

Preliminary Responses Submitted by Japan  
to the Questions on the Compliance System under the Kyoto Protocol

The Buenos Aires Plan of Action, adopted at COP4 is intended to prepare the Kyoto Protocol to enter into force at the earliest possible date and to maintain political momentum for this purpose. To achieve this goal, the Plan of Action calls on the Parties to reach agreements on major negotiation items at COP6. In accordance with the Plan of Action, the Parties must make steady progress on items contained therein, including compliance issues, to ensure that the Parties reach agreements at COP6 and that the protocol enters into force as early as possible.

Decision 8/CP.4 lays down that procedures and mechanisms relating to compliance is a task that COP/moP 1 needs to address.

The following are the preliminary comments of the Government of Japan on Annex I of FCCC/SB/1999/CRP.3/Rev.1. Further comments will be submitted at a later stage.

1. General issues

In designing the compliance system under the Protocol, we consider it important to take into account the following elements.

(i) Objectives and characteristics

(a) General principles

The compliance system should be so constructed as to facilitate compliance, provide early warning and give opportunities for rectification, and prevent non-compliance. It must also be efficient and workable, and ensure transparency and credibility.

(b) Built-in compliance related provisions

Articles 5, 7 and 8 respectively provide for the estimation of emissions and removals, communication of information, and reviews of information. These provisions embody essential elements in the implementation of the Protocol by the Parties. Therefore, it is important to bear in mind these already built-in compliance mechanisms in the Protocol.

(c) Examination of existing multilateral agreements

In designing the compliance system, it is useful to examine the existing multilateral agreements, including multilateral environmental agreements (MEAs), focusing on their compliance schemes.

(ii) Institutional arrangement

The question of whether an institutional arrangement is necessary must be approached from the standpoint of making the best use of the already built-in compliance mechanisms of the Protocol and what deficiencies there exist, if any, and how to fill the gaps. In other words, what is required of the compliance system is how to supplement those substantive provisions already built in the Protocol that require the Parties to comply.

Article 8.3 states that the expert review teams "shall provide a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of this Protocol." It also states that the expert review teams "shall prepare a report to the Conference of the Parties serving as the meeting of the Parties to this Protocol (COP/moP), assessing the implementation of the commitments of the Party and identifying any potential problems in, and factors influencing, the fulfilment of commitments." This shows that the expert review teams have an important function related to the compliance system of the Protocol. On the other hand, it should also be noted that the expert review teams are not mandated to determine and address cases of non-compliance.

The Protocol stipulates that COP/moP and the Convention's subsidiary bodies to play an essential role in the compliance system (cf. Article 8.5). COP/moP, in particular, is authorised under Article 8.6 to make decisions necessary to promote the Protocol's effective implementation. Therefore, COP/moP and the Convention's subsidiary bodies could be considered as a possible institution to determine and address cases of non-compliance. However, it is necessary to carefully examine whether these bodies are to be entrusted with the actual function to determine and address cases of non-compliance, taking into account their efficiency and mobility in decision-making.

To summarise, we should carefully examine the roles and functions of the already existing institutions and consider whether an additional institutional arrangement

is needed or not.

### (iii) Kyoto Mechanisms

Articles 6, 12 and 17, which respectively provide for joint implementation, clean development mechanism and emissions trading, are an important parameter on the question of compliance. For example, Article 6.4 provides that "any such units (emission reduction units) may not be used by a Party to meet its commitments under Article 3 until any issue of compliance is resolved." We should take into account the ongoing negotiations on the Kyoto Mechanisms because they will inevitably and significantly deal with compliance-related matters. Whether one integrated procedure is sufficient or a separate procedure is needed for dealing with compliance elements of the mechanisms is a very important issue to be addressed.

## 2. Institutional issues

There are a number of institutional arrangements under the Kyoto Protocol, related to compliance in a broad sense, such as expert review teams under Article 8, multilateral consultative process under Article 16, and dispute settlement under Article 19. Questions of institutional issues need to take into account these existing institutions, including the roles and functions of each institution and their inter-relationships. The institutional arrangement, if it is to be created, should be characterised by cost-effectiveness, efficiency, due process of law and predictability. The following points should also be taken into account.

To ensure the transparency and credibility of the compliance system, the function and mandate of the institution need to be clearly defined. We must also ensure that the institutional arrangement fulfil its role fairly and efficiently.

In order to attain efficiency and low cost, the size of the institutional arrangement is a decisive factor. Expertise in science and technology, economics, law and other relevant fields are called for. Whether such experts are Party representatives or individuals representing themselves is a question to be approached from the standpoint of ensuring transparency, predictability, fairness and consistency. In taking cost effectiveness into consideration, it should be an ad hoc body and active only when it is called into action.

Furthermore, we should look into the question of who is eligible to initiate the

procedure for determining and addressing cases of non-compliance. Although there could be a number of prima facie candidates, such as (i) expert review teams under Article 8 of the Protocol and (ii) a Party, we need careful consideration of their eligibility. At any rate, when available, an assessing report by the expert review teams pursuant to Article 8.3 must be given due consideration in determining cases of non-compliance.

### 3. Issues related to consequences of non-compliance

First, it should be noted that various kinds of obligations/requirements exist in the Protocol. Violations or failures of these obligations vary, ranging from light to serious ones. Accordingly, it is necessary to consider consequences in proportion to the nature and extent of violations or failures of each obligation.

Secondly, the compliance system should provide reasonable certainty and automaticity. Parties must know in advance what consequences will ensue for a particular violation. Reasonable expectation of consequences in advance will provide proper incentives to comply and promote equal treatment among Parties. Automaticity in the determination of consequences, taking into account the cause, type, degree and frequency of non-compliance, will ensure the predictability and credibility of the compliance system.

Furthermore, it is necessary for the compliance system to have a function to facilitate compliance in itself. For example, some Parties may find it difficult to comply with provisions of the Protocol, especially Article 3, due to the lack of capacity. In such a case, it would be important that the compliance system contains elements to assist such Parties.

In any case, our primary concern in this question of "consequences of non-compliance" should be how to facilitate compliance rather than what penalties to impose as a consequence of non-compliance.

Taking the above points into account, we must decide the following two points: (i) what are obligations/requirements which should entail consequences for non-compliance, and (ii) what are specific consequences to ensue.

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