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# Compliance in Transition: Is Facilitative Compliance Finding its Place in the Paris Climate Regime

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## Introduction

In the transition from the Kyoto Protocol to the Paris Agreement, some parties took great length to distance themselves from the architecture and institutions of the Kyoto Protocol.<sup>1</sup> Key among this architecture was the Kyoto compliance system, which was seen as a departure from the norm for multilateral environmental agreements (MEAs). The system included an enforcement branch that applied automatic consequences in case of non-compliance with key obligations of developed country parties. It is therefore not surprising to see a focus on facilitation in Article 15 of the Paris Agreement and specific direction that the compliance system is to be non-adversarial and non-punitive.<sup>2</sup>

The differences between the Kyoto compliance system and that to be developed under the Paris Agreement are, of course, also driven by substantive differences between the two agreements. Most notable among these differences is that the Paris Agreement establishes a much broader range of commitments and obligations covering mitigation, adaptation, funding, technology access, education, capacity building, and loss and damage. The commitments, furthermore, have been made by a much broader range of parties, including all developing countries, in particular the least developed countries and small island states. Many of the commitments are self-determined in the form of nationally determined contributions (NDCs) to be updated by parties every five years.<sup>3</sup>

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<sup>1</sup> Jane Bulmer, Meinhard Doelle and Daniel Klein, 'Negotiating History of the Paris Agreement', in Daniel Klein and others (eds), *The Paris Climate Agreement: Analysis and Commentary* (OUP 2017).

<sup>2</sup> For a more detailed analysis of compliance in the context of climate change generally and the Kyoto compliance system in particular, see Jutta Brunnée, Meinhard Doelle and Lavanya Rajamani (eds), *Promoting Compliance in an Evolving Climate Change Regime* (Cambridge University Press 2012); Alexander Zahar, *International Climate Change Law and State Compliance* (Routledge 2014).

<sup>3</sup> Meinhard Doelle, "Assessment of Strength and Weaknesses" in Daniel Klein and others (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press 2017); Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani (eds), *International Climate Change Law* (Oxford University Press 2017).

While there are many important differences, some of the core challenges of ensuring compliance are, on closer examination, remarkably similar to the Kyoto Protocol. Both agreements include a range of commitments from voluntary to binding. Both include provisions for market mechanisms, which will be dependent on compliance to be effective. Both include a range of reporting obligations that are fundamental to the functioning of the regime. These parallels suggest parties would be well advised to draw on the compliance experience under the Kyoto Protocol in negotiating the design of the Paris compliance system.<sup>4</sup>

This contribution to the special issue on the Paris Rulebook assesses the state of play in the negotiations under Article 15.<sup>5</sup> Of course, these negotiations are taking place in the context of the provisions of Article 15 itself as well as provisions 103 and 104 of the Paris COP decision. Before delving into the current state of the negotiations, it is helpful to identify the key relevant elements of the agreement parties reached in Paris.<sup>6</sup>

The overall purpose of the compliance process under Article 15 is to facilitate the implementation and promote compliance with the provisions of the Paris Agreement. As has been pointed out by others, it is important to highlight that Article 15 refers to “the provisions”, not just some provisions, and not just obligations.<sup>7</sup> It seems clear, therefore, that the mandate of the compliance committee should be broad in scope, include individual and collective commitments, and include binding obligations as well as non-binding commitments.<sup>8</sup>

Another set of provisions in Article 15 clarify the overall approach to be taken in the design of the compliance system. They refer to the facilitative, non-adversarial and non-punitive nature of the process, and the principle of transparency. These elements offer important guidance to negotiators on the design of the compliance process and the measures the compliance committee should have at its disposal to facilitate implementation and promote compliance.

A key message in Article 15 relates to the “respective national capabilities and circumstances of the Parties”. This reference to the revised principle of common but differentiated responsibilities (CBDR) in the Paris Agreement signals that the process needs to be sensitive to the capacity challenges of the least developed countries in particular.<sup>9</sup> Article 15 is clear that

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<sup>4</sup> Brunnée, *Promoting Compliance* (n 2); Zahar (n 2).

<sup>5</sup> The article benefitted from the excellent analysis on a previous version of the negotiating text, Sebastian Oberthür, ‘Options for a Compliance Mechanism in a 2015 Climate Agreement’ (2014) 4 *Climate Law* 30.

<sup>6</sup> United Nations Framework Convention on Climate Change (UNFCCC), ‘Adoption of the Paris Agreement’ (30 November 2015) Dec COP.21, UN Doc FCCC/CP/2015/L.9/Rev.1 paras 103, 104; Paris Agreement, (entered into force 4 November 2016) art 15.

