cost abaters with the effect that the set level of emissions is achieved by lowest cost methods." Baldwin (note 40), at 6.

⁸⁵ Patrick Low, *Trade and the Environment: What Worries the Developing Countries?*, 23 ENVIRONMENTAL LAW (ENVTL L.) 708 (1993).

⁸⁶ Interestingly, Art. 17 KP foresees the elaboration of the rules of ETS by the COP, the institution of the Convention and not the COP/MOP: "The Conference of the Parties shall define the relevant principles,

also referred to in Article 3 paragraphs 10-11 KP, which set forth the basic framework of ETS without regulating details.⁸⁷ The preconditions and elements of the system are laid down in specific articles of the KP itself, legislative measures of both the COP/MOP of the KP and the COP of the Convention, which concretizes the "principles, modalities, rules and guidelines" by adopting formal decisions in accordance with the general rules. Such decisions are enacted mainly on the basis of advice from the Subsidiary Body for Implementation, the Subsidiary Body for Scientific and Technological Advice as well as the Secretariat. NGOs also contribute to such decisions either indirectly by way of lobbying, or by way of direct participation in government delegations.⁸⁸ Concretizing regulatory proposals of the COP and the COP/MOP are adopted in the form of decisions under the general rules of decision-making⁸⁹ and mandate institutions or bodies of the KP to carry out specific actions. These decisions giving effect to the individual Articles of the KP and rendering mechanisms of the KP more feasible are usually very elaborate and precise and are often of highly technical nature.

3. *The Procedural Regime*

a) Management of the Emissions Trading System

The reduction commitments of Annex I countries span 5 year commitment periods. The Emissions Trading System, which is designed to facilitate meeting these commitments, may be analyzed here in a framework that breaks down these commitment periods into three main stages: *eligibility assessment (aa)*, *trading phase (bb)* and *commitment period compliance assessment (cc)*. In reality, the operation of the ETS reflects much rather a continuum than such clear-cut phases. However these three phases provide an adequate framework of analysis for the purposes of the present paper.

modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading." However, Decision 18/CP.7 transferred decision-making power relating to the ETS's "modalities, rules and guidelines" to the COP/MOP. There is thus a 'mix' of Convention and Kyoto bodies in charge of defining the rules of ETS.

⁸⁷ Fanny Missfeldt, *Flexible Mechanisms: Which Path to Take after Kyoto?*, 7 REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW (RECIEL) 128, 129 (1998).

⁸⁸ Steinar Andresen & Lars H. Gulbrandsen, *The Role of Green NGOs in Promoting Climate Compliance, in IMPLEMENTING THE CLIMATE CHANGE REGIME* 169, 173 (Olav Schram Stokke, Jon Hovi & Geir Ulfstein eds., 2005).

⁸⁹ Draft Standard Electronic Format for Reporting Kyoto Units recommended for adoption by Decision 17/CP.10 para 1.

1. In the first stage, the eligibility of signatory States for participation in the ETS is assessed. This involves the allocation of allowances to the Parties according to their respective reduction commitments. The Parties in turn must meet the technical requirements for participating in flexible mechanisms. Compliance is ensured by reporting and review procedures.
2. In the next stage, provided the eligibility criteria are met, Parties can acquire and transfer allowances with a view to meeting their reduction commitments. From an administrative perspective, this process requires the establishment, management and supervision of national and international registries, which track the transactions and establish uniform rules for accounting allowances between registries.
3. In the final stage, at the end of the commitment period, the Parties' compliance with their respective reduction commitments is reviewed based on the information gathered in the reporting process.

In the following, the three main stages of the emissions trading system are examined in detail to illustrate the administrative procedures under the KP.

b) Eligibility Assessment

The functioning of the ETS is premised on the sound assessment of emissions and sinks that capture GHG-s, as well as the precise allocation of the Parties' emission allowances. Therefore only those Parties to the KP which comply with specific 'eligibility criteria are eligible for participation in the trading system.'⁹⁰ To evaluate eligibility, a system of national reporting and review by KP bodies has been established.

According to the eligibility criteria Annex I Parties are obliged to establish and maintain national (electronic) registries for tracking holdings of emissions allowances they have been assigned, or which they have acquired or transferred.⁹¹ They are required to compile national GHG inventories on emissions by sources

⁹⁰ The eligibility criteria are set forth in Decision 18/CP.7, para 2.

