

Compliance for Intended Nationally Determined Contributions in the 2015 Climate Change Agreement

Melissa Low

SYNOPSIS

Though the legal form of the climate change agreement expected to be reached in Paris at the 21st Conference of the Parties on Climate Change in 2015 has not been conclusively determined, practitioners and academics alike assume that a legally binding form would have a positive effect on compliance. However, the commitments regime is currently pointed towards submission of Intended Nationally Determined Contributions (INDCs) and compiling states' political commitments to implement national law and policy rather than binding treaty obligations. As a result, the new approach to compliance would need to respond to the shift from a centralized standard setting to a bottom-up approach. This policy brief examines the relationship between compliance and form in the framework of the ongoing climate change negotiations.

KEY POINTS

- A future international climate change regime underpinned by an international treaty that includes binding obligations upon all Parties will require a comprehensive compliance regime post-2020 and has to be decided by the Paris meeting in 2015.
- Despite renewed interest in the Kyoto Protocol's extension into its second commitment period, it is currently unclear if the extent the compliance incentives provided by the Kyoto Mechanisms and related eligibility rules would continue to be available from 2020.
- Multilaterally agreed rules provide a sound foundation for compliance but the Intended Nationally Determined Contributions (INDCs) introduce a challenge to the negotiations in that the evolving capabilities and data availability of Parties mean that not all Parties might be able to adhere and agree to produce upfront information requirements.
- A bottom-up approach with INDCs is likely to require a variety of compliance approaches, ranging from facilitative, to justificatory, and to being sanction-oriented.

INTRODUCTION

The ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) is to stabilize atmospheric concentrations of greenhouse gases at levels that would prevent dangerous anthropogenic interference with the climate system. A "protocol, another legal instrument or an agreed outcome with legal force" (herein after "2015 agreement") has to be completed no later than 2015 in order for it to be adopted at the twenty-first session of the Conference of the Parties (COP-21) in Paris and for it to

come into effect and be implemented from 2020. One goal of the Ad hoc Working Group on the Durban Platform for Enhanced Action (ADP), which is the main body overseeing the negotiations for the agreement, is to ensure "climate effectiveness", moving the world onto a pathway to stabilize atmospheric concentrations of Greenhouse Gases (GHGs) at safe levels. Achieving the highest possible level of climate effectiveness requires solving a complex equation involving the ambition of commitments, levels of participation and compliance.

The ongoing climate change negotiations now refer to Parties' commitments in the 2015 agreement as INDCs, and there is a general leaning towards inscription of INDCs into national schedules, possibly including different timelines or activities to achieve commitments. The challenge will be to select an appropriate mix of approaches for promoting compliance for all Parties, taking into account the variety and type of INDCs submitted by the first quarter of 2015 by Parties ready to do so.

The submission of INDCs will be the starting point for a new iterative process, which is still undefined since no specification was given by the Warsaw Decision in 2013. INDCs will be considered at least with regards to the feasibility of Parties' contributions (technical and political, based on national circumstances), individual level of ambition, aggregated level of ambition in line with the 2°C target and existing commitments for support and equity. The form of the new agreement, and the type and way that the INDCs will be inscribed will have an effect on the design of the compliance system in the 2015 agreement.

ANALYSIS

Review of Intended Nationally Determined Contributions

In general, there are four types of commitments from which Parties can choose to submit as INDCs, and it is suggested that they be accompanied by upfront information, both basic and additional, depending on the type of INDC submitted. Several Parties have argued that upfront information is necessary to ensure transparency, quantifiability, comparability, verifiability and ambition.

INDCs will not be the same in level of ambition and the commitment type will differ. The type of commitment chosen, whether quantified, intensity-based, deviates from business-as-usual, or other policies and measures, affect the information requirements. This in turn determines the Measuring, Reporting and Verification (MRV) procedure that will be in place in the 2015 agreement. A clear and robust MRV and accounting rules regime is fundamental to a comprehensive compliance regime post-2020.