<sup>7</sup> Oberthür (n 5); Alexander Zahar, ‘Bottom-Up Compliance Mechanism for the Paris Agreement’ (2017) 1 *Chinese Journal of Environmental Law* 69.

<sup>8</sup> Many of the key commitments in the Paris Agreement, such as commitments on finance and on efforts to keep global average temperature increases to well below 2 degrees, are collective commitments. Dealing effectively with such collective commitments will be one of the key challenges facing the new compliance system.

<sup>9</sup> It is important to recall the difficult and drawn out negotiations on differentiation in the climate negotiations. It is clear that the agreement reached in Paris, while a breakthrough, has not laid these issues to rest. Views on

with respect to compliance, differentiation based on capabilities and other relevant circumstances is the job of the compliance committee. This suggests that the compliance modalities and procedures should provide flexibility for the committee to apply certain aspects of the compliance system to parties that have capabilities and circumstances that may warrant either relaxing process requirements or warrant the application of different measures at the conclusion of the compliance proceedings.<sup>10</sup>

The agreement reached in Paris offers considerable direction on the process to be designed. Included is the composition of the compliance committee (12 members, two from each of the 5 UN regions plus one each from a least developed country and a small island developing state), required areas of expertise, and the importance of gender balance on the committee. The committee is to report annually to the Conference serving as the Meeting of the Parties to the Paris Agreement (CMA). This is the context within which parties are now negotiating the modalities and procedures for compliance.<sup>11</sup>

A particular source of complexity in the negotiations is that the compliance modalities are being negotiated in parallel with the overall Paris Rulebook.<sup>12</sup> Not only is there uncertainty about the nature of substantive rules on mitigation, emissions trading, and finance, but as discussed elsewhere in this special issue, the Paris Agreement contemplates a comprehensive 5 year review cycle that consists of parties reporting on their efforts to implement their NDCs, review of those efforts and reports, a global stocktake of progress against the long term goals, and revised NDCs.<sup>13</sup> Even though the Paris Agreement clearly provides for a compliance system, it seems that some parties would prefer to subsume the compliance effort under the work of the transparency framework and the global stocktake.

To be effective, the compliance process under Article 15 will have to find its place within the Paris Climate Regime, both substantively (i.e. its role with respect to mitigation, emissions trading, finance, adaptation, technology, capacity building, coordination among institutions and connection among commitments) and in relation to the overall institutional structure being developed. The aim must be to complement the bottom up NDC approach with appropriate top down elements to help close the significant ambition gaps that currently exist in all key areas of the Agreement. A key contribution of the compliance process will be its relative independence and its resulting opportunity to impartially assess compliance with individual and collective commitments. This will help inform the broader discussion about the effective implementation of the Paris Agreement.

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differentiation still vary greatly among the parties, resulting in difficult negotiations in many aspects of the Paris Rulebook, including compliance.

<sup>10</sup> Oberthür (n 5).

<sup>11</sup> UNFCCC (n 6).

<sup>12</sup> Zahar, Bottom-Up Compliance (n 6) suggests that the negotiation of the compliance modalities should be delayed pending the completion of the remainder of the Paris Rulebook.

<sup>13</sup> Placeholder for appropriate cross references to other contributions to the special issue to be added by editors

## Assessment of Key Elements of the Current Text

This overview is based on the state of the negotiations at the end of the negotiating sessions in Bonn in May, 2018. The text developed in Bonn is structured using 12 topics.<sup>14</sup> Key among them are the initiation of proceedings, the scope of the committee's work, institutional arrangement and process, and outcomes and measures to be applied by the committee. In this section, the key issues before the negotiators in each of the twelve areas are briefly identified, along with recommendations forward.

### 1. Purpose, Principles and Nature<sup>15</sup>

The current negotiating text contains a broad range of proposals on the purposes and principles to be included in the modalities and procedures for Article 15 and the articulation of the nature of the compliance procedures to be established. Much of what is proposed would seek to either clarify or re-negotiate key elements of Article 15, including its reference to the facilitative, non-adversarial and non-punitive nature of the compliance procedures, and the need for the compliance committee to consider the capabilities and circumstances of parties that are subject to the compliance procedures. There is clearly disagreement among parties about the need for these purposes, principles, and related elaborations.