⁹¹ Annex B of the KP itself contains the data necessary for the quantification of the emission allowances assigned to each Annex I State. Accounting takes place in compliance with Decision 13/CMP.1, (Modalities for the accounting of assigned amounts under Art. 7(4) of the Kyoto Protocol).

and removals by sinks⁹² and to supplement their respective annual reports⁹³ and periodic national communications under the Convention⁹⁴ with additional information related to the KP.⁹⁵ Together, these documents constitute the initial report first reviewed⁹⁶ by international Expert Review Teams. These compile reports for the COP on the Parties' compliance with the above obligations, identifying problems and factors related to non-compliance as 'questions of implementation'. ERTs may give advice or "put questions to, or request additional or clarifying information" from the Parties, while the latter are to assist the experts by supplying information and necessary facilities.⁹⁷ In their assessment ERTs are not restricted to information submitted by the Party under review, implying that they may also avail themselves of also information provided by NGOs when performing the review.⁹⁸ The draft report⁹⁹ of the respective ERT must be submitted to the Party subject to review within strict time limits. The Party then has the opportunity to comments on the report.¹⁰⁰ Subsequently, the ERT report is finalized in accordance with the guidelines set forth in Decision 22/CMP.1.¹⁰¹ Reports are forwarded to the Enforcement Branch of the Compliance Committee, which determines whether the Party has fulfilled all requirements to be eligible for participation in the ETS.¹⁰² After the Enforcement Branch has completed its

⁹² Art. 5(1) KP; Decision 20/CMP.1, *IPCC Good practice guidance and adjustments under Article 5*, paragraph 2 of the Kyoto Protocol.

⁹³ In compliance with the guidelines set out in Decision 17/CP.8 and detailed in: *Reporting on Climate Change - User Manual for the Guidelines on National Communications from Non-Annex I Parties*.

⁹⁴ Art. 12 UNFCCC; Decision 3/CP.5, incorporating *Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part I: UNFCCC reporting guidelines on annual inventories*.

⁹⁵ Decision 15/CMP.1, (*Guidelines for the preparation of the information required under Art. 7 of the Kyoto Protocol*), Art. 7(1)-(2) KP.

⁹⁶ Art. 8(1) KP.

⁹⁷ Decision 22/CMP.1, (*Guidelines for review under Art. 8 of the Kyoto Protocol*), paras. 5 and 6.

⁹⁸ Section 153 of Decision 22/CMP.1.

⁹⁹ Draft status report, draft individual inventory review report, draft review report on the national registry or draft national communication review report depending on the scope of review.

¹⁰⁰ Decision 22/CMP.1, para. 7.

¹⁰¹ Decision 22/CMP.1, paras. 64, 83.

¹⁰² Decision 24/CP.7, (*Procedures and mechanisms relating to compliance under the Kyoto Protocol*), Section VI. paras.1 and 3; 2/CMP.1, (*Principles, nature and scope of the mechanisms pursuant to Arts. 6, 12 and 17 of the Kyoto Protocol*).

preliminary examination, the Party is notified of the findings.¹⁰³ The Party may then provide comments in writing, and shall also be heard if it so requests. As a rule, such hearings are public. However, the Enforcement Branch may decide otherwise of its own accord or upon request of the Party concerned.¹⁰⁴ The Enforcement Branch "shall adopt its preliminary finding or a decision not to proceed within six weeks of the notification or two weeks of the hearing, whichever is the shorter."¹⁰⁵

Eligibility assessment also implies that the Enforcement Branch suspends Parties that no longer fulfill the eligibility criteria. Should a Party fail to continue meet the eligibility criteria, e.g., for reasons of overselling its assigned allowances¹⁰⁶ (in other words, not preserving the so-called commitment period reserve),¹⁰⁷ it shall deduct the excess emissions from the Party's next commitment period, oblige the Party to develop a compliance action plan, and suspend the Party.¹⁰⁸ Should the Party fail to meet other eligibility requirements under the KP, the Enforcement Branch shall suspend the Party.¹⁰⁹ The Party concerned may in certain cases apply to the ERT for a decision brought in an expedited procedure to review the reinstatement of eligibility¹¹⁰ or may apply directly to the Enforcement Branch for reinstatement. In such cases the Enforcement Branch reviews the report of the ERT (if available) as well as the Party's action plans and subsequent annual progress reports to make a determination on the Party's reinstatement.¹¹¹

¹⁰³ *Id.* at Section VII. Paras. 6-7 and Section X. para. 1(a).