Options for Compliance in the Future International Legal Regime on Climate Change

In 1997, three years after the UNFCCC entered into force, the third Conference of the Parties (COP-3) adopted the Kyoto Protocol (KP), giving industrialized countries binding commitments to reduce their GHGs. The Marrakech Accords agreed at COP-7 in 2001 advanced a procedure to deal with non-compliant Parties, marking the design of a compliance regime that was aimed at achieving the environmental goal of the Protocol. There are two texts governing the procedure on non-compliance. The first (Decision 27/CMP.1) was adopted by the first Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP-1) in 2005, establishing the non-compliance procedure. The second (Decision 4/CMP.2) contains the Rules of Procedure adopted by the second CMP (CMP-2) in 2006.

In view of the ongoing negotiations in the ADP, some Parties have suggested that the compliance mechanisms in the new agreement follow the Kyoto compliance mechanism, including an Enforcement Branch (EB) and/or a Facilitative Branch (FB); or to develop a new compliance review institution and structures that could include various platforms.

Retaining and Improving Elements of the Kyoto Protocol Compliance System

Since operationalization in 2006, the Kyoto compliance system has had some positive effects through the issues of implementation brought before the EB. However, improvements such as safeguarding against using the compliance process to continuously borrow from future commitment periods by penalizing non-compliant Parties within the same commitment period, or increasing the current 1.3 rate in case of repeated failure to meet emissions reduction targets, could be made to strengthen compliance procedures in the 2015 agreement. The FB should also have access to more concrete tools and resources to assist Parties in their efforts to meet commitments, particularly with respect to tracking emissions, sinks, credits, and reporting; and allowing a greater number of actors such as non-Parties to trigger the procedure.

For industrialized countries, it is currently unclear if the extent the compliance incentives provided by the Kyoto Mechanisms and related eligibility rules (a sanction-orientated feature) would continue to be available from 2020. Whatever the form the compliance mechanism may take in the 2015 agreement, it is also crucial whether or not it will be able to monitor the additionality and environmental integrity of projects, from which units are accrued and traded, in an expanded global carbon market. It is important to also consider if the compliance mechanism would be able to guarantee that reliance on the carbon market is supplemental to domestic mitigation efforts. Nevertheless, the Kyoto compliance system provides a useful reference for Parties to build upon in the 2015 agreement.

A Multilateral Rules-Based Regime for Transparency and Accountability

In the future climate regime where all Parties have some INDC, rules will be required to guide the definition and implementation of commitments. MRV arrangements will help ensure detailed quantification and tracking of progress towards commitments. In addition, accounting rules for market-based mechanisms and the land-use sector should also be developed. Procedures and institutions to operationalize these rules, including the timing and frequency of the reporting and review cycles, the role of expert review teams, the UNFCCC Secretariat and other institutional arrangements can be decided between 2015 and 2020, similar to the 2001 Marrakesh Accords which were agreed 3 years after the Kyoto Protocol was signed.

Article 18 of the Kyoto Protocol calls for the creation of “appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance...”. Crucially, the new agreement must have similar provisions but avoid a cumbersome ratification process for binding consequences to enter into force. This can be done by ensuring that compliance procedures and consequences for non-compliance are included from the outset in the treaty, either in a specific provision, or subsequently through COP decisions or a schedule. By the

time of the Paris meet, Parties need to define basic regime principles and obligations of Parties to be included in the 2015 agreement itself as part of the future rules-based regime for transparency and accountability, building up into a compliance regime post-2020.

Multilaterally agreed rules provide sound foundation for compliance. They draw on Kyoto’s facilitative and justificatory aspects in order to maintain the integrity of Parties’ commitments. The INDCs introduce a challenge to the negotiations in that the evolving capabilities and data availability of Parties mean that not all Parties may be able to adhere and agree to producing upfront information requirements. Furthermore, countries are expected to build effort over time and move to more transparent, consistent, comparable and accurate approaches. As capacity develops, there is the likelihood that provisions could include increasing stringency for commitments over time and with each cycle of commitments. This is on top of a common accounting framework for all Parties under discussion at the moment.

