

Compliance in the 2015 climate agreement

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1. Introduction

The UN Framework Convention on Climate Change (UNFCCC) is entering a defining moment of its existence as it prepares to strengthen the multilateral rules-based regime to address climate change, through a legally binding agreement that will be applicable to all parties.

The Durban Platform for Enhanced Action clearly calls for the 2015 agreement to be legal in nature, which is reflected in three elements: form; obligations; and provisions for compliance and enforcement. This paper focuses on provisions for compliance and enforcement.

Some argue that a strong compliance mechanism may discourage countries from ratifying the agreement, or from being ambitious in their nationally determined contributions. However, the UNFCCC negotiations have gained significant momentum towards adopting an agreement to address climate change through a multilateral rules-based regime; in other words, under a regime that is legally enforceable.

The rule of law has a significant influence on how states behave. A legally binding regime with a robust compliance mechanism can provide much-needed certainty that the agreed provisions are enforceable, and that the targets that the parties themselves have set can be met. Provisions for compliance give an assurance that the parties are serious about their self-determined targets – which can in return enhance trust between parties. A compliance mechanism can also support effective implementation, and prevent the so-called ‘free riding’ of those parties unwilling to contribute, but who will eventually benefit from other parties’ sacrifices.

This paper discusses the options for addressing compliance in the 2015 climate agreement. It briefly explains various approaches of compliance in other multilateral environmental agreements (MEAs) and discusses key positions on the table for the current negotiations. The final section of the paper presents the main findings and recommendations for the way forward.

2. Compliance in other environmental regimes

Most multilateral environmental agreements use compliance systems to prevent non-compliance, facilitate implementation and ensure enforcement. In general, enforcement provisions in MEAs seek to facilitate compliance, and only penalise as a last resort.¹

Biodiversity-related MEAs adopt a unique approach to enforcement by means of trade control and sanctions, which further encourages domestic compliance through imports and exports. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), for instance, controls the trade of endangered species through national systems that grant permits in accordance with the conditions ascribed in the Convention.

Enforcement measures and sanctions on other MEAs include formal cautions, 'naming and shaming' lists, joint inspections, and the suspension of rights under the Convention/ Protocol; including eligibility to participate in market mechanisms or to apply for funding.

States may be encouraged to comply through various instruments, including peer review and national reports to monitor and review a regime's effectiveness. This cooperative approach to compliance is carried out through institutional arrangements such as compliance committees, which provide advice, assist parties on developing action plans, and issue recommendations on the provision of financial and technical, technology transfer and capacity-building assistance for the non-compliant state.

The UNFCCC, through the Kyoto Protocol, adopts both an enforcing and a facilitative approach through two distinct 'branches'. This will be seen in more detail below.

The following are examples of compliance mechanisms in MEAs:

The Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)² adopts a list-based approach, by which a state domestically monitors imports and exports of listed protected species. Trade can only take place if the exporting state issues the correct documents and complies with the regulation. Lack of compliance may subject the party to international trade suspensions and even trade bans on particular species.

1 In the words of Birnie *et al.* (2009), "The fundamental assumption is that when governments voluntarily undertake commitments they normally intend to comply. Non-compliance procedures thus operate on the understanding that it is better to assist and encourage than to penalize them for failing" (Birnie *et al.* (2009) *International Law and the Environment*. Oxford University Press, p. 246).

2 CITES was signed in 1973.

The trade control promoted by CITES affects non-parties too³ since members of the Convention are not allowed to import from those that are not parties to the agreement.

The compliance procedure usually begins with the Secretariat noticing that an issue of non-compliance is imminent and notifying the concerned party. Should the party fail to promote compliance, the CITES Standing Committee may analyse the case, issue recommendations on compliance for the Conference of Parties (COP) to decide or, in some cases, undertake compliance measures itself.

Montreal Protocol on Substances that Deplete the Ozone Layer

The Montreal Protocol⁴ has also incorporated a trade control system that impacts trade with non-parties to the Protocol, in accordance with its Article 4.

