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ARTICLE

The Desirability of Depoliticization: Compliance in the International Climate Regime

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Abstract
The Kyoto Protocol is remarkable among global multilateral environmental agreements for its efforts to depoliticize compliance. However, attempts to create autonomous, arm's length and rule-based compliance processes with extensive reliance on putatively neutral experts were only partially realized in practice in the first commitment period from 2008 to 2012. In particular, the procedurally constrained facilitative powers vested in the Facilitative Branch were circumvented, and expert review teams (ERTs) assumed pivotal roles in compliance facilitation. The ad hoc diplomatic and facilitative practices engaged in by these small teams of technical experts raise questions about the reliability and consistency of the compliance process. For the future operation of the Kyoto compliance system, it is suggested that ERTs should be confined to more technical and procedural roles, in line with their expertise. There would then be greater scope for the Facilitative Branch to assume a more comprehensive facilitative role, safeguarded by due process guarantees, in accordance with its mandate. However, if – as appears likely – the future compliance trajectories under the United Nations Framework Convention on Climate Change will include a significant role for ERTs without oversight by the Compliance Committee, it is important to develop appropriate procedural safeguards that reflect and shape the various technical and political roles these teams currently play.

Keywords: Kyoto Protocol compliance system, Depoliticization, Expert review teams, Compliance Committee, United Nations Framework Convention on Climate Change (UNFCCC)

1. INTRODUCTION

There are divergent perspectives on the appropriate role of politics in the compliance systems[1] of multilateral environmental agreements (MEAs). Some commentators

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[1] Compliance systems may be defined as encompassing performance review information, multilateral non-compliance procedures, and non-compliance response measures: United Nations Environment Programme (UNEP), *Compliance Mechanisms under Selected Multilateral Environmental Agreements* (UNEP, 2007), at p. 9, available at: http://www.unep.org/pdf/delc/Compliance_Mechanism_final.pdf.

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have described the compliance mechanisms of MEAs as providing 'a political solution through gentle political pressure, consultation, and negotiations',[2] and as being 'political and pragmatic, not legalistic'.[3] According to Chayes and Chayes, a 'co-operative, problem-solving approach' to promoting compliance with international regulatory agreements such as MEAs is desirable.[4] Others, by contrast, have observed that MEAs' compliance procedures are increasingly analogous to administrative procedures,[5] reflecting a tendency towards more formal and rule-based processes. Klabbers has expressed concern that compliance processes are in practice 'subject to negotiations',[6] and would prefer greater reliance on formalism, procedural safeguards and the rule of law.[7] These various characterizations of the actual and normatively appropriate role of politics in the compliance systems of MEAs can be seen to reflect a broader tension between ideals of state sovereignty and a law-based international order[8] that permeates the international realm.

The Kyoto Protocol[9] to the United Nations Framework Convention on Climate Change (UNFCCC)[10] adopted a 'prescriptive, quantitative, time-bound, compliance-backed approach' to climate change mitigation.[11] This Protocol applied to 37 industrialized countries and the European Union (EU) during its first commitment period from 2008 to 2012, which is the focus of this article. The compliance system developed under this Protocol is remarkable for its attempts to depoliticize compliance processes in international environmental law (IEL),[12] and to create

2 N. Goeteyn & F. Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?' (2011) 10(4) *Chinese Journal of International Law*, pp. 791–826, at 826.

3 D. Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2009), at p. 248.

4 A. Chayes & A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998), at p. 3.

5 A. Tanzi & C. Pitea, 'Non-Compliance Mechanisms: Lessons Learned and the Way Forward', in T. Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press, 2009), pp. 569–80, at 580; K.N. Scott, 'Non-Compliance Procedures and the Resolution of Disputes under International Environmental Agreements', in D. French, M. Saul & N.D. White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart, 2010), pp. 225–70, at 230.

6 J. Klabbers, 'Compliance Procedures', in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 995–1009, at 1001.

7 Ibid., at pp. 1007–9.

8 See, e.g., O.A. Hathaway, 'International Delegation and State Sovereignty' (2007) 71 *Law & Contemporary Problems*, pp. 115–49, at 115.

9 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf.

10 New York, NY (US), 9 May 1992, in force 21 Mar. 1994, Art. 1, available at: http://unfccc.int. All Decisions and other official documents cited below relating to the UNFCCC and Kyoto Protocol are available at: http://unfccc.int/documentation/documents/items/3595.php.

11 L. Rajamani, J. Brunnée & M. Doelle, 'Introduction: The Role of Compliance in an Evolving Climate Regime', in J. Brunnée, M. Doelle & L. Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press, 2012), pp. 1–14, at 7.

12 G. Ulfstein, 'Depoliticizing Compliance', in Brunnée, Doelle & Rajamani, ibid., at pp. 418–34. Ulfstein's account of the attempts to depoliticize compliance in the Kyoto compliance system primarily focuses on the Enforcement Branch. The discussion that follows adds to Ulfstein's account by, inter

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autonomous, arm's length, technocratic and rule-based compliance processes.[13] The Kyoto compliance system incorporates a number of components: (i) requirements for national measurement and reporting of Annex I states' emissions inventories; (ii) internationally coordinated external verification and review of national emissions inventories by expert review teams (ERTs); (iii) the resolution of compliance issues and the determination of the consequences of non-compliance by the regime's Compliance Committee, which consists of the bureau, plenary and Facilitative and Enforcement Branches;[14] and (iv) ultimate oversight by the Conference of the Parties (COP) serving as the Meeting of the Parties to the Kyoto Protocol (CMP).[15] The Kyoto compliance system thus provides a sophisticated administrative apparatus for review of state action by independent bodies.[16]

This article examines the extent to which the ideals of insulating compliance processes from undue political influence were achieved in practice during the Kyoto Protocol's first commitment period. The point of departure for this discussion is that moves towards depoliticizing compliance and increasing reliance on formal, arm's length and rule-based procedures are generally normatively desirable in IEL. This is because, as Koskenniemi rightly observes, without a degree of formalism and adherence to 'previously agreed rules, institutions and procedural safeguards', the status of law to justify the exercise of constraint over states is seriously undermined.[17] Moreover, it is argued that depoliticization of MEA compliance systems is desirable to enhance the reliability and consistency of the review processes underpinning assessment of state compliance with international environmental obligations.

One notable aspect of attempts to depoliticize the Kyoto compliance system is the extensive reliance on putatively independent technical experts in the ERTs[18] and the Facilitative and Enforcement Branches,[19] which contrasts with compliance bodies in

alia, teasing out the roles of the expert review process and the bypassing of the Facilitative Branch in undermining attempts to depoliticize the Kyoto compliance system.

13 This definition of depoliticization draws inspiration from what Dubash and Morgan define as the 'rules' end of a spectrum between 'rules and deals' in the context of theorizing the regulatory state in the global south: N. Dubash & B. Morgan, 'The Embedded Regulatory State: Between Rules and Deals', in N. Dubash & B. Morgan (eds), *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford University Press, 2013), pp. 279–96, at 279–83.

14 J. Bulmer, 'Compliance Regimes in Multilateral Environmental Agreements', in Brunnée, Doelle & Rajamani, n. 11 above, pp. 55–73, at 66.

15 J. Brunnée, 'Climate Change and Compliance and Enforcement Processes', in S.V. Scott & R.G. Rayfuse (eds), *International Law in the Era of Climate Change* (Edward Elgar, 2012), pp. 290–320, at 303–4; A. Zahar, 'Verifying Greenhouse Gas Emissions of Annex I Parties: Methods We Have and Methods We Want' (2010) 1(3) *Climate Law*, pp. 409–27, at 411.

16 A. Zahar, J. Peel & L. Godden, *Australian Climate Law in Global Context* (Cambridge University Press, 2012), at p. 126.

17 M. Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3(1) *Yearbook of International Environmental Law*, pp. 123–62, at 147.

18 Members of ERTs shall 'serve in their individual capacities' and have 'recognized competence in the areas to be reviewed': Decision 22/CMP.1, Guidelines for Review under Article 8 of the Kyoto Protocol, FCCC/KP/CMP/2005/8/Add.3, 30 Mar. 2006, at paras 23 and 24.

19 Members of the Compliance Committee are required to 'serve in their individual capacities' and shall have 'recognized competence relating to climate change and in relevant fields such as the scientific, technical, socio-economic or legal fields': Decision 27/CMP.1, Procedures and Mechanisms Relating to

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other global MEA compliance systems that comprise representatives of a restricted number of parties.[20] Expert involvement in decision making may increase the range of considerations taken into account and the sophistication of the ensuing debate, thus enhancing the input legitimacy of compliance decision-making processes.[21] However, the relationship between expertise and depoliticization deserves further unpacking.