All of the issues raised here are reflected again in the operative provisions of the proposed compliance procedures. Their ultimate treatment will depend on how the underlying issues are resolved below. Once resolved, it is unclear whether their elaborations here will serve a useful purpose. That is not to say that there may not be uncontroversial and helpful principles that emerge once there is agreement on the substantive provisions. General principles of good process, such as transparency, fairness, efficiency, and accountability come to mind and are useful to highlight for purposes of guiding the overall implementation of the compliance procedures. The restatement of principles in Article 15, though not necessary, might also help to remind parties of the context within which these rules of procedures will operate.

### 2. Functions<sup>16</sup>

This section has become a battle ground over the meaning of the phrase "facilitate implementation and promote compliance" in Article 15(1). The key area of disagreement is whether this language signals two separate and distinct functions, or whether it is an articulation of one broad mandate. Those that are advocating for two separate functions appear to disagree over the basis for the separation of functions. Some see this language as an opportunity to separate binding from non-binding commitments. Others view it as an opportunity to push for a separation between developed countries (who would be subject to

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<sup>14</sup> UNFCCC, 'Draft Elements of APA Agenda Item 7: Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15.2 of the Paris Agreement: ' (8 May 2018)

<[https://unfccc.int/sites/default/files/resource/APA%207\\_Informal%20Note\\_8May2018\\_final%20for%20posting.pdf](https://unfccc.int/sites/default/files/resource/APA%207_Informal%20Note_8May2018_final%20for%20posting.pdf)> accessed 30 July 2018.

<sup>15</sup> *ibid* pt 3(A), 3.

<sup>16</sup> *ibid* pt 3(B), 4.

procedures to promote compliance) and developing countries (who would be subject to procedures to facilitate implementation). The different views of the role of the language on implementation and compliance, in turn, has implications for the treatment of scope, the institutional structure, and outcomes.

In short, the section on function actually does not appear to raise important issues independent of the questions of scope, process, and outcomes. Once these underlying concerns and differences are resolved through clear and appropriate rules on scope, process, and outcomes, the section should either disappear altogether or simply clarify that the committee will carry out both functions using an integrated institutional structure and process that is sensitive to the differences among parties and the differences among the obligations and commitments that come before it.

Regardless of how the function is ultimately articulated, the key outcomes will be the following:

- Consistent with the language in Article 15, the mandate of the committee should extend to all commitments in the PA, not just binding ones.
- The mandate of the committee should extend to all parties, while providing for appropriate flexibility in how developing countries, particularly least developing countries (LDCs) and Small Island States (SIDS), are treated in terms of process, information requirements, timelines, and outcomes
- The committee should have a broad range of tools at its disposal within the parameters set in the PA, while providing clarity that not all tools are appropriate for all circumstances, particularly not all parties and not all commitments.

### 3. Institutional Arrangements<sup>17</sup>

The section on institutional arrangements includes a long list of issues, most of which are not likely to be controversial or critical for the proper functioning of the committee. A few of the issues do warrant close attention. They are briefly discussed here.

The goal of individual, expert based membership of the committee with gender balance is clear from the agreement reached in Paris. Parties agreed that membership would be distributed among the 5 UN regions, with extra members from LDCs and SIDS, following the precedent set with other UNFCCC committees. What is not clear is how these goals will be achieved through the nomination and election process. If parties are to be encouraged to nominate representatives in accordance with the regional distribution, it will be important to be clear about the qualifications needed. Multiple qualified nominees will be needed from each region. A screening process will be needed to ensure those nominated meet the basic criteria to ensure the election of a slate of members consistent with the multiple objectives parties have already agreed to.<sup>18</sup>

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<sup>17</sup> *ibid* pt (3)C, 5.

<sup>18</sup> The screening process carried out by the secretariat for appointments under the Kyoto Protocol may provide a starting point, but the issues are likely to be more complex. Will legal expertise be as important as it has been for

With respect to the related issue of conflict of interest, there are at least two important issues to consider. One is at the point of the election of the committee members. It will be important to have an effective screening process that ensures candidates have the appropriate expertise without any obvious potential bias or conflict of interest. This initial screening should consider potential conflict of interest issues with respect to individual parties as well as the ability of the potential members to consider systemic issues in an impartial manner. Members who have a conflict with specific parties but are otherwise suitable would still be eligible to serve on the committee, however would not hear cases involving those parties.<sup>19</sup> A key consideration for the appointment of the committee will be the ability of all members to deal with systemic issues that may come before the committee.

Of course, without knowing the specific issues that will come before the committee, any conflict of interest screening effort at the point of election of committee members will be imperfect at best. The rules of procedure therefore should provide for a process within the rules of the compliance committee to determine whether a particular member has a conflict in dealing with a particular matter that has come before the committee.