A formal non-compliance procedure can be triggered by request of the Secretariat or any party to the Protocol, including the party under imminent or current non-compliance. The Implementation Committee, a body of ten members elected under proportionate geographical distribution, analyses the case and issues a recommendation. The Meeting of the Parties then decides on a solution for the non-compliant state.

Facilitation measures may include providing financial, technical and capacity-building support, as well as assistance on reporting issues. For such purposes, the Implementation Committee may even visit the party's territory, should it be invited to do so.

In case such facilitative measures are not enough, the Meeting of the Parties (MOP) may apply sanctions such as issuing formal cautions and suspending rights under the Protocol, including trade privileges.

Cartagena Protocol on Biosafety

The Convention on Biodiversity⁵ itself does not contain provisions on enforcement and compliance mechanisms. The Cartagena Protocol, on the other hand, has established a mechanism to address non-compliance, and a Compliance Committee.

3 The term 'non-parties' refers to any state, entity or individual that is not a party to a given international agreement. Such parties may sometimes be indirectly affected by extraterritorial provisions in international agreements which they have not entered into.

4 The Montreal Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention for the Protection of the Ozone Layer, 1987.

5 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000.

The Compliance Committee provides advice, assistance and reports, and recommends facilitative measures for adoption by the COP/MOP. It also nudges parties to provide reports and assists on the development of action plans.

The COP/MOP may approve recommendations on financial and technical assistance for non-compliant parties, but also sanction them with formal cautions, or by publishing their non-compliance status in the Biosafety Clearing House, and take other more stringent measures in case of repeated non-compliance.

3. Lessons learned from the Kyoto Protocol

The Kyoto Protocol⁶ has developed an innovative compliance mechanism that:

1) addresses questions of implementation by the parties, providing advice and recommendations; 2) facilitates assistance for complying with the commitments under the Protocol; and 3) applies sanctions in cases of non-compliance.

Article 18 of the Kyoto Protocol mandated the establishment of a compliance mechanism.⁷ At the first meeting of the parties to the Kyoto Protocol a Compliance Committee was established to carry out compliance procedures under the Protocol.⁸ These procedures aimed to facilitate, promote and enforce compliance with commitments under the Protocol.

The Compliance Committee is formed of two branches – the enforcement and facilitative branches, each composed of ten members,⁹ a chair and a vice-chair. The committee meets in a plenary of members of both branches, and is supported by a bureau, consisting of the chair and vice-chair of each branch.

Under the enforcement branch, a quasi-judicial process takes place, and penalties are imposed on non-complying parties.¹⁰ Such penalties include increasing the individual party's target level and suspending treaty rights.¹¹

The Kyoto Protocol compliance mechanism addresses compliance issues in developed countries, though the facilitative branch can also support implementation by developing countries.

6 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997.

7 Kyoto Protocol, Article 18: "The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol".

8 Decision 27/CMP.1.

9 Including one representative from each of the five official UN regions (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, Western Europe and 'Others'), one from the Small Island Developing States, and two each from Annex I and non-Annex I Parties.

10 Non-confrontational and non-judicial compliance procedures, similar to that of the World Trade Organization dispute settlement body.

11 Such as eligibility to participate in emissions trading or the Clean Development Mechanism, among other things.

3.1 The facilitative branch

The facilitative branch is responsible for providing advice and facilitation to parties in implementing the Protocol, and for promoting parties' compliance with their commitments under the Protocol, taking into account the principle of common but differentiated responsibilities and respective capabilities.

This facilitative approach includes:

- giving advice and facilitating assistance to parties on implementing the Protocol
- facilitating financial and technical assistance, including by means of technology transfer and capacity building
- assessing imminent non-compliance cases and providing early warning recommendations and assistance
- making recommendations to requesting parties.