The robustness of the compliance regime under the 2015 agreement will therefore be shaped by the form of the INDCs and the willingness of Parties to accept the terms in which they must be submitted. This includes upfront information requirements and the question of whether there will be an *ex ante* consultation process, an *ex post* review, a cycle of commitments and how long that is expected to be. Some Parties have proposed that consultations on INDCs should be non-intrusive, non-punitive and respectful of national sovereignty, and that Parties should not be obliged to adjust their INDCs unless they wish to do so. Though it is not practically possible to have all of the technical detail agreed in Paris, Parties must begin to develop a robust and effective multilaterally agreed rules-based regime for transparency and accountability that would increase participation while locking in high ambition.

Existing MRV and Linkages: A Multilateral Consultative Process for Compliance

The 2015 agreement could also instead heed the call within Article 13 of the UNFCCC for a “multilateral consultative process... for the

resolution of questions regarding the implementation of the Convention". This is being revived in the current Multilateral Assessment (MA) process, as part of the International Assessment and Review (IAR) process for developed country Parties to be launched soon in Lima, Peru in late 2014. If successful, the MA process could extend lessons for the new agreement by establishing different tracks for the types of contributions and timelines following the Biennial Reporting for Annex I Parties and Biennial Update Reporting for Non-Annex I Parties. Although this would improve accountability and widen participation, many Parties have come forward to oppose a binary differentiation between Annex I and non-Annex I Parties in the 2015 agreement.

On the basis of equity and following the principle of common but differentiated responsibilities however, it might still be relevant and necessary to distinguish between the intentional and non-intentional non-compliance. Moreover, a MCP can begin sooner than a compliance procedure that has to be triggered. For instance, in a 10-year cycle, assessing compliance at the end of the period in 2030 at the earliest is unlikely to guarantee climate effectiveness because a compliance assessment can only begin some years after the end of the period once the emission data is available.

Since climate change depends on cumulative emissions rather than emissions at any particular point in time, ambition and participation must be considered as dynamic variables. Less ambitious INDCs or participation now might produce greater climate effectiveness in the long run, if they are part of an evolutionary framework that leads to stronger action later. A MCP can begin immediately once Parties have INDCs in place and could allow for external parties such as scientific bodies, civil society and other relevant experts to review the initial commitments. Moreover, commitments may evolve over time as the socio-economic circumstances of countries change. Thus, flexibility can be built into an MCP to deal with Parties who move up or down in terms of their commitments or who are currently unable to comply with rules but might ratchet up their commitments over time. A drawback

of such a format is its lengthy process. Allowing open review might also deter some Parties due to concerns about allowing inventory data to be shared and openly criticized.

The compliance regime needs to be tailored to the various INDCs put forward by Parties and also create a culture of compliance. A bottom-up approach with INDCs will require a variety of compliance approaches, ranging from facilitative, to justificatory, and to being sanction-oriented. Parties, as well as the UNFCCC Secretariat must be ready to consider all options in order to ensure that climate effectiveness is achieved through careful consideration of the future assessment and review of INDCs and compliance.

WHAT TO LOOK OUT FOR

- An INDC Decision at the end of COP-20 in Lima clarifying and providing guidance to Parties on the upfront information to accompany INDCs would provide a useful starting point for a compliance mechanism to be developed.
- The diversity and type of INDCs chosen by Parties - whether quantified, intensity-based, deviates from business-as-usual or other policies and measures that Parties put forward by the first quarter of 2015 as it will affect the MRV and compliance arrangements to be developed.
- The degree to which Parties' INDCs can be legally enforced, depending on the legal form of the 2015 agreement.

Melissa Low is a Research Associate at the Energy Studies Institute of the National University of Singapore.

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