¹⁰⁴ *Id.* at Section IX. para. 2 and Section X. para. 1(b)-(c).

¹⁰⁵ *Id.* at Section X. para. 1(d).

¹⁰⁶ Decision 18/CP.7, para 8.

¹⁰⁷ Amounting to 90% of the AAUs of the respective seller Party or 100% of five times its most recently reviewed inventory – whichever is lowest, Decision 18/CP.7. para. 6.

¹⁰⁸ Decision 24/CP.7, Section XV. para. 5.

¹⁰⁹ Namely those enshrined in Arts. 6, 12 and 17 KP, Decision 24/CP.7, Section XV. para. 4.

¹¹⁰ Decision 22/CMP.1, Arts. 159-160.

¹¹¹ Decision 24/CP.7, (Procedures and mechanisms relating to compliance under the Kyoto Protocol), Section X. paras. 1-4; Decision 27/CMP.1.

c) Trading

After fulfilling the technical and administrative requirements of the eligibility assessment phase, Parties may commence trading their Kyoto allowances.¹¹² Transactions from emissions trading are tracked on both the respective national registries and the so-called International Transaction Log (ITL) administered by the Secretariat. The Log records all transactions¹¹³ and includes only transactions from flexible mechanisms that have been verified, i.e., the Party is eligible for participation in the ETS, the transaction is properly accounted and the allowances of the Party have not dropped below the commitment period reserve. The ITL rejects transactions that do not meet these criteria and directs national registries to terminate such transfers (reconciliation procedure).¹¹⁴ The Secretariat also manages the Compilation and Accounting Database, the official repository recording inventory estimates and corrected allowance holdings of the Parties.¹¹⁵ Based on advice delivered by the Subsidiary Body for Scientific and Technological Advice, the COP/MOP decides on the standardized rules and modalities for the accounting – that is the rules regarding the addition and subtraction – of allowances.¹¹⁶ All national electronic registries as well as the Log administered by the Secretariat of the Convention must conform to these accounting rules. The Secretariat cooperates with national registry administrators in developing common operational procedures and practices, promoting the compatibility and accuracy of registry systems.¹¹⁷ A Standard Electronic Format for reporting and reviewing Kyoto units as well as automated checks between registries ensure unimpeded trading and review.¹¹⁸ The ERT reviews the calculation and accounting of allowances as well as the capacities of the national registries in the form of annual reviews of national

¹¹² Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amounts, February 2007, at 23.

¹¹³ *Id.* at 15.

¹¹⁴ Decision 24/CP. 8, Annex, para. 25.

¹¹⁵ Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amounts, February 2007, at 13.

¹¹⁶ Decision 13/CMP.1, (Modalities for the accounting of assigned amounts under Art. 7(4) of the Kyoto Protocol).

¹¹⁷ Decision 16/CP.10, (Issues relating to registry systems under Art. 7(4) of the Kyoto Protocol), paras. 4-5.

¹¹⁸ Decision 17/CP. 10, (Standard electronic format for reporting Kyoto Protocol units).

systems¹¹⁹ and reviews of national registries.¹²⁰ Similar to review procedures under the eligibility assessment, strict time limits apply and Parties may comment on the draft report prepared by the ERT, which shall thereafter adopt the final report.¹²¹ Subsequently, the Enforcement Branch of the Compliance Committee proceeds with the review procedure as described above in relation to eligibility assessment, and concludes by adopting a final decision.

Emission trading is not restricted to States. Indeed the Parties' governments may decide to extend trading to non-State participants as well, boosting the intensity and efficiency of the trading system.¹²² However, as emissions allowances reflect international commitments of sovereign States vis-à-vis the other Parties, these may not be privately owned and the Parties remain responsible for all transfers and acquisitions on their registries.¹²³ For this reason, a national system for trading between private parties must put in place further rules to transform the allowances into tradable economic assets,¹²⁴ enact authorization procedures for private entities, and publicize the list of accredited traders. Finally, the Parties are to ensure the effective supervision of the market for emissions trading between such private entities.¹²⁵ Thus, the KP does not exclude domestic or regional emissions trading systems: rather, it forms an *umbrella* encompassing these markets. To avoid distortions of Kyoto commitments all transfers between such trading systems have to be accounted for¹²⁶ should they affect any transactions between the Parties.¹²⁷

¹¹⁹ Decision 22/CMP.1, paras. 84-91.

