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Reviewing Implementation & Compliance under the Paris Climate Agreement: Preliminary thoughts on Process Design for Articles 13-15

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Introduction

Articles 13 to 15 of the Paris Climate Agreement establish four key elements of an overall cycle of review as part of the pledge and review approach adopted in the Agreement, a technical review of progress reports filed by Parties, a multilateral review of these progress reports, a global stocktake of progress toward the collective long-term goal, and an implementation and compliance mechanism. The design, timing and sequencing of these reviews will have to be negotiated before the Paris Agreement can be fully operationalized. This working paper considers some of the key issues negotiators will have to consider in designing these review processes.

Article 13 provides for an enhanced transparency framework to ensure clarity on the actions taken by Parties and the support provided, needed and received. Specific areas of support identified are financial support, technology transfer and capacity building. A particular focus of Article 13 is the actions Parties take to achieve their nationally determined contribution (NDC). Key aspects of the Article 13 transparency framework will have to be negotiated before its implementation. Among them are rules on reporting, including the substance, timing, format, and methodologies of Party's reports, and the flexibility to be afforded to some developing countries in terms of frequency and scope of the reporting obligation. A second element is a technical review to be carried out of the information provided by each Party under Article 13. Finally, Article 13 provides for a facilitative, multilateral consideration of progress on finance and on the implementation of NDCs.

Article 14 provides for a Global Stocktake of collective progress toward achieving the purpose of the Paris Agreement and its long-term goal. The stocktake shall include mitigation, adaptation and the means of implementation and support, and shall consider equity and science in its assessment of progress. Sources of information include the IPCC and subsidiary bodies of the UNFCCC. The first Global Stocktake is to take place in 2023, though a less comprehensive assessment of progress is planned outside the Paris Agreement for 2018.

Article 15 calls for a mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement. The committee to be established shall be expert based, facilitative in nature and function in a manner that is

transparent, non-adversarial and non-punitive. The committee is to consist of 12 members with recognized competence in relevant scientific, technical, socio-economic or legal fields, to be elected by the Conference of the Parties. The regional distribution of membership of the committee is to follow the example of other committees under the UNFCCC, such as the compliance committee under the Kyoto Protocol.

Elements, Goals and Outcomes of the Reviews

My focus in this paper is on the respective roles, connections, timing, sequencing and process options for the following elements of the review process set up in Articles 13-15:

1. The technical review of information provided by Parties on the implementation of and progress toward achieving their NDCs
2. The multilateral consideration of progress on the implementation of NDCs
3. The Global Stocktake of progress toward the LTG
4. The mechanism to facilitate implementation and to promote compliance

It is important to consider these elements of the review process under the Paris Agreement in light of the overall approach of the new climate regime negotiated in Paris, a combination of a collective top down long term goal, nationally determined short and medium term commitments, and a regular reporting, review and stocktaking process to encourage progression of ambition. Among the key considerations for the design of the review process are:

- The importance of Parties knowing whether other Parties are achieving or exceeding the goals set in their NDCs
- Recognition that while there is a commitment to progression in ambition from one NDC to the next in five year cycles, NDCs will continue to be nationally determined.
- There is no agreement on principles that would enable an objective assessment of the comparability of commitments
- The review and assessment of efforts is to be facilitative and non-punitive

Each element of the review process will undoubtedly have very specific goals and objectives, such as enhanced transparency. The ultimate goal of the overall review process, in my view, should be to motivate Parties to increase the ambition of their actions and support over time. It may be instructive, in light of this, to consider what outcomes of a review process have the potential motivate Parties to increase the ambition of their actions and support:

- Transparency of level of achievement, effort and barriers for each Party
- Knowing which Parties are achieving or exceeding their NDCs
- Getting recognition for genuine efforts to achieve or exceed NDCs
- Getting recognition for genuine efforts to increase ambition
- Getting help to overcome barriers to progress that challenge the capacity of the Party involved

- Learning how to overcome barriers
- Learning how to accelerate progress

One of the challenges in designing a review process for actions and support under the Paris Agreement is that it includes a range of efforts, each with its own unique legal status from legally binding to purely discretionary. The efforts that will be subject to review include mitigation, adaptation, finance, technology, capacity and reporting.

To further complicate matters, we should expect that the 197 Parties will, to varying degrees, fail to meet, meet or exceed elements of their NDCs for a broad range of reasons, such as inadvertence, lack of capacity, evolving views on fairness and comparability, unforeseen events, domestic political issues, economic factors, changes in our scientific understanding of the problem and solutions, changes in technologies, and changes in public support. In some cases, these factors will make compliance easier, in other cases they will create barriers. Some unexpected barriers will be overcome by Parties, others will not. Some efforts subject to review will be included in Parties' NDCs, others will not, and the situation will differ from Party to Party. My basic point is that the review process can only hope to achieve the goal of contributing to increased ambition and meeting the long-term goal if it is designed with this diversity of circumstances in mind, and with a full appreciation of the complexity of the Paris Agreement.

