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Strengthening the compliance system for Nationally Determined Contributions*

The Paris Agreement was adopted in 2015 and will guide the post-2020 global climate regulatory regime. The mitigation path adopted by the Paris Agreement represents a progressive, flexible bottom-up pledge and review approach. This bottom-up architecture relies on Parties' unilateral discretion to determine their own mitigation pledges and is subject to an international review process. These pledges are captured in the so-called Nationally Determined Contributions (hereinafter referred to as NDCs).

This briefing paper aims to briefly introduce the oversight mechanisms of NDCs, assess the strengths and weaknesses of the current architecture, and suggest ways forward to strengthen and ensure compliance with parties' commitments in the NDCs implementation process.

I. NDC Oversight Mechanisms of the Paris Agreement

The oversight mechanisms established under Articles 13 to 15 of the Paris Agreement aim to enhance transparency, accountability, trust, and reciprocal action among State Parties by further developing a shared understanding of each Party's targets, contributions, and implementation efforts and by providing scope for feedback on proposed approaches to the issue. To secure states' effective implementation of their NDC commitments, the Paris Agreement has established three mechanisms: first, a 'transparency framework' to review implementation; second, a 'global stocktaking' to assess the collective progress of the implementation of NDCs; and third, 'an implementation and compliance mechanism' to review compliance. Each mechanism is briefly discussed below:

1.1 Transparency Framework (Article 13)

Article 13 of the Paris Agreement establishes an 'enhanced transparency framework' (hereinafter referred to as ETF) to assess and review the implementation of NDCs as well as compliance with their binding procedural obligations. Along with the state's self-reporting and review process, the ETF is tailored with 'built-in flexibility, which takes into account Parties' different capacities and will be implemented in a 'facilitative, non-intrusive, non-punitive manner'. The aim of the ETF is to safeguard the clarity and tracking of progress towards achieving parties' NDCs and adaptation actions as well as to provide clarity on the support provided and received by Parties for which the transparency framework is considered one of the fundamental tools for holding States accountable.

The ETF sets forth a self-reporting system for all countries under which each country is 'regularly'

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required to submit national reports on GHGs inventory and information necessary to track the progress towards implementing and achieving NDCs targets. It is noteworthy that the requirement to submit information on mitigation action is an individually binding obligation that applies to all ('each Party shall', Article 13.7). To put the ETF into operation, the modalities, procedures and guidelines (MPGs) were adopted by Parties in the twenty-fourth Conference of the Parties (COP24) under the Katowice Rulebook.

It was, for example, agreed that the first set of biennial transparency reports (BTRs) through which Parties must report on progress made in implementing and achieving their NDCs (with flexibility for LDCs and SIDSs) will be due by 31 December 2024 at the latest. The negotiations in Katowice, however, could not resolve all pending issues. The Parties are still negotiating on, for example, common reporting tables and tabular formats for the electronic submission of information necessary to track progress made in implementing and achieving NDCs; outlines of the BTR, national inventory document, and technical expert review report; and a training program for technical experts participating in the technical expert review. Progress on the issues was made during the 52nd meeting of the Subsidiary Bodies (SB52) that took place in June 2021.¹

1.2 Global Stocktake (Article 14)

The transparency framework is complemented by a global stocktaking. According to Article 14, the global stocktake shall take place every five years (the first one will be in 2023) in a facilitative and comprehensive manner. It will assess the collective progress towards achieving the purpose of the Agreement and its long-term goals by considering 'mitigation actions, adaptation, means of implementation and support'. To assess the collective progress towards achieving the long-term goals of the Agreement, the global stocktake will take input from the information on the 'overall effect of the NDCs communicated by Parties', adaptation efforts, mobilization of support, and the information generated through the ETF. The stocktaking process aims to inform the next round of NDCs in order to increase their level of ambition. It will also offer the opportunity to evaluate the need for enhanced action and support.

Under the rules adopted in Katowice, the global stocktake will be conducted in three phases: the first phase involves the collection and preparation of information from sources such as NDCs; scientific studies (including from the IPCC); country reports (including transparency reports); and tailored national submissions. The second phase (technical assessment) will consist of a series of technical dialogues held over two or three consecutive UN climate conferences. The dialogues will be organized to assess collective progress toward the Paris Agreement's purpose and long-term goals, including under Article 2.1 of the Agreement,

around three themes: mitigation, adaptation and means of implementation and support. The third phase will involve consideration of outputs. During this phase, the findings of the technical assessment will be discussed and presented. This phase will summarize key political messages and identify opportunities for enhancing action and support.

1.3 Facilitating Implementation and Promoting Compliance (Article 15)

The Paris Agreement creates a new compliance mechanism that will address issues related to implementation and compliance with the Paris Agreement. It is unlike the Kyoto compliance mechanism, with an enforcement branch and some non-compliance consequences. Like most multilateral environmental agreements, the Paris Agreement focuses on facilitating compliance instead of enforcement. Under Article 15 paragraph 2, the Paris Agreement Implementation and Compliance Committee (PAICC) is established. It will comprise an expert-based committee that will function in a manner that is facilitative, transparent, non-adversarial, and non-punitive and will report annually to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA). The modalities and procedures of the PAICC were adopted by the CMA in Katowice in decision 20/CMA.1.