¹²⁰ *Id.* at paras. 110-120.

¹²¹ *Id.* at para. 94.

¹²² OBERTHÜR & OTT (note 5), at 254.

¹²³ de Witt Wijnen (note 33), at 412.

¹²⁴ *Id.* at 405; the emission units allocated to the Parties may be "regarded as a mixture of a sovereign rights ... and a public property right of an Annex I Government. ... Allowances can also create property rights or quasi property rights with private entities holding allowances allocated under a domestic scheme. [Allowances] represent a hybrid between a purely public and a purely private right, which has been described as a 'regulatory' right. As such, they find themselves between an administrative grant and private property." Matthieu Wemaere & Charlotte Streck, *Legal Ownership and Nature of Kyoto Units and EU Allowances*, in LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK 35, 42 (David Freestone & Charlotte Streck eds., 2005).

¹²⁵ OBERTHÜR & OTT (note 5), at 254. It is important to note that transactions between private traders within the national registry are irrelevant from the point of view of the KP, as they do not lead to allowance transfers between eligible State Parties. de Witt Wijnen (note 33), at 410.

¹²⁶ Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amounts, February 2007, at 10.

The cross-accounting between domestic, regional and Kyoto trading regimes thus requires 'linking' the trading systems.¹²⁸

d) Commitment Period Compliance Assessment

At the end of the commitment period the overall compliance of the Parties with their respective reduction commitments is assessed: each Party must 'retire' a quantity of Kyoto Protocol units equal to or greater than its aggregate emissions, that is, all allowances held by the Parties at the end of the commitment period must exceed their actual emissions in the same period. The commitment period compliance assessment presupposes the conclusion of the annual review and compliance procedures for the final year. After completion, the additional period for fulfillment of commitments begins (true-up period), providing the Parties with a grace period to meet commitments and compile 'true-up reports'¹²⁹ on the Parties' transactions and holdings. The ERT compares the true-up report with the allowance units retired to a separate account on the Party's registry designated for facilitating compliance assessment. They also apply the corrections the Parties have failed to make by cancelling corresponding units, and finally, adopt a review report for the true-up period. Subsequently, the Enforcement Branch of the Compliance Committee reviews the Parties' compliance and, in cases of over-emissions, deducts "units equal to 1.3 times the quantity of the Party's excess emission from the Party's unit holdings for the subsequent commitment period"¹³⁰ (non-compliance cancellation). It is important to note that a Party may appeal to the COP/MOP against final decisions of the Enforcement Branch related to compliance assessments under Article 3 paragraph 1 KP if it "believes it has been denied *due process*." The appeal operates to suspend the effect of the decision. By a 3/4 majority vote the COP/MOP may override the decision and refer the matter back to the Enforcement Branch.¹³¹ This form of appeals reflects the *principle of supervision* as employed by von Bernstoff, where "parent organs ... exercise a degree of control

¹²⁷ Jürgen Lefevere, *Linking Emissions Trading Schemes: The EU ETS and the 'Linking Directive'*, in LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK 511 (David Freestone & Charlotte Streck eds., 2005).

¹²⁸ See EU 'Linking Directive': Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC, establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms.

¹²⁹ Decision 27/CMP. 1, Section XIII., Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amounts, February 2007, at 26.

¹³⁰ Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amounts, February 2007, at 63.

¹³¹ Decision 24/CP.7, Section XI. paras. 1-4.

over subsidiary organs ... including the right to overrule [their] decisions."¹³² Finally, upon request and subject to review by the ERT, units in excess of emissions may be 'carried over' to the next commitment period.

e) Characteristics of Compliance Procedures

Compliance procedures under the KP are not restricted to mere reviews carried out by KP bodies but also impose obligations on national administrations, such as accounting, reporting and possibly also capacity-building obligations. With this, the climate change regime affects national administrative structures, prompting changes and amendments to these. The interaction between KP bodies and national governments is highly structured both as regards timeframes and procedures ('formalization' and 'rationalization').¹³³ The instruments addressed to national authorities are diverse and numerous. First, some KP Articles themselves contain specific requirements for national implementation.¹³⁴ Furthermore, COP as well as COP/MOP decisions impose detailed obligations. Finally, 'manuals'¹³⁵ and other documents compiled by KP or other bodies¹³⁶ provide assistance to Parties in fulfilling their commitments. The strict timeframes for proceedings and Parties' submissions,¹³⁷ the terminology employed by the relevant decisions as well as the possibility of hearings and the adoption of reasoned decisions resemble administrative or judicial proceedings. Together, these features add up to a strict requirement of due process.¹³⁸ Since issues of legitimacy become more pressing in proportion to the "degree of formality and the autonomy of international officials,"¹³⁹ the stringent procedural rules described above are crucial for the system's formal legitimacy.