There is a paradox associated with expert involvement in international law, which is brought to the fore by the extensive reliance on technical and legal experts in the Kyoto compliance system. On one hand, it is acknowledged that experts are not simply 'neutral mouthpieces of science' or law, and construct knowledge by the processes of prioritizing, interpreting and framing available information.[22] That is, it is inevitable that there will be political dimensions to expert decision making.[23] On the other hand, the legitimacy of experts' knowledge hinges on perceptions that it is not significantly skewed by personal or political preferences. It is the achievement of this aspiration – that expertise is not unduly biased – that reflects alignment between ideals of technocratic decision making and depoliticization. Otherwise, as Werner notes, '[i]f it is not possible to identify rules separated from day-to-day politics, international [expert] advice becomes indistinguishable from other types of political advice and loses its own specific legitimizing function'.[24]

This article argues that the aspiration of expert decision making that is perceived to be free from political bias is put under strain by ERTs' simultaneous roles of technical review and compliance facilitation within the Kyoto compliance system, and the centrality of these roles within the compliance hierarchy. It is suggested that the roles of negotiation, facilitation, diplomacy and cooperation assumed by ERTs led to political considerations shaping review processes in the first commitment period. The degree to which ERTs assumed these facilitative roles was perhaps not anticipated by the institutional designers of the Kyoto compliance system, who created a separate Facilitative Branch with extensive facilitative powers that were safeguarded by numerous due process guarantees.[25] Given the likelihood of a continued, and arguably increasingly important, role for national reporting and

Compliance under the Kyoto Protocol, FCCC/KP/CMP/2005/8/Add.3Annex, 30 Mar. 2006, Annex, at section II, para. 6.

20 See nn. 98–9 below. The focus of this article is on global rather than regional MEAs such as the Aarhus Convention, which is relatively highly depoliticized but operates against a different political backdrop to global environmental agreements: see Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus (Denmark), 25 Jun. 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/treatytext.html.

21 M. Ambrus, K. Arts, E. Hey & H. Raulus, 'The Role of Experts in International and European Decision-making Processes: Setting the Scene', in M. Ambrus, K. Arts, E. Hey & H. Raulus (eds), *The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?* (Cambridge University Press, 2014), pp. 1–16, at 6.

22 W.G. Werner, 'The Politics of Expertise: Applying Paradoxes of Scientific Expertise to International Law', in Ambrus, Arts, Hey & Raulus, ibid., pp. 44–62, at 56.

23 L. Schrefler, 'Reflections on the Different Roles of Expertise in Regulatory Policy Making', in Ambrus, Arts, Hey & Raulus, n. 21 above, pp. 63–81, at 76.

24 Werner, n. 22 above, at p. 56.

25 See discussion in Section 4.1 below.

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internationally coordinated expert review in the emerging international climate architecture,[26] the dual political and technical roles currently played by ERTs need to be taken into account in designing appropriate procedural safeguards for future compliance processes.[27]

The following discussion highlights at least two issues of salience for the field of transnational environmental law. First, one focus of this field is the roles played by non-state actors,[28] which include technical experts. In particular, it is suggested that the network of technical experts from which ERTs are selected[29] may be seen as 'transnational' as it involves private, non-state actors operating across national borders and significantly influencing international climate governance.[30] However, the independent technical experts who become members of ERTs are nominated by Parties and act as officials of the Kyoto compliance system, blurring the boundaries between their private and public roles.[31] The related issue of the tension between the technical and political roles of ERTs is a central theme of this article.

Secondly, aspects of the following discussion are informed by understandings from global administrative law (GAL), which Sand describes as an 'essential component' of the field of transnational environmental law.[32] One of the primary focal points for GAL is the adoption of domestic administrative law-type mechanisms – such as those pertaining to accountability, transparency, participation, reason-giving and review – in global regulatory bodies.[33] A key normative concern of GAL is the role of rules and decisions of an administrative character that operate to 'limit decisions on the basis of power and expediency',[34] which is consonant with this article's focus on efforts to depoliticize the Kyoto compliance system by creating autonomous and

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26 J. Morgan, 'The Emerging Post-Cancun Climate Regime', in Brunnée, Doelle & Rajamani, n. 11 above, pp. 17–37, at pp. 26 and 34; R. Lefeber & S. Oberthür, 'Key Features of the Kyoto Protocol's Compliance System', in Brunnée, Doelle & Rajamani, ibid., pp. 77–101, at 100–1. See also Section 5 below.

27 Ulfstein has similarly argued that '[d]ue process guarantees ("procedural safeguards") are a *quid pro quo* [of depoliticization] in the sense that empowered independent organs should be subject to procedural control': Ulfstein, n. 12 above, at p. 418.

28 V. Heyvaert & T.F.M. Etty, 'Introducing Transnational Environmental Law' (2012) 1(1) *Transnational Environmental Law*, pp. 1–11, at 6.

29 UNFCCC, 'UNFCCC Roster of Experts', 2014, available at: http://maindb.unfccc.int/public/roe.

30 This aligns with the definition of 'transnational' provided by Abbott: 'An institution, regime or regime complex is transnational when (i) private actors (such as environmental NGOs, business enterprises and technical experts) and/or sub-national governmental units (cities or provinces, for example) play significant roles in its governance, instead of or in addition to states and/or IGOs; and (ii) it operates across national borders': K.W. Abbott, 'Strengthening the Transnational Regime Complex for Climate Change' (2014) 3(1) *Transnational Environmental Law*, pp. 57–88, at 65.

31 Ibid., at p. 67.

32 P.H. Sand, 'The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective' (2012) 1(1) *Transnational Environmental Law*, pp. 183–98, at 185.

33 B. Kingsbury, N. Krisch & R.B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3) *Law and Contemporary Problems*, pp. 15–61, at 16, 18 and 28. See also N. Krisch & B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) *European Journal of International Law*, pp. 1–13, and the other articles in this Symposium issue of the *European Journal of International Law*, at pp. 1–278.

34 See, e.g., R.B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108(2) *American Journal of International Law*, pp. 211–70, at 220.

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proceduralized compliance processes. As Scott notes, the aptness of GAL observations to the compliance processes of MEAs is 'undeniable',[35] and this is particularly true in the case of the international climate regime in which 'administrative regulation is most developed'.[36]

The remainder of the article is structured as follows. Section 2 contextualizes the following discussion by providing an overview of the elements of the Kyoto compliance system. Sections 3 and 4 consider the extent to which attempts to depoliticize the ERT and the Compliance Committee processes, respectively, have been realized in practice. Section 5 then discusses the significance of the current and likely future compliance trajectories under the international climate regime, before concluding remarks are offered in Section 6.

2. CONTEXTUALIZING THE KYOTO COMPLIANCE SYSTEM

MEA compliance systems may be defined as encompassing:

- a requirement for information reviewing national performance of MEA obligations ('performance review information');
- institutionalized multilateral procedures to consider apparent instances of non-compliance ('multilateral non-compliance procedures'); and
- multilateral measures adopted to respond to non-compliance ('non-compliance response measures').[37]

The Kyoto compliance system contains all three features. A brief overview of each follows.

2.1. *Performance Review Mechanisms*

Compared with the performance measurement systems of other MEAs,[38] the measurement, reporting and verification provisions in Articles 5, 7 and 8 of the Kyoto Protocol represent a sophisticated approach to collecting performance review information. Under Article 5, Parties are required to establish national systems to estimate greenhouse gas (GHG) inventories and removals using the common metric of carbon dioxide equivalents. Tiered methodological approaches to preparing

[35] Scott, n. 5 above, at p. 230.

[36] J. Gupta, 'Developing Countries: Trapped in the Web of Sustainable Development Governance', in O. Dilling, M. Herberg & G. Winter (eds), *Transnational Administrative Rule-Making: Performance, Legal Effects, and Legitimacy* (Hart, 2011), pp. 305–33, at 309.

[37] UNEP, n. 1 above, at p. 9. The author of this report uses the phrase 'compliance mechanisms' rather than 'compliance systems' in relation to these points. However, the phrase 'compliance systems' is considered preferable for the purposes of this article as the focus is on the synergistic operation of the multiple tiers within the Kyoto compliance hierarchy. The author also includes 'dispute settlement procedures' as a fourth compliance mechanism; however, because such procedures have not been used in the Kyoto compliance system and are not directly relevant to the arguments in this article, they will not be a focus here.