As per the rules adopted in Katowice, cases can come to the PAICC in a number of different circumstances: if the country requests assistance from the committee; if the country fails to submit a required document (e.g. NDC or inventory report) under the Paris Agreement; or if the country does not participate in processes established by the Agreement's transparency system. The committee may also become engaged, but only if the country agrees, if there are "significant and persistent inconsistencies" in the information countries provide in their transparency reports as compared to the requirements. In the situations outlined above, the Committee is tasked to take appropriate measures to facilitate implementation and promote compliance.² Under Decision 20/CMA, the measures are designed in such way as not to impede, but complement and add value to other processes under the Paris Agreement.³ Currently, the committee is developing the 'rules of procedures of the committee' for adoption by CMA3.

2. Assessing the Current System

The architecture of the Paris Agreement and its NDCs is flexible in nature, with flexible implementation and oversight mechanisms. A key strength of the approach is that commitments are nationally designed and determined and, therefore, reflect the national circumstances, priorities, and respective capacities. There are no binding substantive obligations of result (e.g. to meet a target)

¹ For further details and progress made during the virtual SB in May/June 2021 see: <https://unfccc.int/sites/default/files/resource/IN.SBSTA2021.i20.pdf>. ² Christina Voigt, 'The 'Article 15 Committee' to Facilitate Implementation and Promote Compliance. Paris Agreement Policy Brief' (2019), at 5. <<https://ercst.org/wp-content/uploads/2019/05/20190415-Art-15-Brief-VF.pdf>> ³ *Ibid*.

but only procedural obligations of conduct (e.g. to file and update an NDC). Hence, the Paris Agreement is easily compatible with states' governing systems without hampering their sovereignty and national interests.

The flexible approach fulfills the demand by many Parties not to be bound by legally binding rules and also creates a favorable platform where all countries can join with their respective capacities to address the reduction of GHG emissions. It is, therefore, expected that this approach will make the global community more interested in implementing their NDC commitments, with greater vigor and zeal. They may be more inclined to pursue self set mitigation commitments and targets whose development and implementation they control.⁴

However, the flexible 'bottom-up' approach may erode the principles of the UN Framework Convention on Climate Change and lead to legal uncertainties. Moreover, there is a general belief that mandatory obligations signal greater commitments and offer greater assurance of compliance to achieve the expected behavioral change.⁵ This ultimately raises the question of whether this flexible, political approach to NDCs would be able to function effectively to address climate change problems. In international environmental law, it is not surprising to see the adoption of such a political, rather pragmatic and not strictly legal approach.

The fact that national circumstances and priorities are taken into consideration when states draft their NDCs may not necessarily mean that they are fair and ambitious to address global goals. The nationally determined nature of pledges may not be conducive to consistency across NDCs, which will be important to enable comparison. Moreover, the NDC-related provisions of the Paris Agreement provide no method for determining equity or adequacy of Parties' NDCs. These parameters ultimately give leeway to Parties to adopt a minimum mitigation target corresponding to their respective capacity. Furthermore, as part of the review process, there is no mechanism to assess the adequacy of NDCs in efforts to mitigate environmental harm. This is undoubtedly a major drawback of NDCs that eventually challenges their effectiveness to address the GHG mitigation problem.

The oversight regime of NDCs, instead of relying on legal enforcement, puts much emphasis on the review mechanism and negotiated solutions. It does not rectify past breaches and relies heavily on peer pressure and global naming and shaming. Its strength lies in the two-tier review mechanism (ETF and global stocktake): Parties' NDC implementation efforts will be periodically reviewed both at the individual and the aggregated level. Individual review under the ETF will identify the gap between states' mitigation pledges and actual domestic application. Review at the aggregated level will identify gaps between the

total sum of national measures and the required level of ambition. Identification of such gaps will help to put forward a more realistic way for enhancing mitigation actions. Implementation of the NDCs' commitments will be further assisted by an expert-based compliance mechanism whose role will be to enable and support the achievement of NDCs, and that will function in a facilitative, non-adversarial, and non-punitive manner.

The oversight mechanism established by the Paris Agreement is unique and persuasive but not free from drawbacks. As there is no rigorous consequence of non-compliance, it gives countries leeway to bypass the adoption and establishment of costly mitigation policies that involve technological and economic transformation towards low carbon development. Moreover, the past experiences of international climate change politics give little hope on the functionality of peer pressure and naming and shaming to prevent non-compliance.