Another issue raised under the heading of institutional arrangements is the need for and role of a bureau, presumably a subcommittee of the compliance committee to fulfill a narrow set of specific functions. The main function of the bureau under the Kyoto Protocol was to decide which branch of the Kyoto compliance system should deal with a matter brought before the committee. Assuming that the committee will not consist of two branches, but rather will serve as one committee, the bureau would not serve this purpose. A bureau consisting of the chair and vice chair could still potentially play a useful screening role to review referrals to the committee to make sure they raise legitimate issues and that there is an adequate information base to proceed or to screen members for conflict of interest. However, parties may be reluctant to leave such decisions to two members of the committee and may prefer having these decisions made by the full committee. In that case, the bureau may not be necessary at all.

The frequency and nature of meetings should not be controversial. However, the current text provides for electronic meetings. This is a sensible suggestion that can improve the efficiency of the compliance process. Such meetings under the Kyoto compliance system have, however, raised transparency and public access concerns. It will be important to clarify that in case

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the Kyoto compliance system? What about substantive expertise in mitigation, finance, adaption, technology, and capacity building? If a mix of expertise is desired, how does that fit with regional distribution, gender balance, and the nominations and election process?

<sup>19</sup> One source of tension under the Kyoto compliance process has been whether active negotiators should be eligible to serve on the compliance committee. There is no clear answer on this from a conflict of interest perspective for individual compliance issues, as long as members do not get involved in matters involving the parties they represent, but the issue should be resolved so as to avoid this source of tension under the Paris compliance system. With respect to systemic or collective compliance issues, it is more difficult to see how perceptions of conflict of interest can be avoided.

meetings to deliberate and possibly make decisions take place by electronic means, the public's right of access to the proceedings will be the same as if the meeting had taken place in person. In other words, if the in-person meeting had been open to the public, the electronic exchange should also be made public. Nothing short of this would be consistent with the commitment to transparency parties made in Article 15(2) of the Paris Agreement.<sup>20</sup>

Regarding quorum and decision making, a key issue will be what level of agreement is needed for committee decisions. The committee will be well served to strive to make decisions by consensus as much as possible and it will be helpful to have a commitment to make all reasonable efforts to reach consensus clearly set out in the rules of procedure. The more difficult question is what level of agreement short of consensus should be enough for decisions where consensus is not possible. A reasonable perspective would be to conclude that a committee of individual experts should be able to reach a high level of agreement and that voting by  $\frac{3}{4}$  majority should be appropriate.<sup>21</sup> The risk of such an approach is that it could hamstring the committee on difficult issues. Differentiation between decisions involving binding obligations of individual parties and other decisions might be a way to overcome disagreement on this point. On balance, a simple majority with clear preference for consensus may suffice, as this would minimize the risk of the committee being paralyzed by internal disagreement, while still pushing for consensus-based decision making.

There has been an ongoing debate within the negotiations about the level of detail that can and should be provided in the rules to be finalized at COP 24. It seems unrealistic and unnecessary to develop detailed rules between now and November. The best solution under the circumstances might be to only resolve issues needed to give parties comfort that the process will be efficient, effective, and fair, then mandate the committee, once established, to work out the details. A key question under this scenario will be whether the rules developed by the committee have to be approved by the CMA. Ultimately, this will depend on the level of detail negotiators are able to achieve by November, but it seems reasonable, unless the direction to the committee is sufficiently clear, to require that the final rules of procedure have to be approved by the CMA. One concern with such a requirement, if it also applies to future amendments to the rules, is that the committee may be reluctant to adjust the rules, even if those adjustments would significantly enhance the process. One option might be to require the CMA to approve the initial rules developed by the committee, but to allow for further adjustments to uncontroversial aspects to be made without CMA approval.

#### 4. Scope<sup>22</sup>

The scope of the mandate of the committee is undoubtedly one of the most contentious issues in the negotiations. The discussion is linked to the issues raised under the functions of the committee, particularly whether its role in facilitating implementation is separate and distinct

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<sup>20</sup> Meinhard Doelle, 'Experience with the Facilitative and Enforcement Branches of the Kyoto Compliance System' in Jutta Brunnée, Meinhard Doelle and Lavanya Rajamani (eds), *Promoting Compliance in an Evolving Climate Change Regime* (Cambridge University Press 2012).

<sup>21</sup> Oberthür (n 5).