¹³² Jochen von Bernstorff, in this issue.

¹³³ *Id.*

¹³⁴ Art. 3 and 7 of the KP.

¹³⁵ Revised 1996 IPCC Guidelines for National Greenhouse Gas Inventories - Reference Manual, in accordance with Art. 5(2) KP, available at: <http://www.ipcc-nggip.iges.or.jp/public/gl/invs6.htm>. Such 'manuals', 'specifications', etc. are often incorporated into COP/MOP Decisions by reference. Jochen von Bernstorff, in this issue.

¹³⁶ On such implementation support, Armin von Bogdandy & Philipp Dann, *International Composite Administration*, in this issue.

¹³⁷ Decision 24/CP.7, Section IX. para. 11.

¹³⁸ Olav Schram Stokke, Jon Hovi & Geir Ulfstein, *Introduction and Main Findings*, in *IMPLEMENTING THE CLIMATE CHANGE REGIME 1*, 11 (Olav Schram Stokke, Jon Hovi & Geir Ulfstein eds., 2005).

¹³⁹ Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE LAW JOURNAL* 1490, 1510 (2006).

f) Features of Compliance Decisions

As noted, the aims and advantages of the complex system of emissions trading can only be achieved through securing the observance of all related rules.¹⁴⁰ Thus, as demonstrated above, the most characteristic feature of the Kyoto regime is its strict compliance regime. The regime of the KP thus focuses on the issues of compliance. The instruments central to the ETS are therefore the decisions adopted by the Enforcement Branch of the Compliance Committee. These come about in complex procedures of multiple stages involving various phases of periodic reporting and review as well as the cooperation of other KP bodies.

The legal basis for the binding decisions are found in the Annex of Decision 27/CMP.1 (Procedures and mechanisms relating to compliance under the Kyoto Protocol). The decisions of the Enforcement Branch are addressed to the Parties and contain findings on the compliance of the Parties with their commitments under the KP ('declaration of non-compliance'). The decision also specifies the consequences, such as suspension or reinstatement of eligibility in the Kyoto mechanisms or the deduction of allowance units from non-compliant Parties.¹⁴¹ Decisions also impose obligations on non-compliant Parties to draft adequate compliance action plans and submit progress reports to the Enforcement Branch. Such decisions may be termed as 'hard law' because they contain provisions which are binding on the Parties and are reinforced by enforcement measures. The decisions are based on a variety of sources of information. These include the official reports and submissions of the Parties and the ERTs, information provided by the COP, the COP/MOP and other Convention and KP bodies, and other information supplied by "competent intergovernmental and non-governmental organizations" or experts.¹⁴² Widening the scope of such potential sources of information contributes to the decisions adopted by the Enforcement Branch being perceived as well founded. This, in turn, increases not only to the input legitimacy of the system but also to effective outputs. Final decisions "include conclusions and reasons" and are made available to the public, thus making the system more transparent.¹⁴³

¹⁴⁰ SEBASTIAN OBERTHÜR & HERMANN E. OTT (note 5), at 260.

¹⁴¹ Decision 27/CMP.1, (Procedures and mechanisms relating to compliance under the Kyoto Protocol), Section XV.

¹⁴² *Id.* at Section VIII. paras. 3-4.

¹⁴³ *Id.* at Section VIII. para. 7.

C. Conclusions

From the point of view of environmental sustainability the effective enforcement of Kyoto obligations would not necessarily result in achieving the stabilization of GHGs. From a legal point of view, despite strict, unprecedented mechanisms, ensuring effective compliance may still remain problematic. Parties may choose to over emit in subsequent commitment periods, with the consequence that deduction of emission units are merely cumulated thus "delaying the punishment forever."¹⁴⁴ Parties in non-compliance may also elect to simply withdraw from the KP, the procedure for which is uncomplicated.¹⁴⁵ Despite such weaknesses, the KP marks a new era in international cooperation by placing a greater emphasis on both the possibilities for flexible fulfillment of international obligations as well as the legitimacy of the exercise of international public authority.