By way of example, the USA's refusal to join and Canada's withdrawal from the Kyoto Protocol's regime proves that the major GHG emitter countries are willing to accept reputational costs when it comes to choosing national priorities over international concerns. Although NDCs, through their flexible bottom-up approach, achieved global consensus and increased countries' awareness towards normative commitments and their international responsibility, it is very unlikely that this alone will outweigh countries' conflicting national interests.⁶

3. Strengthening Compliance

The final section of this paper, therefore, examines how Parties could increase the likelihood of compliance with their own self-set commitments under the Paris Agreement. The treaty itself lacks enforceable obligations and is largely based on good intentions, voluntary actions and good faith – rather than strict legal obligations.⁷ It relies on the expectation that, because it is in their best interest, governments, companies and other organizations will consider both the challenges and the financial, regulatory and social opportunities that come with climate change, and implement and comply with their commitments by transferring them into their domestic policy and legal frameworks.

To strengthen the bindingness and robustness of the mitigation targets in their NDCs several Parties have in the past integrated their pledges in national law. For example, Germany has enshrined a 55 per cent greenhouse gas reduction target by 2030 in relation to 1990 levels in binding federal legislation (the "Klimaschutzgesetz"). The UK has included the target to achieve net-zero carbon emissions by 2050 (100% relative to 1990 levels) by amending the 2008

⁴ Sharaban Tahura Zaman, 'The 'bottom-up pledge and review' approach of Nationally Determined Contributions (NDCs) in the Paris Agreement: A historic breakthrough or a setback in new climate governance?' [Vol 5, Issue 1, (2018), IALS Law Review, Institute of Advanced Legal Studies, School of Advanced Study, University of London. ⁵ *Ibid*, at 17. ⁶ *Ibid*, at 18. ⁷ Michaela Danneman, 'The Paris Agreement's Compliance mechanism' (2016), at 45. <<http://www.diva-portal.org/smash/get/diva2:1049560/FULLTEXT01.pdf>>

Climate Act. The EU has internal legislation that requires EU member states to meet their agreed contribution to an overall EU target. Other countries that have or are planning to capture their mitigation goals in legislation include Canada, Chile, Japan or Mexico.⁸ In this context, the integration of the NDC into development priorities and other climate-related programmes, policies and strategies can enhance NDC implementation acceptability.

Another option states have to make their NDC mitigation targets legally binding would be to declare them as (or to be) a binding unilateral declaration. Such a declaration is a statement made on behalf of a State, which creates legal rights or obligations under international law.⁹ This has been recognized by the International Court of Justice (ICJ) and the International Law Commission's "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" provide general guidance on when such a statement by a State or State official can be considered legally binding.¹⁰ While enforcement of such a declaration on climate change mitigation would still be a challenge, it could potentially be subject to judicial review in international and domestic courts.

Within the Paris Agreement system, the role of the Article 15 Committee (to facilitate implementation and promote compliance) could be strengthened over time through the internal rules of procedure it is currently developing, changes to the modalities and procedures adopted in Katowice which are to be reviewed by CMA7 as well as its future work and activities. The range of cases that trigger the Committee's involvement (failure to communicate or maintain an NDC, to submit certain other mandatory reports or communications or to participate in the facilitative, multilateral consideration of progress) could be extended to include other "shall" obligations of the Parties or additional measures the Committee can take.

The Committee's Rules of Procedure (currently under

construction) may address the balance between Parties' autonomy and the Committee's authority as well as the measures available to the Committee to address non-compliance in further detail to avoid political wrangling in the future. The authority to apply measures on a case-by-case basis, independently of the CMA and, if necessary, through majority voting decisions would enable swift and timely action. On an informal basis, the Committee could also review other implementation and compliance related issues and regularly liaise with observer organizations or other stakeholders.

In addition, Parties can strengthen the wider oversight mechanism through capacity-building and supporting technology and other needs, and by strengthening the wider enabling environment and allocating adequate financial resources. A well-funded Capacity-Building Initiative for Transparency could play a crucial role in helping build the institutional and technical capacity of Parties. Clear indicators, methodologies and accounting approaches to monitor and verify the implementation of mitigation targets, effective tabular format and reporting standards are all important components to track progress, enable the comparability of Parties' efforts and ensure that the quality of reporting improves over time.

Based on the experience of Parties with their first round of updated NDCs, the guidance on information to facilitate clarity, transparency and understanding (iCTU) of NDCs will be reviewed and could be adjusted to facilitate greater consistency across NDCs. Linking the reporting and iCTU guidance could help to ensure consistency in planning, implementation and reporting. The technical expert review reports and summaries of the FMCP (under the ETF) should be included as sources of input to the GST. Enhancing the reporting requirements on, for example, support received, in the MPGs, which are much less detailed than those on support mobilized and provided, will help provide a clearer picture of the actual impact of climate finance.

⁸ See the Grantham Research Institute on Climate Change and the Environment's database on climate laws and policies from around the world at <<https://climate-laws.org/>>. ⁹ On the whole issue, see the LRI advice paper Unilateral Declaration available at <<https://legalresponse.org/legaladvice/unilateral-declaration/>>. ¹⁰ The principles with commentary are available at: <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf>.

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