[38] K. Raustiala, *Reporting and Review Institutions in 10 Multilateral Environmental Agreements* (UNEP, 2001), available at: http://www.peacepalacelibrary.nl/ebooks/files/C08-0025-Raustiala-Reporting.pdf; Treves et al., n. 5 above.

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emissions inventories are provided by specified guidance materials produced by the Intergovernmental Panel on Climate Change (IPCC), the use of which was mandatory during the first commitment period.[39] Article 7 of the Protocol stipulates requirements for submission by Parties of national emissions information, review of which is then conducted by independent third party ERTs under Article 8. In practice, a primary focus of such review processes is the completeness and reliability of national emissions inventories,[40] which are arguably the 'foundation on which the rest of the international climate regime is built'.[41]

2.2. *Multilateral Non-Compliance Procedures*

The legal basis for the Kyoto Protocol's elaborate compliance system stems from Article 18, which mandates the development of 'appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance', including through 'the development of an indicative list of consequences'. After complicated and occasionally fraught negotiations, the Protocol's non-compliance procedure was adopted by Decision 27/CMP.1[42] at the first CMP in 2006. Several key procedural elements were subsequently clarified in the Rules of Procedure of the Compliance Committee to the Kyoto Protocol adopted by Decision 4/CMP.2[43] at the second CMP in 2007.[44]

There are three ways in which the non-compliance procedure may be triggered:

(a) by an ERT report;
(b) by the self-nomination of a Party who is not in compliance; and
(c) by one Party with respect to another Party provided the initiating Party provides 'corroborating information'.[45]

In practice, the role of ERTs in triggering non-compliance matters has proved to be vital.[46] Within seven days of the non-compliance procedure being triggered, the bureau will allocate the matter to the appropriate branch of the Compliance Committee.

This Committee was established as the body responsible for resolving compliance issues and determining the consequences of non-compliance under Decision 27/CMP.1.[47] Within the Committee, the roles of the Facilitative and Enforcement Branches are

[39] Art. 5(2) Kyoto Protocol; A. Herold, 'Experiences with Articles 5, 7, and 8: Defining the Monitoring, Reporting and Verification System under the Kyoto Protocol', in Brunnée, Doelle & Rajamani, n. 11 above, pp. 122–46, at 125.

[40] A. Zahar, 'Does Self-Interest Skew State Reporting of Greenhouse Gas Emissions? A Preliminary Analysis Based on the First Verified Emissions Estimates under the Kyoto Protocol' (2010) 1(2) *Climate Law*, pp. 313–24, at 315.

[41] Zahar, Peel & Godden, n. 16 above, at p. 96.

[42] Decision 27/CMP.1, n. 19 above.

[43] Decision 4/CMP.2, Compliance Committee, UN Doc. FCCC/KP/CMP/2006/10/Add.1, 4 Mar. 2007.

[44] S. Urbinati, 'Procedures and Mechanisms Relating to Compliance under the 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change', in Treves et al., n. 5 above, pp. 63–84, at 65–6.

[45] Decision 27/CMP.1, n. 19 above, at section XI, para. 1.

[46] Lefeber & Oberthür, n. 26 above, at p. 86.

[47] Decision 27/CMP.1, n. 19 above, at section II.

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bifurcated to reflect the various facilitation, compliance promotion and enforcement-oriented aims of the compliance procedures and mechanisms.[48] The Facilitative Branch is tasked with advising on and facilitating implementation for all Parties, and promoting compliance by Annex I Parties[49] with Protocol commitments that do not relate to emissions reduction commitments,[50] taking into account the principle of 'common but differentiated responsibilities and respective capacities'.[51] It is also intended to serve as an 'early-warning' function for potential non-compliance in relation to emissions targets and methodological and reporting requirements.[52] By contrast, the Enforcement Branch has a mandate to take significantly stronger measures in response to questions involving emissions reduction commitments and related reporting and eligibility requirements 'taking into account the cause, type, degree and frequency of the non-compliance of that Party'.[53] The plenary serves as a link between the Compliance Committee and the CMP, and plays a largely administrative role.[54]

2.3. *Non-Compliance Response Measures*

In the event of a finding of non-compliance, the Facilitative Branch has recourse to a number of 'soft' responses, including the provision of advice regarding implementation, financial and technical assistance, and the formulation of recommendations.[55] The significantly more intrusive consequences of a finding of non-compliance available to the Enforcement Branch include the requirement of a 'compliance action plan' for remedying non-compliance with methodological and reporting requirements,[56] suspension of states from participating in the Protocol's flexibility mechanisms[57] if the non-compliance issue concerns the eligibility requirements,[58] and deductions from future emissions allocations if a Party's emissions target is exceeded.[59] A Party may

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48 Decision 27/CMP.1 states that the objectives of the procedures and mechanisms are to 'facilitate, promote and enforce compliance': ibid., at section I.

49 That is, developed countries and countries in transition. Other categories of countries under the UNFCCC are Annex II countries, which includes members of the Organisation for Economic Cooperation and Development and the European Community, and non-Annex I Parties, which are developing countries: Urbinati, n. 44 above, at p. 64.

50 Stated differently, the mandate of the Facilitative Branch is to address questions of implementation that are not within the purview of the Enforcement Branch: G. Ulfstein & J. Werksman, 'The Kyoto Compliance System: Towards Hard Enforcement', in O.S. Stokke, J. Hovi & G. Ulfstein (eds), *Implementing the Climate Regime: International Compliance* (Earthscan, 2005), pp. 39–62, at 45.

51 Decision 27/CMP.1, n. 19 above, at section IV, para. 4.

52 S. Oberthür, 'Options for a Compliance Mechanism in a 2015 Climate Agreement' (2014) 4(1–2) *Climate Law* pp. 30–49, at 40.

53 Decision 27/CMP.1, n. 19 above, at section XV, para. 1; J. Brunnée, 'Promoting Compliance with Multilateral Environmental Agreements', in Brunnée, Doelle & Rajamani, n. 11 above, pp. 38–54, at 50.

54 Lefeber & Oberthür, n. 26 above, at pp. 81–2.

55 Decision 27/CMP.1, n. 19 above, at section XIV.

56 Ibid., at section XV, para. 5(b).

57 The three flexibility mechanisms are joint implementation, the clean development mechanism and emissions trading: see Arts 6, 12 and 17 Kyoto Protocol.

58 Decision 27/CMP.1, n. 19 above, at section XV, para. 5(c).

59 Specifically, a 'deduction from the Party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions': ibid., at section XV, para. 5(a).

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appeal to the CMP against a decision of the Enforcement Branch if it believes it has been denied due process and the decision 'relates to' Article 3(1) of the Kyoto Protocol regarding national emissions targets.[60]

3. THE RE-ASSERTION OF POLITICS IN THE ERT PROCESS

The Kyoto compliance system represents a sophisticated administrative apparatus for holding states to account for their international environmental commitments under the Kyoto Protocol. However, experience during the first commitment period indicates that there is considerable dissonance between the extent of depoliticization reflected in the compliance rules, and decision making in practice. It will be argued in this section that the procedures for impartial and autonomous technical review by ERTs have been undermined by simultaneous expectations on ERTs to respect state sovereignty and the diplomatic customs of international law. This has negative implications for the reliability and consistency of ERTs' review processes.

3.1. *Deference to State Sovereignty in Review Practices*

Despite the ostensibly technical nature of expert review of states' national emissions inventories, considerable deference to state sovereignty is expected in the review process. The review requirements to be fulfilled by ERTs are articulated in Article 8 of the Protocol, which includes a requirement at sub-paragraph (3) that '[t]he review process shall provide a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of [the] Protocol'. Inventories are to be reviewed against the basic principles of transparency, consistency, comparability, completeness and accuracy, as required by the UNFCCC reporting guidelines.[61] The main focus of such review processes, which consist primarily of desk reviews and may include in-country reviews, is the overall reliability of national emissions inventories.[62]

In practice, there is considerable uncertainty associated with quantifying GHG emissions, leading to reliance on estimation techniques,[63] which can undermine the accuracy and completeness of states' emissions reports. This means that while reviewed emissions inventories may be deemed to be legally compliant, they may not be 'in scientific compliance'.[64] The main checks that ERTs can make relate to: (i) comparisons with a state's historically reported data; (ii) conformity with standard IPCC methodologies; (iii) country-level statistics on the production, import and export of fuel from the International Energy Agency; and (iv) comparisons with the

[60] Ibid., at section XI, para. 1.

[61] UNFCCC, 'Review of the Implementation of Commitments and of Other Provisions of the Convention: UNFCCC Guidelines on Reporting and Review', FCCC/CP/20002/8, 28 Mar. 2003, at section B, para. 2.