<sup>22</sup> UNFCCC (n 14) pt 3(D), 8.



from its role in promoting compliance. Some parties are advocating for a focus on individual binding obligations,<sup>23</sup> while others are taking a broader view more in line with the wording of Article 15.<sup>24</sup> Whether the committee should focus on specifically identified commitments or have a general mandate to facilitate the implementation and promote the compliance of all provisions of the Paris Agreement is a related issue that remains unresolved in spite of reasonably clear language in Article 15.<sup>25</sup> Similar differences exist over the extent to which the committee should look beyond individual instances of involving individual parties to consider a range of systemic issues and collective commitments and obligations. There is some suggestion in the current text of differentiation on scope depending on whether a matter comes before the committee as a result of a self-referral, a referral by another party, or a non-party referral (such as a report generated under Article 13 or on the initiative of the committee itself).

On balance, it would appear that there is value in considering different streams for the work of the committee, however not, as suggested by some parties, based on distinctions between developed and developing parties, based on binding and non-binding commitments, or based on the trigger. Rather, the distinction worthy of separate streams would be matters of implementation and compliance involving individual parties versus collective and systemic issues. Distinctions between different parties or commitments can be effectively dealt with through different outcomes and measures, and perhaps some differences in timelines and information requirements, without the need for different streams.

Differences between matters involving individual parties versus collective and systemic issues are much more fundamental and may indeed warrant developing different streams.<sup>26</sup> For example, all parties will want to have the opportunity to have input into the consideration of collective or systemic issues, whereas few parties will want to engage in a matter involving an individual party. Including non-state actors in the process should be less controversial for collective or systemic issues than for matters involving individual parties. Triggering and timing issues will be quite different, especially if the committee's work is to be effectively coordinated with reviews under Article 13 and the global stocktake under article 14.

As a general principle, the scope of the committee's mandate, to be effective, should be comprehensive so as to allow the committee flexibility in deciding which issues are most important to its mandate of facilitating implementation and promoting compliance. Limits on the scope of the committee's mandate should be driven primarily by the desire to avoid overlap with other processes under the Paris Agreement, particularly the review of parties' efforts under Article 13, and the global stocktake under Article 14.

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<sup>23</sup> Such as Paris Agreement, arts 4(2), 4(8), 4(9), 4(13), 4(15), 6(2), 9(5), 9(7), 13(7) and 13(9).

<sup>24</sup> Which would include collective commitments listed below as well as non-binding individual commitments such as those contained in Paris Agreement, arts 3, 4(3), 4(19), 5(1), and 13(10).

<sup>25</sup> Oberthür (n 5).

<sup>26</sup> See e.g., Paris Agreement, arts 2, 4(1), 4(4), 4(5), 7(7), 7(13), 9(1), 9(3), 9(4), 10(6), 11(3), 11(4), 12, 13(14), and 13(15) for collective commitments.

## 5. Initiation of Consideration<sup>27</sup>

How matters can come before the committee has proven to be among the most difficult and controversial issues before negotiators. The one uncontroversial trigger is the self-trigger, which allows a party to bring itself before the committee seeking help with a particular issue of implementation or compliance. Of course, experience with other MEAs has shown that this is not enough to bring important matters of compliance and implementation before a compliance committee. Similarly, the party-trigger, whereby a party can bring another party before the committee, has shown at times to be a valuable trigger, but one likely to play a limited role.<sup>28</sup> Allowing a group of parties to trigger a review of a party could offer a modest improvement to the party-trigger. Similarly, allowing the CMA to initiate proceedings may be appropriate, but it is not on its own an adequate trigger for proceedings under Article 15.

Ultimately, the effectiveness of the compliance process will depend on effective non-party triggers in addition to “self” and “party” triggers. Non-party triggers can include triggers linked to other processes under the Paris Agreement, such as the review of parties’ performance under Article 13, triggering by the committee on its own, in response to petitions from non-parties, or based on specific reports or information generated under the Paris Agreement. The details of an effective non-party trigger will ultimately depend on the nature of other processes under the Paris Agreement, such as the review process under Article 13, but the goal has to be to develop a non-party trigger that ensures the committee has the opportunity to explore all important issues of implementation and compliance. This will likely require an opportunity in appropriate circumstances for the committee to initiate proceedings on its own.

Attempts to differentiate triggers based on the nature of the commitment or the party involved would run the risk of undermining the effectiveness of the compliance process. However, some accommodation of parties concerned that the committee needs to be directed further on the importance of differential treatment might be possible without undermining the integrity of the compliance process. For example, the party trigger, along with appropriate non-party triggers could apply to binding obligations, whereas the self-trigger in combination with appropriate non-party triggers could be established for all other issues of compliance or implementation.