Legitimacy figures as the crucial factor in the participants' overall acceptance of the KP's procedures and the outcomes of its exercise of public authority. The analysis of the Kyoto system shows that it conforms to high standards of good governance. Krisch and Kingsbury point out that examples of global governance "testify to a growing trend of building mechanisms analogous to domestic administrative law systems to the global level" with "transparency, participation, and review" being their main features.¹⁴⁶ The flexible mechanisms of the Kyoto Protocol seem to substantiate this observation. From an in-put legitimacy perspective it may be pointed out that the members of the COP/MOP, the supreme authority of the KP, is composed of government representatives, that is, officials democratically legitimized in their respective signatory States.¹⁴⁷ Members of the COP/MOP possess equal voting power in the decision-making procedure, which enhances the legitimacy of decisions taken. The general rule of consensus as well as the participation of all affected Parties forces the Parties to take the interests of all members into account in order to reach unanimity.¹⁴⁸ However, unanimity requirement may have deterring effects on the output of the legislative body. The 'automaticity'¹⁴⁹ of technically oriented procedures, the composition,

¹⁴⁴ Stokke, Hovi & Ulfstein (note 138), at 11.

¹⁴⁵ *Id.*

¹⁴⁶ Nico Krisch, Benedict Kingsbury & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 15, 19 (2005).

¹⁴⁷ See Jochen von Bernstorff, in this issue; Eberhard Schmidt-Aßmann, in this issue.

¹⁴⁸ Krisch, Kingsbury & Stewart (note 146), at 26.

¹⁴⁹ Stokke, Hovi & Ulfstein (note 138), at 1.

professionalism and expertise of the Expert Review Teams and the Compliance Committee all contribute to the substantive legitimacy of decisions adopted on Parties' compliance, whereas strict enforcement measures ensure an efficient, predictable operation of the mechanism. The possible, indirect participation of private and non-State entities in the development and review of the trading system is weak. However, the detailed rules on decision-making, its "procedural rigor,"¹⁵⁰ the possibility of majority voting and the formal requirements related to decisions enhance the democratic credentials of the system. The administrative procedures are highly structured and formalized, adding to the transparency, reliability and formal legitimacy of the actions of KP bodies. The publication of documents – decisions as well as the inclusion of external experts in certain matters – provides further transparency and openness to the system, also enabling various forms of "social enforcement," such as naming and shaming or granting awards by non-State entities.¹⁵¹

Various principles contained in the KP guide the operation of the ETS. These are not only written principles contained in the Convention and referred to by the KP, but also uncodified principles inherent in the nature of the compliance regime itself. Thus, a general principle of cooperation¹⁵² may be abstracted from the KP and traced back to specific obligations of both the Parties to collaborate in related research, education and technological development,¹⁵³ as well as the COP/MOP to make use of information and assistance provided by other, non-Party entities.¹⁵⁴ The principle of constitutionality in the meaning attributed by von Bogdandy is also implied. The principle has its basis in the elaborate provisions on the specific competences of the individual KP bodies and the regulation of the Parties' obligations, signaling a highly complex division of powers. The principle of the rule of law may be deduced from the requirement that all binding acts of the Compliance Committee must include conclusions and reasons and are to be brought in the form of a formal decision.¹⁵⁵ Finally, the Parties may demand a hearing and lodge an appeal (although the appellate instance is political rather than legal in nature). These procedural mechanisms also mark a tendency toward the

¹⁵⁰ Esty (note 139), at 1495.

¹⁵¹ Gupta (note 43), at 467-468.

¹⁵² See Armin von Bogdandy, *On Principles of International Public Authority*, in this issue.

¹⁵³ Art. 10(c),(d),(e) KP.

¹⁵⁴ Art. 13(i) KP.

¹⁵⁵ Decision 24/CP.7, Section VIII. para. 7.

internalization of the principle of due process.¹⁵⁶ In sum, although the effectiveness of the ETS may be arguable, the system nevertheless constitutes a turning-point in employing novel solutions and setting the stage for the further development of multilateral environmental agreements.

¹⁵⁶ Krisch, Kingsbury & Stewart (note 146), at 17.