[62] Zahar, n. 40 above, at p. 315.

[63] Ulfstein & Werksman, n. 50 above, at p. 52; R. Simnett, M. Nugent & A. Huggins, 'Developing an International Assurance Standard on Greenhouse Gas Statements' (2009) 23(4) *Accounting Horizons*, pp. 347–63, at 353–4.

[64] T. Berntsen, J. Fuglestvedt & F. Stordal, 'Reporting and Verification of Emissions and Removals of Greenhouse Gases', in Stokke, Hovi & Ulfstein (eds), n. 50 above, pp. 85–106.

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types of issue reported in other states' reports (four reports are typically scrutinized by an ERT in a six-day, centralized review process).[65] Non-state sources are not to be consulted in verifying states' emissions information unless the government of the state under review formally supplied that data.[66] ERTs may compare the consistency of information reported by states to various international bodies, and may undertake procedural and other types of consistency check, but may not independently verify the emissions information reported by states.

The expectation of reliance by ERTs on official materials produced by sovereign states contrasts with the more wide-ranging powers available to the Enforcement Branch for collecting compliance information,[67] and places a significant limitation upon the capacity of ERTs to meaningfully review the accuracy and completeness of states' emissions reports. Considering the significant authority that ERTs have assumed within the Kyoto compliance system, it is a matter of concern that their ability to provide rigorous review of states' emissions information is so heavily constrained. As the following discussion demonstrates, this is just one of many ways in which deference to state sovereignty is expected of ERTs.

3.2. *The Reliability and Consistency of Review Processes*

There is a considerable disconnect between the technical and ostensibly depoliticized roles of ERTs evidenced in the compliance rules, and the realities of their roles and decision making in practice. The compliance rules and procedures require members of ERTs to serve in their personal capacities – that is, as technical experts, rather than as state representatives[68] – and stipulate that they may not participate in reviews of their country of origin,[69] which, prima facie, promotes impartiality. To achieve geographical representation, ERTs are typically composed of six experts from diverse countries, excluding the country under review. In determining the composition of these teams, the Secretariat aims to ensure an appropriate balance between representatives from Annex I and non-Annex I Parties (of the two lead reviewers for each review, one is from an Annex I and one is from a non-Annex I Party), as well as a geographical balance within these two groups.[70]

A closer examination of the UNFCCC Roster of Experts[71] reveals that almost all reviewers work in government departments for their national governments, and many are involved in the preparation of their own country's emissions inventory.[72] On a pragmatic level, this may provide members with valuable insights into the processes

[65] Zahar, Peel & Godden, n. 16 above, at pp. 105–6.

[66] Ibid., at p. 119, citing UNFCCC Secretariat, *Handbook for Review of National GHG Inventories* (undated), at pp. 11–2.

[67] See the discussion in Section 4.2 below describing the more far-reaching review powers of the Enforcement Branch.

[68] Decision 22/CMP.1, n. 18 above, at para. 23.

[69] Ibid., at para. 25.

[70] Herold, n. 39 above, at p. 135.

[71] UNFCCC, n. 29 above.

[72] Zahar, n. 15 above, at pp. 423–4.

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of preparing and reviewing national emissions inventories. Nonetheless, their political independence is drawn into question if they are effectively playing the double role of reviewer and of those whose work is reviewed. Fransen's 'not-for-attribution interviews' with individuals involved in the review process for Annex I national communications under the UNFCCC[73] indicate that ERT members are 'reluctant to challenge each other's communications for fear of their own communications being challenged'.[74] As the same pool[75] of reviewers is responsible for reviews of national emissions inventories of Annex I states, and the compliance stakes are higher, this tendency is also likely to be evident, and perhaps more pronounced, in the Kyoto compliance system. Thus, the practices that allow reviewers to serve these double roles are out of step with the 'spirit' of the rules and procedures, which codify more rigorous standards of impartiality.

The intended political neutrality and rigour of the review process is reflected in the following requirement of Decision 22/CMP.1:

> Each expert review team shall provide a thorough and comprehensive technical assessment of information submitted under Article 7 and shall, under its collective responsibility, prepare a review report, assessing the implementation of the commitments of the Party included in Annex I and identifying any potential problems in, and factors influencing, the fulfilment of commitments. The expert review teams *shall refrain from making any political judgement*.[76]

However, guidelines issued by the UNFCCC in 2003 state that one of the aims of ERT reviews should be the examination of reported information in a 'facilitative and open manner'.[77] As diplomacy and negotiations are almost invariably intertwined with facilitative processes,[78] it is contradictory to expect ERTs to engage in compliance facilitation whilst refraining from 'making any political judgement'. There thus appears to be a tension between the UNFCCC's 2003 guidance and the CMP decision of 2006. Although it may be expected that the latter decision would override the former guidance, the UNFCCC's guidance appears to have significantly influenced practice.

Zahar, Peel and Godden observe that 'in fact, the state retains much of its sovereign power and the UNFCCC Secretariat carefully manages the ERTs to ensure that their attitude is facilitative and respectful of the age-old customs of

73 The largely procedural requirements for non-Annex I countries under the UNFCCC relate to establishing emissions inventories, emissions mitigation programmes and producing national communications reports: Art. 4(1)(a), (b) and (j) UNFCCC.

74 T. Fransen, 'Enhancing Today's MRV Framework to Meet Tomorrow's Needs: The Role of National Communications and Inventories', World Resources Institute, June 2009, at p. 8, available at: http://www.wri.org/sites/default/files/national_communications_mrv.pdf.

75 ERTs are responsible for 'in-depth review' of Annex I Parties' national communications and technical review of their inventories under the UNFCCC. They are also responsible for the 'periodic' reviews of national communications and the 'annual reviews' of inventories under the Kyoto compliance system: A. Zahar, *International Climate Change Law and State Compliance* (Routledge, forthcoming 2015), at p. 41.

76 Decision 22/CMP.1, n. 18 above, at para. 21 (emphasis added).

77 UNFCCC, n. 61 above, at p. 83.

78 Klabbers, nn. 6 & 7 above.

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international law'.[79] This includes 'considerable give and take' between the ERT and the state under review during a period of facilitative dialogue in which the state may voluntarily revise its emissions accounts to align with preliminary advice received from the ERT.[80] The ability of states to *revise* reported data in line with ERT advice seems to go far beyond one of the stated objectives of the ERT process, which is to 'assist' Parties in *improving* their emissions reporting and the implementation of their commitments under the Protocol.[81]

Furthermore, Fransen's interview data collected from ERT members who conducted reviews of national communications under the UNFCCC suggests that 'parties at times pressure the review teams to alter the language used in the [ERT] reports'.[82] Again, as the compliance stakes are higher under the Kyoto Protocol, which has binding emissions targets, this tendency is likely to be exacerbated under the Kyoto compliance system. Thus, it appears that both states and ERTs may revise their reported information in light of their facilitative dialogue – that is, despite the rule of procedure stating that ERTs shall refrain from making any political judgment, diplomatic and facilitative decision-making modes have considerable traction in practice. The implications of the ERTs being allowed, and even encouraged, to assume this political role in the compliance system will be teased out in the following discussion.

There appears to be a clear procedure for the listing of questions of implementation by ERTs for referral to the Compliance Committee:

> Only if an unresolved problem pertaining to language of a mandatory nature in these guidelines influencing the fulfilment of commitments still exists after the Party included in Annex I has been provided with opportunities to correct the problem within the time frames established under the relevant review procedures, *shall* that problem be listed as a question of implementation in the final review reports.[83]

The literal meaning of this text is that ERTs shall (that is, must) list non-compliance with a mandatory requirement of the Kyoto Protocol as a question of implementation if the issue is not resolved through dialogue.[84] This appears to align with depoliticization aims to the extent that it promotes the consistent treatment of non-compliance issues according to pre-agreed standards.

However, in practice the rules of procedure regarding the listing of questions of implementation by ERTs for referral to the Compliance Committee have been interpreted as vesting discretion in the ERTs to determine *if and when* they will list a Party's breach of a mandatory rule for action by the Compliance Committee.[85]

79 Zahar, Peel & Godden, n. 16 above, at p. 104.

80 Ibid.; Decision 27/CMP.1, n. 19 above, at para. 7.

81 Decision 27/CMP.1, n. 19 above, at para. 2(c) (emphasis added). See also Decision 22/CMP.1, n. 18 above, paras 5, 106 and 117.

82 Fransen, n. 74 above, at p. 8.

83 Decision 27/CMP.1, n. 19 above, at para. 8 (emphasis added).

84 Zahar, n. 15 above, at p. 420. The requirements for facilitative dialogue are provided in Decision 27/CMP.1, n. 19 above, at para. 7.