Non-party triggers, either by the committee on its own or based on information from the Article 13 review process or some other specified body or report could potentially be set up in a more nuanced way, so that specific triggers are designed for specific individual or collective issues of compliance or implementation.<sup>29</sup> Examples of issues of compliance and implementation to consider for specific non-party triggers include a Party’s failure to meet the commitments set out in its NDC, the collective failure of developed countries to meet their

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<sup>27</sup> UNFCCC (n 14) pt 3(E), 9.

<sup>28</sup> Karen N Scott ‘Non-Compliance Procedures and Dispute Resolution Mechanisms’ in Duncan French, Mathew Saul & Nigel D White eds *International Law and Dispute Settlement: New Problems and Techniques* (Oxford and Portland, Oregon: Hart Publishing 2010) 242, the author concludes that the majority of submissions are from the treaty secretariat or compliance body.

<sup>29</sup> Doelle (n 20), the Expert Review Team trigger under the Kyoto compliance system was critical to the operation of the enforcement branch.

funding commitments to developing countries, the failure to balance adaptation and mitigation funding, the failure of certain key technologies to make a breakthrough in a particular region, such as Africa, or the failure of the parties collectively to make adequate progress toward the long term goals of the Paris Agreement.

## **6. Process<sup>30</sup>**

The negotiating text currently only has relatively few issues listed under process. This is in part because a number of process issues are considered under function, institutional arrangements, and scope. A key issue before negotiators in the section is whether to grant the committee discretion to set its own process, and if so, how and how far to bound the committee's discretion. The issue of differentiation among parties has been raised as well. This is a place where reasonable accommodation of LDCs and SIDS with respect to timing and information requirements seems appropriate and possible without undermining the effectiveness of the committee.

Proposals to require the consent of a Party to the process applied to it must be rejected, as should be the suggestion by some that the output and measures should be subject to the approval of the party being investigated. Both suggestions would clearly undermine the integrity and effectiveness of the compliance process. A proposal to include an opportunity of a party being investigated to comment on a draft report seems more reasonable and could likely be accommodated without undermining the compliance process, as long as comments and changes made in response to the draft report are open to public scrutiny.

It will be important to give careful thought to designing a process that offers due process to parties and one that is transparent and accountable. Among the many issues that require attention is the importance of parties responding to requests for information and otherwise engaging constructively, responsively, and transparently in the process.

## **7. Measures and Outputs<sup>31</sup>**

The current text includes a broad range of measures and outputs that could be at the disposal of the committee. The measures being contemplated are grouped into 5 categories. For each category, it is helpful to consider whether the measures are appropriate for both individual and systemic streams, whether the measures are appropriate for binding and non-binding commitments, and whether they are appropriate for all parties including LDCs and SIDS.

The first category of measures focusses on information sharing and lessons learned, both for the party before the committee and other parties. The information shared would include conclusions about challenges that contributed to the issue before the committee and recommendations on how to address them. These possible outcomes would appear appropriate to both individual and systemic streams, to binding and non-binding commitments, and to all parties including LDCs and SIDS.

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<sup>30</sup> UNFCCC (n 14) pt 3(F), 10.

<sup>31</sup> *ibid* pt 3(G), 12.

The second category of measures deals with the consequences for the Party being investigated. Key among the consequences contemplated in the current text are an action plan to address the issues raised, and the possible loss of certain privileges, such as access to markets under Article 6. There is currently no agreement on whether the content of the action plan is under the complete control of the Party or whether the committee can direct its content. Interestingly, there is no reference in the current text to any compensatory measures, suggesting parties are not drawing any distinction between “punitive” and “compensatory” measures. For example, in case of double counting of credits under Article 6, one might have interpreted a consequence that required a Party to purchase additional credits to make up for the double counting as a “non-punitive” but “compensatory” measure.

The measures considered under this category are most appropriate for issues involving binding obligations of individual parties. Consideration could be given to excluding the application of some of these measures to LDCs and SIDS, however, the non-punitive, non-compensatory nature of the measures suggest that this may not be necessary for most. One exception may be the eligibility to trade under Article 6.