3.2 The enforcement branch

The enforcement branch is responsible for determining whether an Annex I party is not in compliance with its emissions targets, with the methodological and reporting requirements for greenhouse gas inventories, or with the eligibility requirements under the mechanisms. It may then impose sanctions on such parties for not meeting their commitments.

The members of this branch are usually lawyers. Decisions are based on evidence and legal reasoning and are made public. Public hearings may be conducted too, if requested by the concerned party. Although not a judicial process, the due process of law is observed in many respects.

3.3 The Compliance Committee procedure

At the Second Meeting of the Parties to the Kyoto Protocol, the Rules of Procedure of the Compliance Committee were adopted, under Decision 4/CMP.2.¹² The procedure is triggered when a 'question of implementation' is raised.

¹² Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol, Decision 4/CMP.2, 'Compliance Committee'.

3.3.1 Questions of implementation

Kyoto Protocol's questions of implementation, including issues and concerns for non-compliance, can be raised by:

- expert review teams¹³ under Article 8 of the Protocol
- any party with respect to itself
- any party with respect to another party, supported by corroborating information.

After a preliminary examination, the Bureau of the Compliance Committee allocates the matter to one of the branches (facilitative or enforcement), according to their respective mandates. The enforcement branch may also refer a question of implementation to the facilitative branch.

Within the scope of the facilitative branch are questions of implementation such as: 1) How are Annex I parties minimising the adverse impacts on developing countries of response measures aimed at mitigating climate change? And 2) Are Annex I parties using the flexibility mechanisms in a manner that is 'supplemental' to domestic action?

Questions to the enforcement branch may refer to a possible case in which a party included in Annex I is 1) not complying with its emissions targets; 2) not complying with the methodological and reporting requirements for greenhouse gas inventories; or 3) failing to fulfil the eligibility requirements under the mechanisms.

Furthermore, the enforcement branch may decide in the case of disagreements between a party and an expert review team, such as in the following situations: 1) the need for adjustments in greenhouse gas inventories, or any need to correct the compilation; 2) the appropriateness of the database for the accounting of assigned amounts.

3.3.2 Promoting compliance

The facilitative branch is also responsible for providing advice and facilitation for compliance, as well as for issuing early warnings for potential non-compliance with mitigation commitments as in Article 3 paragraph 1, and with the methodological and reporting requirements for greenhouse gas inventories as per Article 5 paragraphs 1 and 2, and Article 7 paragraphs 1 and 4 of the Kyoto Protocol.

13 Expert review teams (ERTs) are tasked to review national reports (annual inventory submissions and other periodic national communications), and to indicate any 'question of implementation' in their reports. This triggers the proceedings of the compliance committee. According to Oberthür, by mid-2014 all the questions of implementation that the enforcement branch addressed were raised in expert review team reports (Oberthür, S (2014) Options for a compliance mechanism in a 2015 climate agreement. ACT 2015. Washington, DC. See http://act2015.org/ACT2015_OptionsForCompliance.pdf).

The facilitative branch procedure is based on dialogue with the concerned parties. By the end of its assessments, the branch decides on the consequence for the party concerned, taking into account the principle of common but differentiated responsibilities and respective capabilities. The consequence could be:

- advice and facilitation of assistance for implementing the Protocol to the party concerned
- facilitating financial and technical assistance to the party concerned, including technology transfer and capacity building
- recommendations to the party concerned on the linking clause of Article 4, paragraph 7, of the Convention. This clause states that the extent to which developing country parties will effectively implement their commitments will depend on the effective implementation by developed country parties of their financial resources and technology transfer commitments.

3.3.3 Addressing non-compliance

For each type of non-compliance, a specific course of action takes place:

Should the enforcement branch identify that the emissions of an Annex I party have exceeded its assigned amount, it must:

- declare that the party is in non-compliance
- require the party to make up the difference between its emissions and its assigned amount during the second commitment period, plus an additional deduction of 30 per cent
- require the party to submit a compliance action plan, and suspend its eligibility to make transfers under emissions trading until the party is reinstated.