85 Zahar, n. 15 above, at p. 422. This situation is compounded by drafting weaknesses resulting in a lack of clarity regarding which requirements are mandatory and which are not: Zahar, n. 75 above, at pp. 67–8.

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Significantly, it appears that ERTs have assumed the role of ad hoc gatekeeper, referring only eight matters to the Compliance Committee since 2006,[86] which seems unlikely to reflect the full range of compliance issues arising in the first commitment period. One explanation for this is that ERTs are engaging in facilitation themselves[87] rather than passing such matters up to be dealt with by the Facilitative Branch. A related explanation, which similarly underscores the facilitative element of compliance, is that states are more willing to negotiate with ERTs to resolve differences than to allow the matter to escalate so as to require a formal compliance determination.[88] Either way, the extent to which ERTs fulfil their mandate to act independently and hold states to account for their emissions obligations continues to be strongly influenced by facilitative compliance politics.

A risk associated with these informal and opaque facilitative processes is that consistency in addressing compliance issues will be undermined. There appear to have been multiple attempts by the Enforcement Branch and the Compliance Committee's plenary to address this issue. In 2010, for example, the Enforcement Branch reprimanded the ERTs for lack of consistency in listing 'unresolved problem[s] pertaining to language of a mandatory nature' in ERT reports.[89] In March 2010, an ERT finalized its review of Bulgaria's 2009 inventory report and identified a question of implementation concerning Bulgaria's national system, which triggered non-compliance proceedings. Specifically, the ERT concluded that Bulgaria's national system did not operate in accordance with the Guidelines for National Systems for the Estimation of Emissions by Sources and Removals by Sinks under Article 5(1) of the Kyoto Protocol because of inadequacies in (i) the country's institutional arrangements and (ii) the arrangements for the technical competence of staff within the national system involved in the inventory-development process.[90]

Significantly, these problems were not new for Bulgaria and had been identified in both in-country and desk reviews by ERTs in the previous two years.[91] In line with their mandate to assist states to improve their national emissions reporting,[92] in previous years the ERTs had made suggestions for enhancing Bulgaria's national system, but only engaged the Compliance Committee in relation to these concerns in 2010. In its final decision concerning Bulgaria, the Enforcement Branch formally expressed concern about the 'lack of clarity' in this ERT report:

> During its implementation, the branch noted with concern the lack of clarity in the 2010 [Annual Review Report], which does not clearly explain why unresolved questions

86 UNFCCC Secretariat, 'Compliance under the Kyoto Protocol' (2014), available at: http://unfccc.int/kyoto_protocol/compliance/items/2875.php.

87 M. Doelle, 'Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design' (2010) 1(2) *Climate Law*, pp. 237–60, at 260.

88 Lefeber & Oberthür, n. 26 above, at p. 94.

89 Decision 22/CMP.1, n. 18 above, at para. 8.

90 Compliance Committee, Report of the Review of the Annual Submission of Bulgaria Submitted in 2009, CC-2010-1-1/Bulgaria/EB, 17 Mar. 2010, at para. 200.

91 M. Doelle, 'Compliance and Enforcement in the Climate Change Regime', in E.J. Hollo, K. Kulovesi & M. Mehling (eds), *Climate Change and the Law* (Springer, 2012), pp. 165–88, at 182.

92 Decision 22/CMP.1, n. 18 above, at paras 2(c), 5 and 7.

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> did not result in the listing of questions of implementation pursuant to paragraph 8 of the annex to decision 22/CMP.1. In particular, differing interpretations of this provision may lead to different conclusions as to whether an unresolved problem is required to be listed as a question of implementation. This reveals more systematic issues that concern the review process under Article 8 of the Kyoto Protocol and the compliance system as a whole, which require urgent attention.[93]

This comment by the Enforcement Branch underscores both the facilitative dimension of the roles of ERTs and implies a rebuke to them for exercising undue discretion in deciding when to list questions of implementation and thus escalate compliance matters.

These types of concern have been echoed by the Compliance Committee's plenary. For example, in the 2011 Annual Report of the Compliance Committee the plenary 'recommended' that future ERT reports include a list of problems identified in the review process, providing reasons as to whether or not each problem relates to language of a mandatory nature and, if the ERT decides not to list such a problem as a question of implementation, an explanation of the basis for this decision.[94] Thus, it appears that the plenary was seeking to enhance consistency and accountability on the part of ERTs through imposing requirements to give reasons.[95] Further, in 2012, both branches and the bureau of the Compliance Committee proposed a joint workshop with ERT lead reviewers to focus on the issue of improving the consistency of reviews.[96] The workshop was held in Bonn (Germany) in March 2013.[97] Thus, there has been ongoing concern about the fairness of the discretionary elements in the decision-making processes of ERTs, and concerted attempts to rectify this issue.

3.3. *Are ERTs Appropriately Equipped to Engage in Facilitation?*

The appropriateness of technical experts engaging in diplomatic facilitation of compliance deserves further consideration. It is notable that the designers of the Kyoto compliance system have departed from common practice in other major global MEAs – including the Montreal Protocol on Substances that Deplete the Ozone Layer[98] and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[99] – where UN-sponsored bureaucracies or political bodies

[93] Compliance Committee, Decision under Paragraph 2 of Section X, CC-2010-1-17/Bulgaria/EB, 4 Feb. 2011, at para. 14.

[94] Compliance Committee, Annual Report of the Compliance Committee to the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Seventh Session, FCCC/KP/CMP/2011/5, 3 Nov. 2011, para. 28, available at: http://unfccc.int/resource/docs/2011/cmp7/eng/05.pdf.

[95] Kingsbury, Krisch & Stewart, n. 33 above, at p. 39.

[96] Compliance Committee, Annual Report of the Compliance Committee to the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Eighth Session, FCCC/KP/CMP/2012/6, 8 Nov. 2012, para. 28, available at: http://unfccc.int/resource/docs/2012/cmp8/eng/06.pdf.

[97] Compliance Committee, Annual Report of the Compliance Committee to the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Ninth Session, FCCC/KP/CMP/2013/3, 1 Oct. 2013, para. 7, available at: http://unfccc.int/resource/docs/2013/cmp9/eng/03.pdf.

[98] Montreal (Canada), 16 Sept. 1987, in force 1 Jan. 1989, available at: http://ozone.unep.org/new_site/en/montreal_protocol.php.

[99] Washington, DC (US), 3 Mar. 1973, in force 1 Jul. 1975, available at: http://www.cites.org.

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play pivotal roles in facilitating compliance.[100] By contrast, the Kyoto compliance system vests facilitative decision-making authority in the ERTs and the Facilitative Branch, which are both ostensibly composed of independent experts.[101] As will be elaborated in the following section, the facilitative roles played by the ERTs have meant that the Facilitative Branch, which was specifically designed for this purpose, has been rendered obsolete. In effect, therefore, the small teams of experts who comprise the ERTs have assumed the chief responsibility for facilitating Annex I states' compliance with their obligations under the Kyoto Protocol. This raises a question about whether the technical experts conducting expert reviews are in fact suitably equipped to engage in the high-level politics associated with facilitating state compliance with international environmental commitments.

Most reviewers are national government bureaucrats, although a handful have come from other career backgrounds such as academia.[102] Such backgrounds may equip members to deal with the technical dimensions of emissions review. However, if ERTs are to play a vital role in facilitating compliance, it is arguable that a background in international diplomacy and negotiation is at least beneficial, and arguably indispensable, for engaging in high-stakes political compliance negotiations.

The administrative apparatus of the Kyoto compliance system may be seen to be 'embedded' within a broader, state-sanctioned space for political negotiation[103] in the UNFCCC as an MEA. From this vantage, the political 'embeddedness' of actors within the Kyoto compliance system – including members of ERTs who, as previously mentioned, may play the role of both reviewer and those whose work is reviewed – is arguably desirable. According to this view, members' 'understanding of diverse interests, as well as the ability to engage with actors credibly in a deliberative manner'[104] may, in fact, be productive and contribute to the legitimacy and smooth functioning of the administrative apparatus in practice.