The third category of measures is about the support to be offered to the Party being investigated. The support contemplated includes the sharing of information advice, capacity building, access to technology, and finance. The key outstanding issue is whether the role of the committee is merely to point out where such support is available, or whether a Party that has gone through the compliance committee may have preferential access to some or all of these sources of support. A key concern is that preferential access will encourage self-triggering even where it is not warranted. One way to limit the scope for abuse might be to offer preferential access to assistance only to LDCs and SIDS. Without preferential access, there is little reason to distinguish between systemic and individual, between binding and non-binding, or between categories of parties in making decisions about these measures.

The fourth category is about the conclusions reached by the committee about the state of compliance or implementation. Measures contemplated include early warnings, statements of concern, factual findings on issues investigated, and findings of non-compliance. Many of these conclusions are most appropriate for cases involving individual parties failing to comply with binding obligations. Some could also be applied to collective binding obligations. As with other measures, there are opportunities to treat LDCs and SIDS differently, though the non-punitive nature of the measures may make this unnecessary. Rather, the differentiation can be expressed in a more nuanced manner through the tone, and by offering context for the findings made.

The fifth and final category is about post decision follow-up by the committee. The text currently offers no details on the process our outcomes of follow up. One specific opportunity to enhance follow-up is to provide a clear mandate to the committee to oversee the implementation of compliance action plans filed in response to findings of non-compliance. This would enable the committee to follow the response to a compliance issue until it is

resolved. The addition of an effective follow-up stage to the process has the potential to significantly enhance the effectiveness of the overall compliance effort. It can only be hoped that this element will be retained and elaborated upon.

### **8. Identification of Systemic Issues<sup>32</sup>**

The negotiating text uses the term systemic issues to refer to issues of compliance and implementation that go beyond the consideration of a specific issue involving a specific party. As a result, there is potential for systemic issues to include a range of compliance and implementation issues. Systemic issues therefore could include the following among others:

- Collective commitments and obligations of all or a large number of parties, such as the commitment to pursue the various elements of the long term goal, and various commitments by developed countries to assist developing countries in their efforts to achieve their NDCs.
- Repetitive or other broader issues involving one or more parties, such as the failure of certain policy or set of policies to achieve the anticipated emission reductions
- Patterns in the failure of certain technologies to take hold in certain countries and regions
- Different levels of ambition in various regions of the world leading to an unequitable distribution of the global effort to reduce GHG emissions

It is not clear from the negotiating text whether negotiators have turned their minds to the full range of possibilities with respect to systemic issues. A key issue occupying negotiators appears to be whether to limit systemic issues to issues that are of a general nature, or whether to include issues that one or a few parties encounter repeatedly. Another key question is whether the exploration of systemic issues can only be initiated by the CMA or whether the committee can initiate such an exploration on its own, on request by a party or group of parties, or based on specified information such as information provided by the secretariat or contained in specified reports. Finally, the question of the process and output from an exploration of systemic issues is unresolved. Bounded discretion on scope and process would seem appropriate, and key outcomes would be conclusions and recommendations regarding the issues explored, and a clear link to the global stocktake. In other words, it should be made clear that the exploration of systemic issues by the compliance committee will inform the global stocktake.

It is unclear how broad the mandate of the committee will be with respect to these systemic issues. The choices may in part be influenced by whether some of these issues are clearly and adequately addressed in other forums, such as the global stocktake under Article 14. At the same time, the decision on the scope of systemic issues will have significant implications for the resources and support the committee will need to be effective. Some of these issues, such as progress toward the long-term goals, will require close coordination with the Intergovernmental Panel on Climate Change. Others will require expertise in policy design and review or in the dissemination, distribution and deployment of technologies.

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<sup>32</sup> *ibid* pt 3(H), 13.

## **9. Sources of Information<sup>33</sup>**

Many of the sources of information identified in the draft text would appear reasonable and uncontroversial. It is important to note, however, that any attempt to restrict the information available to the committee will risk undermining the work of the committee. The general operating principle should be that the committee will have access to any information generated under the Paris Agreement that is relevant to the issues before it, including information generated under Articles 13 and 14, and under any of the substantive provisions of the Paris Agreement including ones dealing with mitigation, adaptation, technology, finance, and trading. Regarding confidential information, this of course risks undermining transparency of the work of the committee, so the use of confidential information should be minimized, and the burden should be clearly on the party seeking to submit confidential information to demonstrate both that it needs to be treated confidentially and that it is relevant to the issue before the committee.

## **10. Relationship with Conference of the Parties<sup>34</sup>**

A key issue in the relationship between the committee and the CMA appears to be whether and how the committee will report to the CMA on individual cases, including on incidents or non-compliance, and on systemic issues. Another outstanding issue in the negotiations is what the CMA should do in response to any report from the committee, in particular whether it can or should take note of reports on individual cases of non-compliance.