The party has 100 days to make up the shortfall.¹⁴ By the end of 100 days, if emissions are still greater than its assigned amount, the enforcement branch must declare the party to be in non-compliance and apply the same consequences as described above.

If the enforcement branch identifies that an Annex I party does not meet an eligibility requirement for Kyoto's flexibility mechanisms, the eligibility of the party will be withdrawn or suspended immediately.

¹⁴ By acquiring assigned amount units (AAUs), certified emission reductions (CERs), emission reduction units (ERUs) or removal units (RMUs) through emissions trading in the carbon market. See http://unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php.

The party may request to have its eligibility restored once it has been able to meet the eligibility criteria again.

In the event of a party not complying with the reporting requirements as set out in Article 5 paragraphs 1 and 2, and Article 7 paragraphs 1 and 4 of the Kyoto Protocol, the committee will publicly declare the non-compliance, and the concerned party will be required to develop a compliance action plan in three months, with progress reports.

3.3.4 Deliberations

Decisions of the plenary and the facilitative branch are taken by a three-quarters majority, while decisions of the enforcement branch require, in addition, a majority of votes by both Annex I and non-Annex I parties.

As a general rule, decisions taken by the two branches of the Committee cannot be appealed. The exception is an enforcement branch decision on emissions targets. Even then, a party can only appeal if it believes it has been denied due process, in which case it can appeal to the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol.

The Kyoto compliance mechanism is recognised as one of the most rigorous at international level, for not only promoting and facilitating compliance, but also for incorporating the means to address non-compliance. It has successfully addressed cases of methodological and reporting requirements and disagreements on inventory data for eight countries.

However, this compliance mechanism is not above criticism. Since the core obligations under the Kyoto Protocol are limited to developed countries, the scope of the compliance mechanism is consequently limited to address the obligations of these countries. Moreover, the facilitative part of Kyoto's compliance system may be ill-conceived in terms of its ability to avoid non-compliance. The case of Canada is an example of a major compliance issue that could not be addressed by the Compliance Committee. In 2007, the Government of Canada publicly declared, and scientific data endorsed, that it would not be able to meet its emissions target. Despite such a clear warning of imminent non-compliance, the Kyoto compliance system was not triggered – and was then unable to take any facilitative action. The facilitative branch could only issue an 'early warning' letter to Canada in February 2012,¹⁵ long after the state had announced its withdrawal from the

15 See 'Earlier discussion by the branches of the Committee of the matter of Canada's withdrawal from the Kyoto Protocol' in the Note CC/EB/25/2014/2 of the Compliance Committee, at: https://unfccc.int/files/kyoto_protocol/compliance/enforcement_branch/application/pdf/cc-eb-25-2014-2_canada_withdrawal_from_kp.pdf

Kyoto Protocol on December 2011, becoming effective in December 2012. As a result, Canada was not sanctioned and did not suffer any legal consequences whatsoever for its non-compliance. Kyoto failed twice: for not being able to facilitate and avoid non-compliance when it had a clear chance, and then for failing to sanction Canada by allowing an easy getaway: treaty withdrawal.

4. Compliance in the current negotiating text

4.1 Current status of negotiations

There are many questions still to be answered in the context of the Durban mandate for the Paris Agreement. Some key questions include: 1) Should the mechanism be facilitative only, or also contain an enforcement function, such as the Kyoto Protocol's compliance mechanism? 2) How should the mechanism balance facilitation and enforcement? 3) Which substantive commitments/contributions should be covered in the compliance mechanism? 4) Should the compliance mechanism differentiate between developed and developing countries, or assume that differentiation is already reflected in the substantive commitments/contributions? 5) How could differentiation be applied? It is difficult to answer all these questions given such different parties with their different views.