In this instance, however, the facilitative role of experts in the ERTs appears to go beyond constructive embeddedness. Here, the mantle of 'expertise' appears to mask sensitive political negotiations that occur behind the scenes, and it is doubtful that technical experts are best qualified for this type of role. A more open acknowledgement of the dual nature of the functions of ERTs, and the limits of expertise in these political settings, raises questions about whether multidisciplinary teams, composed of both technical experts and skilled diplomats/negotiators, would be better equipped to fulfil the diverse responsibilities of ERTs. Such an arrangement may well be able to combine the legitimacy benefits associated with both expert decision making and diplomatic politics in this setting. As it appears likely that internationally coordinated ERTs will remain a central plank of future compliance processes in the emerging international climate regime, it is

100 See, e.g., A. Fodella, 'Structural and Institutional Aspects of Non-Compliance Mechanisms', in Treves et al., n. 5 above, pp. 355–72, at 360.

101 See n. 19 above.

102 UNFCCC Secretariat, n. 29 above.

103 This argument is informed by Dubash & Morgan, n. 13 above, at p. 290.

104 Ibid.

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perhaps timely to consider reforming the team composition requirements for ERTs in this vein.[105]

4. DEPOLITICIZING THE COMPLIANCE COMMITTEE: A MIXED RECORD

4.1. *The Significance of Bypassing the Facilitative Branch*

ERTs exercise discretion to determine which matters will be passed up to the Compliance Committee. During the first commitment period, the bureau referred all eight substantive compliance matters escalated by the ERTs to the Enforcement Branch. Only one substantive submission was made to the Facilitative Branch by South Africa on behalf of the G-77 and China back in 2006 – that is, before the start of the first commitment period – but it did not proceed because of a failure of the Branch members to agree on a procedural issue.[106]

The limited recourse to the Facilitative Branch in the first commitment period is attributable in part to the pivotal role played by the ERTs in facilitating compliance,[107] which rendered the role of the Facilitative Branch largely obsolete. The Secretariat – which, as previously noted, carefully manages the ERTs 'to ensure their attitude is facilitative and respectful of the age-old customs of international law'[108] – appears to endorse the assumption of facilitative responsibilities by the ERTs in place of the Facilitative Branch. An additional factor contributing to the moribund state of the Facilitative Branch during the first commitment period was the absence of a trigger for its early-warning function.[109] Since 2011, the Branch has attempted to rectify this issue and clarify its mandate by re-interpreting its rules in a way that give it an effective role in advice provision and addressing early-warning issues. However, it has achieved minimal success in establishing a meaningful niche for itself vis-à-vis the facilitative roles played by the ERTs.[110]

Significantly, there are numerous due process requirements for matters heard before the Facilitative Branch, including rights of the Party concerned to (i) representation; (ii) submit information for consideration; (iii) comment in writing on other information relied upon, and on the final decision; and (iv) request translation of relevant documents into one of the six official UN languages. In addition, decisions of the Facilitative Branch must include conclusions and reasons.[111] Although ERTs must take into account information submitted by the Parties and provide some conclusions and reasons in their reports, there are far fewer procedural safeguards governing their facilitative work. This effectively equates to a sanctioned bypassing of the more formal

105 See further discussion in Section 5 below.
106 Doelle, n. 91 above, at pp. 171–2.
107 Lefeber & Oberthür, n. 26 above, at p. 99.
108 See n. 79 above.
109 Oberthür, n. 52 above, at p. 40; Zahar, n. 75 above, at p. 72.
110 Zahar, n. 75 above, at pp. 72–4, 79–82.
111 Decision 27/CMP.1, n. 19 above, at section VIII.

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processes and procedural safeguards of the Facilitative Branch in favour of the less transparent and accountable facilitative processes undertaken by ERTs.

According to proponents of global administrative law, the types of due process guarantee built into the design of the Facilitative Branch may enhance the legitimacy of its decision-making processes.[112] If utilized, the Facilitative Branch may represent a legitimate 'procedurally constrained space for political negotiations'[113] that would help to ameliorate the risk of compliance becoming subject to power politics.[114] A closer examination of the bypassing of the Facilitative Branch raises questions about whether, despite the specifically designed procedures that seek to safeguard compliance from undue politicization, there remains an underlying preference for traditional facilitative and cooperative political approaches to resolving compliance issues in IEL.[115]

4.2. *Risks of Politicization in the Enforcement Branch*

The Enforcement Branch, like the ERTs, reviews state compliance with their treaty obligations. In contrast to the ERTs, the Enforcement Branch has recourse to a significantly wider array of information sources, including ERT reports and information provided by the Party concerned, the COP to the UNFCCC, the CMP to the Kyoto Protocol, the subsidiary bodies, competent intergovernmental and non-governmental organizations, and external experts.[116] Thus, the capacity of the Enforcement Branch to meaningfully review compliance by Parties with their obligations under the Protocol is considerably greater than that of the ERTs. This may be considered appropriate to legitimize the authority to impose consequences for non-compliance vested in the Enforcement Branch. The practical utility of these extensive review powers is, however, drawn into question given the bottleneck created by the ERTs, whose decisions are based on far more limited information.

As with the ERTs and the Facilitative Branch, there are requirements for the expert members of the Compliance Committee to be independent. Members of the Compliance Committee 'shall serve in their individual capacities'[117] as technical experts, rather than as state representatives, and shall 'act in an independent and impartial manner and avoid real or apparent conflicts of interest'.[118] Further, they must take a written oath of service, vouching that their role will be undertaken 'honourably, faithfully, impartially and conscientiously' and with full disclosure of any potential conflict of interest.[119] A complaints procedure has been established for alleged conflicts of interest or incompatibility with 'the requirements of independence

112 See n. 33 above.

113 Dubash & Morgan, n. 13 above, at p. 289; Schrefler, n. 23 above, at pp. 77–80.

114 Tanzi & Pitea, n. 5 above, at p. 573; Klabbers, n. 7 above.

115 See nn. 2–4 above.

116 Decision 27/CMP.1, n. 19 above, at sections VIII.3 and VIII.4; Decision 4/CMP.2, n. 43 above, rule 20.

117 Decision 27/CMP.1, n. 19 above, at section II, para. 6.

118 Decision 4/CMP.2, n. 43 above, rule 4.1.

119 Ibid., rule 4.2.

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and impartiality'.[120] From a depoliticization standpoint, these appear to be desirable requirements for persons engaging in quasi-judicial[121] decision making.

The CMP's decision making regarding funding arrangements, which are obviously informed by pragmatic budget constraints, place some strain on the practical implementation of these requirements of independence and impartiality. In the case of developed states,[122] because of the absence of centrally provided funding, it is the Party who nominated the expert that meets that expert's expenses, and '[s]ome 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'.[123] Repeated requests for the CMP to provide funding for all regular and alternate members of the Enforcement Branch in the interests of independence and neutrality have been unsuccessful.[124]

A further risk of politicization and partisanship stems from the possibility that a member of the Compliance Committee may concurrently serve as a member of a delegation to a meeting under the UNFCCC or the Kyoto Protocol. This appeared to be an issue in an appeal made to the CMP initiated by Croatia in 2010, but which was subsequently withdrawn with no reasons provided.[125] It was claimed in the appeal documentation that a conflict of interest existed as an alternate member of the Enforcement Branch 'was also a member of the EU delegation at COP-12 in Nairobi which had expressed its reservation regarding the applicability of the flexibility under decision 7/CP.12 for Croatia to the Kyoto Protocol'.[126] The Compliance Committee has recommended that 'due diligence' be exercised in such cases of potential conflict of interest.[127]

It should be noted, however, that risks of partisanship stemming from domestic funding sources and national interest representation at negotiations are common problems that beset most international organizations.[128] They do not necessarily imply a failure or a significant limitation of attempts at depoliticization. Rather,

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120 Ibid., rule 4.4.

121 The UNFCCC Secretariat has said that the Compliance Committee is 'neither an international organization nor an international court. … The function of the enforcement branch may, however, be described as "quasi-judicial", in the sense that the branch determines whether states have complied with their legal obligations under the Kyoto Protocol and it applies predetermined consequences in cases of non-compliance': UNFCCC Secretariat, 'Procedural Requirements and the Scope and Content of Applicable Law for the Consideration of Appeals under Decision 27/CMP.1 and Other Relevant Decisions of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, as well as the Approach Taken by other Relevant International Bodies Relating to Denial of Due Process', Technical Paper, FCCC/TP/2011/6, at para. 43.

122 The travel and subsistence expenses of representatives from some developing and low-income countries are reimbursed by the Secretariat: Lefeber & Oberthür, n. 26 above, at pp. 83–4.

123 Ibid., at p. 84, reflecting on their personal experiences as members of the Enforcement Branch.

124 Ibid., at pp. 83–4.

125 Decision 14/CMP.7, 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, FCCC/KP/CMP/2011/10/Add.2, 15 Mar. 2012, at para. 1.