Learning from the Past

Next I will briefly explore which review processes under the UNFCCC Parties might draw on for inspiration on how to design each of the four key elements of the review process under Articles 13-15.

For the Article 13 technical review, the expert review teams (ERTs) set up under the Kyoto Protocol to review compliance with key reporting and substantive obligations may offer lessons on how to design this element of the review process. The experts for these ERTs were nominated by Parties, selected by the COP, and served in teams of three. Among the concerns with the ERT process were inconsistencies in how experts treated certain issues, inconsistencies in which issues got referred to the compliance committee, a shortage of qualified experts, independence of experts from nominating Parties, and compensation of experts for their work.

The number of experts on a review team, training, compensation, the process for nomination of experts, and clear direction on the transition to other elements of the review are among the design issues that warrant consideration. In country reviews appears to be another issue that will be subject to further negotiation, as the Paris Agreement leaves this discretionary. The fact that it does so in spite of the demonstrated value of in country reviews for understanding the challenges and barriers and helping Parties overcome them, suggests that some Parties may perceive them as intrusive.

The Article 13 multilateral review is perhaps the most difficult to design with reference back to a particular existing process. It is difficult to suggest which existing process may best serve as a starting point. The primary reason is that we know little about the purpose of this element of the review process and in particular how it is intended to relate to the expert review, the Global Stocktake, and the Article 15 mechanism. Possible processes to consider when designing the multilateral review include the Multilateral Assessment (MA) under the international assessment and review (IAR), the Facilitative Sharing of Views under the international consultation and analysis (ICA), and the structured expert dialogue (SED) for the 2013-15 review of the adequacy of the long-term goal.

Depending on whether the multilateral review is seen as a step toward the Article 15 review, the Article 14 Global Stocktake, or potentially the conclusion of the review of the information provided by Parties under Article 13, the rigour of the process may be different. On balance, the SED would appear, at least on the surface, to be the most appropriate starting point for designing this element of the review. Among the issues to be explored further is the duration of the multilateral review, and whether it will deal with all Parties collectively, or with individual or groups of Parties.

For the Article 14 Global Stocktake, perhaps the most obvious process to draw on would be the structured expert dialogue (SED) for the 2013-15 review of the adequacy of the long-term goal. The SED process stretched over the course of two years and involved 5 separate sessions, covered two separate themes, involved 70 invited experts, and some 300 questions and answers between Parties and experts. While adjustments would likely have to be made, the basic concept of identifying appropriate themes for the Global Stocktake, inviting appropriate experts, and facilitating an open exchange between experts and Parties on the pre-determined themes would seem a promising start to the process.

A key question will be what the desired outcome of the Global Stocktake would be, and how to design the process to achieve the desired outcome. The SED did not include any formal conclusions or decisions, but it did include a number of messages from the co-facilitators of the process that sought to summarize points of convergence in the discussion. Further adjustments to the process may be warranted based on the experience with the 2018 stocktake to be carried out before the Paris Agreement becomes fully operational in 2020. Possible themes include how collective mitigation efforts measure up against the long-term goal, progress toward the global adaptation goal, the adequacy of support (finance, technology, capacity), and equity.

For the Article 15 implementation and compliance mechanism, the design and experience of the facilitative branch of the compliance committee under the Kyoto Protocol would seem to be most relevant. Certainly, the composition requirements are similar. The challenge with drawing on the facilitative branch of the Kyoto

compliance system is that it was not very active, and it was unable to effectively deal with the one substantive case that was brought before it, a matter referred to it by South Africa on behalf of the G-77 with respect to the failure of a number of developed countries to file demonstrable progress reports. That experience suggests a danger that a committee with the composition prescribed for the Article 15 mechanism could run the risk of becoming politicised along developed developing country lines.

Differentiation will likely be a challenge in the design of this mechanism. A key design issue will be how the mechanism will deal with the different legal status of the various efforts that are subject to Article 13 reporting and review, and whether the Article 15 mechanism deals with all, only some issues identified in the Article 13 review, or will focus on issues not addressed under Article 13. Interesting in this regard is the reference to both implementation and compliance in Article 15, which might be interpreted as suggesting a broad range of issues to come before the committee.