The status of current negotiations shows a general agreement on establishing arrangements for implementation and compliance in the Paris agreement, and many parties are of the view that the agreement should incorporate a clause to ensure that a compliance mechanism is in place by the first session of the governing body. However, disagreements over how to apply the principle of common but differentiated responsibilities and respective capabilities have become a stalling point for negotiations. Some parties argue that differentiation would arise from differences in the substantive commitments/contributions themselves, so that it does not need to be referred to in the compliance mechanism. Others argue that differentiation should be clearly reflected in the provisions of a compliance mechanism, including through its scope and structure, and addressed under facilitative and enforcement branches.

In terms of the nature and the purpose of the compliance mechanism under the Paris agreement, some parties believe that a compliance mechanism should be facilitative in nature, while others argue that it should also have an enforcement function. Some parties have stressed that facilitating implementation and compliance can play an important role in building confidence among parties to the agreement, by enhancing transparency and accountability.

In terms of the operational details of a compliance mechanism, some parties argue that they can be elaborated after COP21, but would need to be developed before the first session of the governing body. Others argue that the arrangements should be ready as part of the Paris package, in order to enable their national stakeholders to fully capture the legal nature of the agreement. On the other hand, other parties have argued that because the six elements contained in paragraph 5 of the Durban Mandate (Decision 1/CP.17) do not include compliance, this should not be in the agreement.

4.2 Proposals for the current negotiations

There are various proposals on the table for facilitating implementation and promoting compliance under the Paris agreement.

1. A Kyoto-style compliance mechanism – with modifications

This proposal aims to establish a compliance mechanism similar to the Kyoto Protocol's, which will promote and facilitate as well as enforce compliance. Consequently, this mechanism should also have two branches: enforcement and facilitative. The scope of the mechanism should cover all obligations under the 2015 agreement. Some proponents of this proposal argue that enforcement should apply to developed country parties, and others with economy-wide greenhouse gas reduction targets, while facilitation should apply to developing countries. Others argue that there should be no differentiation. One key factor of this proposal is ensuring consequences in case of non-compliance. If this proposal succeeds, parties must also make sure of provisions to avoid similar situations to the Canada case, as discussed in the previous section on the Kyoto Protocol compliance mechanism.

2. A compliance mechanism that is facilitative only

This proposal aims to establish a compliance mechanism that is only facilitative in nature and with no legal consequences, penalties or sanctions if a party is found not to comply. Instead, the mechanism will make efforts to prevent non-compliance by facilitating implementation. As such, the compliance mechanism would be non-adversarial, non-judicial and non-punitive. Proponents of this proposal also argue that there should be no differentiation between parties, and facilitation should be applicable to all.

3. A multilateral consultative process

Under this proposal, a multilateral consultative process would be established to ensure implementation of the agreement based on Article 13 of the UNFCCC.¹⁶ Article 13 calls for the establishment of a 'multilateral consultative process' to help governments overcome difficulties they may experience in meeting their commitments. Parties established the Ad Hoc Group on Article 13 (AG13) to explore how to implement Article 13 of the Convention. The AG13 made its final report to COP4 in 1998 recommending the establishment of a multilateral consultative committee to provide the appropriate assistance for difficulties encountered in the course of implementation, by: 1) clarifying and resolving questions; 2) providing advice and recommendations on procuring technical and financial resources

¹⁶ UNFCCC, Article 13, Resolution of Questions Regarding Implementation: "The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention."

for the resolution of these difficulties; and 3) providing advice on information compilation and communication. However, it was never adopted due to lack of agreement on how the committee would be composed¹⁷ and the process has never been followed through.

If a multilateral consultative process is established under the 2015 agreement, it would be purely facilitative, aiming to resolve implementation questions by providing advice on assistance, promoting understanding of the agreement, and preventing disputes from arising. The process would be conducted in a facilitative, cooperative, non-confrontational and non-judicial manner. It should be noted that such a multilateral consultative process would not trigger any action to oversee whether parties' commitments are enforced. There is no guarantee that the parties would comply with their obligations under this process. Having no previous experience of such a process under the UNFCCC regime should also be a concern.