126 Kyoto Protocol Secretariat, Annual Report of the Compliance Committee to the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Sixth Session, FCCC/KP/CMP/2010/6, 8 Oct. 2010, at para. 53; see also Ulfstein, n. 12 above, at p. 420.

127 Kyoto Protocol Secretariat, ibid., at para. 50.

128 Fodella, n. 100 above, at pp. 362–3.

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notwithstanding the risks outlined above, it is suggested that the reliance on experts in the Enforcement Branch represents a high level of depoliticization compared with other global MEA compliance processes.

4.3. *Successful Attempts to Insulate Compliance Decision Making from Undue Political Interference*

In IEL (and indeed international law more broadly) there is a risk that without adequate procedural safeguards compliance will be strongly shaped by the differences in power among the Parties.[129] In contrast to the flexible and discretionary approaches that typically characterize MEAs' compliance systems,[130] the rules of the Enforcement Branch provide an 'automatic review approach' for different types of non-compliance.[131] These include the requirement of deductions from future emissions allocations if a Party's emissions target is exceeded, a 'compliance action plan' for remedying non-compliance with methodological and reporting requirements, and suspension of states from participating in the Protocol's flexibility mechanisms if the non-compliance issue concerns eligibility requirements.[132] Notably, the Enforcement Branch appears to have successfully adhered to procedures promoting similar treatment of analogous cases, evidencing relative freedom from political interference.

Consistent consequences have been applied in each of the eight substantive compliance matters decided before the Enforcement Branch to date.[133] Six of the eight compliance matters have involved eligibility requirements, simultaneously raising questions of methodology and reporting, with the result that the consequences applied included both exclusion from the flexibility mechanisms and a requirement to produce a compliance action plan. In the case of Canada, heard in 2008, the Enforcement Branch deemed that Canada had rectified the factual issues that had originally catalyzed the question of implementation in relation to reporting and methodological requirements, and no consequences were applied.[134] In the most recent case heard by the Enforcement Branch against Slovakia for non-compliance with methodological and reporting requirements in 2012, the consequence applied was the requirement for a compliance action plan to be submitted within three months. Thus, the consequences applied in practice appear to treat analogous cases similarly according to ascertainable rules, aligning with the ideals of depoliticization and the 'assurance of legality' in global regulatory bodies.[135]

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129 Tanzi & Pitea, n. 5 above, at p. 573; Klabbers, n. 7 above.

130 Bodansky, n. 3 above, at p. 251; Klabbers, n. 6 above, at pp. 996–7.

131 Brunnée, n. 15 above, at p. 306.

132 Decision 27/CMP.1, n. 19 above, at section XV, paras 5(a), (b) and (c).

133 The eight substantive matters that have been decided by the Enforcement Branch to date concern Greece, Canada, Croatia, Bulgaria, Romania, Ukraine, Lithuania and Slovakia: UNFCCC Secretariat, n. 86 above.

134 More broadly, however, the inability of the Kyoto compliance system to address or resolve Canada's non-compliance with its first commitment period target, which ultimately led to Canada's withdrawal from the Kyoto Protocol in 2011, resulted in 'heavy criticism of the compliance system as a whole': Lefeber & Oberthür, n. 26 above, at p. 99.

135 This is one of the aims of global administrative law: see Kingsbury, Krisch & Stewart, n. 33 above, at p. 28.

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4.4. *Appeals to the CMP*

A Party may appeal to the CMP against a decision of the Enforcement Branch if it believes it has been denied due process and the decision 'relates to' Article 3(1) of the Kyoto Protocol.[136] This indicates that Parties do not have a right of appeal against *all* Enforcement Branch decisions, including appeal on the grounds of other legal and technical errors. If the CMP agrees by a three-quarters majority vote that there has been a lack of due process, it can 'override' the decision and the matter will be referred back to the Enforcement Branch.[137]

These provisions are yet to be tested. Croatia initiated an appeal against a final decision of the Enforcement Branch in January 2010, but then withdrew the appeal in August 2011 without providing reasons.[138] The compliance procedures and mechanisms under Decision 27/CMP.1 do not specify that the Compliance Committee's duty to make information available to the Party concerned[139] includes a duty to disclose relevant procedural issues, such as potential conflicts of interest, that may be grounds for review.[140] Thus, in practice, it seems likely that this appeals route will continue to serve a largely symbolic function.

It is significant that the CMP, a political organ, does not have the authority to make a substantive decision on compliance or to overrule such a decision made by the more independent Compliance Committee.[141] Thus, the avenues of review to the CMP are deliberately limited to minimize the possibility of political interference with the quasi-judicial decision making of the Enforcement Branch,[142] which is an unusual limitation on the power of states in international law.

In sum, the Kyoto compliance system has attempted to insulate all tiers of its compliance hierarchy from undue political influence, through review teams and a Compliance Committee made up of experts, and by limiting the accountability of these bodies to the Parties serving as the CMP. However, politics has crept back into this system through the facilitative roles of the ERTs, allowing the circumvention of the numerous procedural safeguards built into the system's design.

5. THE CURRENT AND LIKELY FUTURE COMPLIANCE TRAJECTORIES UNDER THE INTERNATIONAL CLIMATE REGIME

This section will outline likely future compliance trajectories under the international climate regime, and assess them in light of the foregoing analysis. In particular, there appears to be a strong likelihood of continuing and even greater reliance on

136 Decision 27/CMP.1, n. 19 above, at section XI, para. 1.

137 Ibid., at section XI.

138 Decision 14/CMP.7, n. 125 above, at para. 1.

139 Decision 27/CMP.1, n. 19 above, at section VII, paras 4 and 5; section VIII, para. 7; and section IX, para. 6.

140 UNFCCC Secretariat, n. 121 above, at para. 31.

141 Ibid., at para. 37. However, the CMP does have authority to change the substantive rule upon which the non-compliance is based: ibid.

142 Lefeber & Oberthür, n. 26 above, at p. 85.

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internationally coordinated expert review processes in the future, reinforcing the salience of the foregoing critiques of the multiple roles played by ERTs.

At the eighth CMP in Doha (Qatar) in December 2012, a significantly reduced number of states, accounting for 22% of global emissions,[143] committed to the Kyoto Protocol's second commitment period from 2013 to 2020. The second commitment period, which commenced on 1 January 2013, allows a continuation of the Protocol's legal requirements and preserves the flexibility, accounting, review and compliance mechanisms established under the first commitment period.[144] Significantly, however, as of November 2014, the Doha Amendment is yet to enter into force.[145] This relatively bleak state of affairs raises questions about the future of the Kyoto Protocol and of compliance under the UNFCCC.

The ongoing negotiations regarding the international climate regime's future have been structured along two parallel tracks – the Kyoto Protocol track, which lacks United States (US) support, and the UNFCCC track, which has the advantage of comprehensive coverage.[146] In recent COP negotiations – most notably in Copenhagen (Denmark) in 2009 and Cancún (Mexico) in 2010 – there has been a marked shift away from the Kyoto Protocol's top-down 'prescriptive, quantitative, time-bound, compliance-backed approach' to a privileging of decentralized, bottom-up selection of national mitigation targets and actions, reinforced by robust reporting frameworks.[147] The latter involves steps to strengthen the system of reporting and verification under the UNFCCC for *all* countries. In particular, international assessment and review (IAR) processes will apply to developed countries' GHG inventories, biennial reports and national communications,[148] and international consultation and analysis (ICA) processes will apply to developing countries' biennial update reports.[149] IAR is to be a 'robust, rigorous and transparent process' undertaken by ERTs 'with a view to promoting comparability and confidence'.[150]

143 This figure was calculated by Rajamani: L. Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61(2) *International and Comparative Law Quarterly*, pp. 501–18, at 516.

144 UNFCCC Secretariat, 'At UN Climate Conference in Doha, Governments Take Next Essential Steps in Global Response to Climate Change', Press Release, 8 Dec. 2012, at p. 2, available at: http://unfccc.int/files/press/press_releases_advisories/application/pdf/pr20120812_cop18_close.pdf.

145 United Nations Treaty Collection, 'Chapter XXVII Environment: 7.c Doha Amendment to the Kyoto Protocol' (2014), available at: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-c&chapter=27&lang=en. In order for this amendment to enter into force, an instrument of acceptance must be received by the Depositary from at least three quarters of the Parties to the Protocol: Art. 20(4) Kyoto Protocol.

146 L. Rajamani, 'Addressing the "Post-Kyoto" Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime' (2009) 58(4) *International and Comparative Law Quarterly*, pp. 803–34, at 830.