A key element of the relationship between the committee and the CMA will be the balance between accountability of the committee to ensure it operates within its given mandate, and the independence of the committee, particularly from political interference in its findings. Beyond this, the relationship should be shaped to maximize the contribution of the work of the compliance committee to the review cycles, the global stocktake, and the progression of parties' NDCs in the common pursuit of the long term goals of the Paris Agreement.

## **11. Review of the Modalities and Procedures<sup>35</sup>**

The central issue under this heading is whether the review of modalities and procedures is carried out by the committee or the CMA, how the review is triggered, and how often it is required. It is unlikely that the CMA will have the expertise to carry out an effective review and recommend adjustments. A regular review to be carried out by the committee should therefore be preferred. Any changes to the modalities and procedures that go beyond or counter to the existing mandate of the committee should require the approval of the CMA.

## **12. Secretariat<sup>36</sup>**

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<sup>33</sup> *ibid* pt 3(I), 14.

<sup>34</sup> *ibid* pt 3(J), 14.

<sup>35</sup> *ibid* pt 3(K), 15.

<sup>36</sup> *ibid* pt 3(L), 15.

The scope of the committee's mandate will be quite broad, much broader than the compliance committee under the Kyoto Protocol. The committee it will have to deal with over 190 individual parties as well as collective and systemic issues potentially covering a broad range of subject matters. Having adequate and effective secretariat support will be critical for its work.

## **Overall Assessment & Reflections**

There is much to be resolved in developing an effective, efficient, and fair compliance process under Article 15. Key among them are effective triggers for the compliance process, an adequately broad mandate to be able to effectively facilitate implementation and promote compliance with all important commitment in the Paris Agreement whether binding or not and whether made by a developed or a developing country Party. The inclusion of "implementation and compliance" and the language of "the provisions" in Article 15(1) clearly enables the process to deal with all important commitments. Any differentiation between binding and non-binding and differentiation among parties should focus on applying appropriate measures in the circumstances. This can be assured through an appropriate combination of general direction to the committee and appropriate discretion. A fair and effective process will depend on the full implementation of the commitment to transparency and on procedural fairness to any Party being investigated.

It will be important to keep the focus of the committee on technical issues and to avoid having it dragged into political issues and equity judgement calls. This seems particularly important and tricky when it comes to the assessment of systemic issues. The committee will be well advised to stick to assessing whether the collective goals are on track and to technical assessments of the causes, without being seen to point fingers at any particular party or group of parties unless they have clearly failed to meet their individual commitments. This means the focus should be on commitments that allow for a technical assessment of compliance or implementation, rather than political consideration or judgements. Committee has the potential to make an important contribution to progress on collective commitments, particularly those that involve all parties or a clearly identified group of parties, as this can be assessed without getting to any assessment of who within the group of parties needs to do more. Having said this, to ensure the committee has the full opportunity to pursue important systemic issues as they arise, the triggers for systemic issues should include the CMA, the Article 13 outcomes, and the committee based on its own assessment of reports generated under the PA.

It will be important to properly integrate the work of the committee with Article 13 and 14. Not much can be said about the details of how to ensure this is done until there is more clarity on the review process under Article 13 and the global stocktake under Article 14. However, it is clear that the compliance committee can benefit greatly from the work proposed under Article 13, and its conclusions and recommendations have the potential to be important for the global stocktake.

For binding commitments, it will be important for the committee to make a finding of compliance/non-compliance and to apply other appropriate consequences including a compliance action plan, and other non-punitive measures. It would be helpful for negotiators to recognize in this regard that compensatory measures are different from punitive measures, and that for markets under Article 6 to function, it may be important to include compensatory measures in the toolbox of the compliance committee. Special access to support should be limited to LDCs and SIDS.

## **Conclusion**

In conclusion, it is too early to say whether the compliance system is finding its place among the many institutions and processes under the Paris Regime. There are still many issues unresolved within the compliance negotiations, and many more issues to be worked out on other key aspects of the Paris rulebook. Unless there is significant progress in other areas well before the COP in November, negotiators would be well advised to develop the modalities and procedures for compliance at a high level, and to leave much of the detail for the compliance committee to work out after there is more clarity on how other aspects of the Paris Agreement, including Articles 6, 13 and 14, will be implemented. As a result, this year's COP will be an important milestone in the development of the Paris compliance system, but it is unlikely to mark the end, as much of the detail will inevitably have to be finalized later, either by the CMA or by the compliance committee once it is established.