The ultimate challenge with the Article 15 implementation and compliance mechanism is that it is difficult to design a process until there is more clarity on its role. Article 15 could focus on individual issues that arise out of the Article 13 technical review, it could pick up issues identified in the Article 13 multilateral review, or it could focus on issues potentially not at all covered by the Article 13 review, such as failure to file reports or submit NDCs all together. The Article 15 mechanism could also carry out thematic reviews of implementation and compliance, such as reporting and accounting methodologies. Finally, it could play a role in determining whether challenges Parties experience warrant priority access to assistance under the GCF, the CTCN, or capacity building. The key issue to keep in mind in considering an appropriate role is the composition of the Article 15 mechanism. It offers a middle ground between the COP and other open consultations on the one hand and expert reviews carried out by individuals or small teams of technical experts on the other.

Timing and Sequencing

The timing and sequencing of the key elements of the review cycles will be a complex and critical task in ensuring an effective review that effectively supports the goals of the Paris Agreement. The starting point for any of the review elements will be accurate and timely information. This means the reporting obligations need to be clarified, and compliance with the guidelines and methodologies developed needs to be promoted through early and regular reviews of the information provided. This needs to happen in advance of the start of the 5-year review cycles so that those cycles can proceed with the assurance that they are based on reliable, accurate and comparable information.

Some of the sequencing of the review cycles is already set in the Paris Agreement and the Paris COP decision. The first stocktake will take place in 2018. This will be followed by Parties submitting intended NDCs in 2019, and final NDCs in 2020.

These elements of the review cycle then repeat themselves every five years, with the Global Stocktake in 2023, the filing of the next intended NDCs due in 2024, and the final NDCs due in 2025.

Key timing and sequencing issues that are unresolved are the timing of Parties' reports under Article 13, the technical reviews of those reports, and the multilateral consideration. It seems clear that Article 13 envisages that the results of the Article 13 review will inform the Global Stocktake, though Article 14 is not as clear on this point. One approach would be to have annual reports filed by Parties, with some form of annual technical review, with flexibility on the frequency for Parties with demonstrated capacity challenges (until those challenges are resolved through the transparency capacity efforts provided for).

An advantage of annual reporting would be that it would then be easier to pick appropriate years for more in-depth reviews, as the reports would be available each year. One set of in depth reviews would take place in the early years of the reporting for the specific purpose of ensuring accuracy, reliability and comparability of the information provided. After that, more in depth reviews could be timed for the best fit with the elements of the review cycle already set, the Global Stocktake, the intended NDC, and the final NDC. A reasonable approach would be to aim to complete in depth reviews (both the technical and multilateral reviews under Article 13) before the start of the Global Stocktake, so that the Global Stocktake has the benefit of the Party reports as well as the results of the reviews. If the implementation and compliance mechanism serves a trouble shooting function, it will presumably have to fulfil that function as issues arise. To the extent that it also deals with thematic issues, those might also best be coordinated to ensure the results are available for the element they are most relevant for.

One further point on sequencing and timing. All elements of the review process discussed here would ideally have a learning element incorporated. As a starting point, each element of the review should reflect on the previous review cycle before the next review cycle is finalized. Beyond this, certain elements can likely be adjusted and enhanced based on experience with other elements. The first multilateral review under Article 13, for example, can inform the design of the first Global Stocktake. Some elements may be able to draw on experience from the current work on enhancing pre-2020 ambition under Workstream 2 of the Durban Platform.

Finally, a point about non-state actors. One of the innovative aspects of the Paris Conference was its engagement of non-state actors, including sub-national governments, the private sector and non-governmental organizations. It is more clear than ever that the success of Paris will depend significantly on the engagement of non-state actors. While Parties will likely continue to play the predominant role in engaging non-state actors, it is clear that the UN climate regime is evolving to reach out more directly. One of many on-going issues in this regard will be the role of non-state actors in the review of Party's efforts. However, it may also be useful to

consider the role of commitments made by non-state actors in the review cycles under Articles 13-15, whether formally or informally. Will there be space, for example, to consider the commitments made and progress on those commitments by subnational governments in the review of a Party's efforts? Will there be ways to ensure information about the efforts of non-state actors achieves a certain level of reliability, accuracy and comparability?

Conclusion

Much important work lies ahead for negotiators with respect to the reporting, review and compliance elements of the Paris Agreement. The basic building blocks are in place, and there is considerable experience that negotiators will be able to draw on from existing and previous review and compliance processes under the UNFCCC and the Kyoto Protocol. The Paris Agreement, however, is a new legal instrument with important new features that require careful consideration in the design of effective reporting, review and compliance procedures in support of ambitious action to address climate change by all Parties.