147 Rajamani, Brunnée & Doelle, n. 11 above, at p. 7; L. Rajamani, 'The Cancun Climate Agreement: Reading the Text, Subtext and Tea Leaves' (2011) 60(2) *International and Comparative Law Quarterly*, pp. 499–519.

148 Decision 1/CP.16, Report of the Conference of the Parties on its Sixteenth Session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1, 15 Mar. 2011, at para. 44; Decision 23/CP.19, Work Programme on the Revision of the Guidelines for the Review of Biennial Reports and National Communications, including National Inventory Reviews, for Developed Country Parties, Advance Unedited Version.

149 Decision 1/CP.16, ibid., at para. 63.

150 Ibid., at para. 44.

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By contrast, ICA is intended to 'increase transparency of mitigation actions and their effects' through a process conducted by a team of technical experts[151] that is 'non-intrusive, non-punitive and respectful of national sovereignty',[152] thus perpetuating a milder form of differential treatment for developed and developing countries.[153] The first round of IAR commenced in March 2014, two months after the first biennial reports of developed countries were due on 1 January 2014.[154] The first round of biennial reports for non-Annex I developing countries are due by December 2014,[155] with ICA set to commence shortly thereafter.

Both the IAR and ICA processes envisage multilateral oversight of the review process by the Subsidiary Body for Implementation (SBI) under the auspices of the UNFCCC.[156] Developed countries' biennial reports, and the reports resulting from their assessment and review, will undergo a 'multilateral assessment'; developing countries' biennial update reports, and the reports resulting from their consultation and analysis processes, will be subject to a 'facilitative sharing of views'.[157] The outcomes of the multilateral assessment phase of IAR will be a set of SBI conclusions, informed by a record of relevant documents and proceedings prepared by the Secretariat, which are to be forwarded to 'relevant bodies under the Convention as appropriate'.[158] A 'summary report and a record of the facilitative sharing of views' are the only outcomes required for the multilateral phase of ICA.[159] Thus, both practices lack enforcement mechanisms as well as facilitative measures – that is, apart from public 'naming and shaming', there are no concrete consequences for Parties in non-compliance.[160]

Importantly, the review processes established for IAR at COP 19 in Warsaw (Poland) in 2013[161] draw extensively upon and largely mirror the requirements for reporting and expert review of national emissions inventories under the Kyoto Protocol. If the Kyoto compliance system is conceptualized as consisting of four rungs – national reporting, internationally coordinated expert review, determinations by the Compliance Committee, and responsibility for appeals vested in the CMP[162] – IAR can be seen to substantially replicate the first two rungs of this process. Thus, it is

151 The majority of these technical experts will be from developing countries: Decision 20/CP.19, Composition, Modalities and Procedures of the Team of Technical Experts under International Consultation and Analysis, FCCC/CP/2013/10/Add.2, Annex, at para 5.

152 Ibid., at para. 63.

153 On the trend towards greater symmetry of obligations for developed and developing countries in the evolving climate regime, see generally Rajamani, n. 143 above, at pp. 507–10.

154 UNFCCC Secretariat, 'International Assessment and Review Process' (2014), available at: https://unfccc.int/national_reports/biennial_reports_and_iar/international_assessment_and_review/items/7549.php.

155 UNFCCC Secretariat, 'National Communications and Biennial Update Reports from Non-Annex I Parties' (2014), available at: http://unfccc.int/national_reports/non-annex_i_natcom/items/2.

156 Oberthür, n. 52 above, at p. 42.

157 Decision 2/CP.17, Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2011/9/Add.1, Annexes II and IV.

158 Ibid., Annex II, paras 11 and 12.

159 Ibid., Annex IV, para. 8.

160 Oberthür, n. 52 above, at p. 43.

161 Decision 23/CP.19, n. 148 above.

162 Zahar, Peel & Godden, n. 16 above, at p. 106.

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timely to reflect upon lessons from such review processes under the Kyoto compliance system that may be salient for transplantation to another part of the international climate regime.

Moreover, such lessons may have relevance for the development of compliance processes under a future international climate agreement. At the Doha Conference, governments agreed to a 'firm timetable to adopt a universal climate agreement by 2015' under the UNFCCC, with a view to its entry into force in 2020.[163] Striking a politically palatable balance between the objectives of environmental effectiveness, climate equity and developed Parties' concerns about a level playing field will constitute a primary challenge for negotiators of the new global climate architecture.[164] Under such an agreement, it appears unlikely that the Kyoto Protocol's current compliance system will be replicated in its entirety;[165] indeed, the IAR/ICA model may provide the most accurate approximation of a future roadmap. It is suggested, however, that the effectiveness of such review processes will be significantly enhanced if they are buttressed by multilateral non-compliance responses, including measures to promote compliance.[166]

Thus, national reporting and internationally coordinated expert review appear likely to be retained as features of compliance processes in the international climate regime. In light of this, it is proposed that there are two reform options that may place appropriate procedural constraints on facilitative compliance politics. Within the *Kyoto compliance system*, it is suggested that ERTs should be limited to undertaking more technical and procedural roles, in line with their expertise. This is consonant with the Compliance Committee's recent attempts to enhance the consistency of ERTs' processes,[167] and may require clarification and re-specification of the rules and guidelines pertaining to ERTs to remove references to 'facilitative' and 'assistance'-based roles. This would then provide scope for the Facilitative Branch to assume a more comprehensive facilitative role, safeguarded by due process guarantees, in accordance with its mandate.

However, if – as appears likely – the future compliance trajectories under the UNFCCC include a significant role for ERTs without oversight by the Compliance Committee, the rules guiding the composition and processes of ERTs should be revised to explicitly reflect the diverse responsibilities that ERTs currently bear. This may include rules to promote an appropriate mix of technical and diplomatic skills in team composition, and guidelines for enhancing the consistency of ERTs' decision-making processes in line with pre-agreed standards. This option, therefore, involves ERTs playing a more openly acknowledged and procedurally constrained role in facilitating compliance.

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163 UNFCCC Secretariat, n. 144 above, at pp. 1–2.

164 N.K. Dubash & L. Rajamani, 'Beyond Copenhagen: Next Steps' (2010) 10(6) *Climate Policy*, pp. 593–9, at 596–8.

165 Rajamani, Brunnée & Doelle, n. 11 above, at p. 7.

166 Oberthür proposes five options for the compliance mechanism for a 2015 agreement, and assesses both their likely effectiveness and political feasibility: Oberthür, n. 52 above, at pp. 44–9.

167 See nn. 94–7 above.

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6. CONCLUSION

The Kyoto compliance system is exceptional in terms of its attempts to insulate compliance decision making from international politics. These aims appear to have been achieved to a large extent in the work of the Enforcement Branch, which is composed of legal experts and has a record of fair and consistent, rather than politicized, treatment of compliance matters. Despite these laudable efforts, this article has demonstrated the persistence of political and facilitative forms of decision making, particularly through the ERTs as gatekeepers of the compliance system. These small groups of experts have created a bottleneck limiting the number of cases that are heard by the Compliance Committee, which does not appear to reflect the full extent of Annex I Parties' compliance issues in the first commitment period.

The ERTs' pivotal roles in facilitating compliance are out of step with the compliance rules and procedures, which suggest a more circumscribed and predominantly technical role for ERTs and a more extensive, yet procedurally constrained, facilitative role for the Facilitative Branch. As the roles of ERTs in practice exceed their mandates on the books, there are arguably inadequate safeguards regarding their skills mix and decision-making processes, and insufficient oversight by other bodies in the compliance hierarchy, raising legitimacy concerns. One consequence of ERTs engaging in informal and opaque facilitative processes is that the reliability and consistency of review processes designed to provide external quality checks on states' reported emissions information may be compromised. Significant decisions regarding states' compliance with their international environmental commitments are made on the basis of this reported information, underscoring the importance of impartial and autonomous review processes. Thus, ongoing efforts to discipline politics are desirable to enhance both the legitimacy and quality of compliance processes in the international climate regime.

In practical terms, this may be achieved by modifying the rules governing ERTs to more explicitly limit their roles to technical review. This will provide greater scope for the Facilitative Branch to fulfil its mandate for the future operation of the Kyoto compliance system. In the likely future compliance trajectories under the UNFCCC, a predominant reliance on the ERT process, in the absence of the multi-tiered compliance hierarchy that buttressed the functions of the ERTs in the first commitment period, is likely to be at strong risk of politicization. Particular attention should therefore be paid to ensuring that internationally coordinated expert review functions are appropriately constrained by procedures pertaining to skills mix, political independence, clearly prescribed decision-making processes and due process guarantees in an effort to prevent their vulnerability to power politics.

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