4. Provisions for transparency

Some parties argue that provisions for transparency are sufficient to facilitate compliance and that there is no need for a stand-alone compliance mechanism. If agreed, such a transparency system could be built on the current UNFCCC transparency system, which already contains provisions for 'international assessment and review' (IAR) and 'international consultation and analysis' (ICA). However, in the context of compliance, a transparency system is merely facilitative and has limited potential to ensure compliance, let alone to address non-compliance. If the 2015 agreement is to be legal in nature and parties are keen to guarantee that legal obligations under the new agreement are enforced, a mere transparency system would not be sufficient.

5. An international climate justice tribunal

An international climate justice tribunal is a twofold proposal – both to ensure compliance and to provide a method for dispute settlement under the agreement. However, there is no precedence for such a body under the climate change regime, hence it remains unclear how it would actually work. This may be a significant departure from the compliance system under the Kyoto Protocol towards a highly confrontational one. A confrontational, judicial tribunal could discourage parties from committing to the new agreement.

6. No provisions

Some parties propose that there should be no provisions for compliance under the new agreement. This means that the agreement will be non-binding and non-legal in nature.

¹⁷ Yamin, F and Depledge, J (2004) *The international climate change regime: A guide to rules, institutions and procedures*. Cambridge University Press, p. 384–385.

Table 1 summarises the various proposals.

Table 1. Compliance proposals for the Paris agreement	
Proposal	Key features
Kyoto-style compliance mechanism	Dual approach: facilitation and enforcement
Compliance mechanism is facilitative only	No provisions for enforcement, no consequences for non-compliance
Multilateral consultative assessment	Facilitative in nature. No guarantee that parties comply with obligations
International climate justice tribunal	Form of dispute settlement, highly confrontational and judicial
Transparency and accountability provisions	Can facilitate the compliance mechanism, but transparency provisions alone will not ensure compliance or address non-compliance
No provisions	No effective implementation of the agreement. The agreement will be non-binding and non-legal in nature

5. Recommendations

- The Paris agreement should establish a compliance mechanism. A compliance mechanism is a crucial element and can ensure the highest legal rigour on binding international agreements.
- The compliance mechanism of the Paris agreement should be designed in a manner that strengthens trust among parties and enforces parties' obligations to implement the nationally determined contributions/commitments.
- The compliance mechanism should be built on features and arrangements in the current UNFCCC regime and other MEAs.
- Lessons learned from the Kyoto Protocol compliance mechanism should be taken into account to ensure that the Paris Agreement has the most effective compliance mechanism. Thus the Paris Agreement's compliance mechanism should contain both facilitation and enforcement branches. The experience with Kyoto has demonstrated that early prevention of non-compliance could be an effective measure to promote compliance (as learned from Canada's case).
- While it may be constructive to study other proposals such as the facilitation-only compliance mechanism, the multilateral consultative assessment and the international climate justice tribunal, such innovative options may not have the right balance of facilitation and stringency – or 'carrot and stick' – and thus may not serve the agreement as effectively as a Kyoto-style compliance mechanism. Moreover, these may be too much of a shot in the dark compared to the solid experience from Kyoto, whose gaps and failures are well-known and can now be properly addressed with a view to improving the mechanism. The UNFCCC's long-standing climate change regime track record has given us the opportunity of learning by doing, so we might as well use this knowledge and build on it.
- A robust transparency system can assist compliance. However, a compliance mechanism surely plays a different role from a transparency system. These may be closely linked, but transparency provisions cannot be a substitute for provisions for compliance.
- Compliance mechanisms are also closely related to dispute settlement methods, but the latter will not be able to deliver the full functions of a compliance mechanism at international level.

- The Paris agreement should establish the nature, scope and composition of the compliance mechanism. Further elaboration will be necessary, but could be done between 2016 and 2020, before the 2015 agreement comes into force.
- Parties should agree to regularly review the compliance mechanism in the context of the dynamic nature of the Paris agreement.



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