

Chapter 18

The role of 'soft' monitoring instruments for compliance with international climate goals³⁸

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Abstract

Learning about effective ways to ensure compliance with internationally agreed targets is key in times of aggravating climate change and other global challenges. This chapter is concerned with the following questions: What role do 'soft' monitoring instruments play within the Compliance System of the Kyoto Protocol (KP), and what are their prospects in the post-2020 climate regime? It analyses the working of the Compliance System since 2006, by looking at the different instruments, ranging from 'soft' (facilitation) to 'hard' (enforcement). It argues that soft instruments and in particular the Expert Review Teams have played an important role in facilitating compliance with countries' climate commitments. The chapter finds that it is the combination of soft and hard instruments that was particularly useful. Based on these empirical findings, derived from expert interviews, recommendations are given for the institutional design of a compliance monitoring architecture to be determined at COP21 in Paris in 2015 and beyond.

18.1 Introduction

It is widely acknowledged that it has never been an easy task to get states to agree on substantive commitments at international climate negotiations. The upcoming climate talks in Paris in December 2015 to agree on a new climate agreement after 2020 will most probably not be an exception to previous experiences. Nevertheless, the current framework, based on decisions of the United Nations Framework Convention on Climate Change (UNFCCC) of 1992 and, in particular, its Kyoto Protocol (KP) of 1997, could be seen, at least according to the UNFCCC itself, as an "important first step towards a truly global emission reduction regime that will stabilize GHG emissions" (UNFCCC, 2014). However, after the first commitment period of the KP in 2012, the world showed a mixed picture: the USA did not ratify the KP, and Canada quit the protocol just before the end of the first commitment period. This meant that only 36 developed countries and so-called countries in transition, which together accounted for 24% of global GHG emissions in 2010, were legally bound by the commitments in that timeframe (see also Box 18.1 below).

Box 18.1 Main facts about the Kyoto Protocol

- Six main greenhouse gases (GHG) are covered: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF₆).
- The individual emission reduction targets (the base-year most often being 1990) for the first commitment period (2008-2012) are listed in the Kyoto Protocol's Annex B, e.g. EU -8%, Japan -6%, Russian Federation 0%; no binding targets for developing countries (which also includes emerging economies such as China).
- Several countries, including the USA, signed the KP, but did not ratify it. Canada left the Protocol in 2012.
- For the second commitment period (2013-2020) 37 countries - representing less than 15% of current global emissions - committed to reducing their emissions by 18% compared with the base-year (most often 1990); major countries such as Japan, Russia, and New Zealand did not commit again.
- USA and China, the world's largest emitters, signed a bilateral agreement in November 2014, agreeing to peak emissions by 2030.

It is at least some good news that these countries collectively over-performed during that period, reducing their overall emissions by 24%. However, as Morel and Shishlov (2015) rightly pointed out, there were also eight countries that did not meet their country targets. But the underachievement of these countries was more than offset by the achievements of other countries. It is noteworthy that the targets agreed upon by the again rather small circle of signatory states of the second commitment period of the

KP cover an even lower percentage of global emissions, which is far from sufficient to stay below the often cited 2°C goal which would be needed to reverse the trend of global warming (IPCC, 2014). This leaves us with the alarming situation that in the run-up to the intergovernmental negotiations at the Conference of the Parties (COP 21) in Paris in 2015, a vast majority of GHG emissions are not governed under what was meant to be the “global” climate agreement, the KP. It is clear that a more far-reaching, ideally global climate deal needs to be agreed upon in Paris for the time after the KP expires in 2020, in order to keep global warming manageable. However, equally important as a broad and ambitious commitment are effective ways to ensure compliance with such commitments.

While the details of how the implementation of a new global climate deal is going to be monitored will most probably only be decided after COP21, it is important to understand and reflect now on lessons learnt from the compliance monitoring under the first period of the KP. As the deal expected from Paris will most probably differ in several respects from the KP, in particular regarding the reach and nature of commitments, lessons from the existing compliance monitoring cannot be transferred directly. Nevertheless, assessing the working of the monitoring set-up and its different features is helpful to determine policy options and develop informed opinions.

The KP Compliance System (CS) consists of both “soft” and “hard” monitoring instruments, which are worth examining. While the former type of instruments relate to measures such as rule clarification and assistance, the latter “entail some kind of costs for the party found in non-compliance” (Oberthür, 2014, p. 35). More specifically, soft instruments in the KP monitoring system are concerned with creating transparency of emission-related information and facilitating compliance with emission targets, while hard instruments have the power to sanction parties in case of non-compliance. Interestingly, the soft instruments can also have an effect, despite not having any punitive enforcement measures at their disposal themselves. In light of the scepticism among many governments towards hard and binding mechanisms in the climate negotiations, it is highly relevant to understand the value of soft instruments, as these might feature prominently in the new climate governance architecture.

Therefore, this chapter is concerned with the question: What role do “soft” monitoring instruments play within the Compliance System of the Kyoto Protocol, and what are their prospects in the post-2020 climate regime?

18.2 The compliance system of the Kyoto Protocol

In order to address the risk of non-compliance of Parties to the KP, the UNFCCC established a Compliance System (CS) for the KP in late 2005, with the aim of ensuring compliance with the agreed targets. This CS can be regarded as unique in its kind, as no other Multilateral Environmental Agreement (MEA) had been designed in such a way.

Within the CS, Parties have two main obligations: they are required to submit annual GHG inventories, as well as regular national communications to the Secretariat (UNFCCC, 2015a).

A key component of the CS is the Compliance Committee (CC). It is composed of two branches: the Facilitative Branch (FB) and the Enforcement Branch (EB). The FB's mandate is to provide facilitation and advice in order to enhance compliance (UNFCCC, 2015b). The branch consists of ten members (and ten alternate members) and can be regarded as a soft mechanism. On the other hand, the EB represents the "stick" within the CS. Its ten members (plus ten alternate members) deal with compliance issues, so-called questions of implementation that are addressed by the branch through one of the three possible triggers: self-trigger, through another Party, and the Expert Review Teams (ERTs) (see below). If the EB considers a country non-compliant, for example regarding its reporting obligations, the branch can apply sanctions such as suspension from the international carbon-market mechanism.

The monitoring of the KP relies on the so-called Measurement, Reporting and Verification system (MRV system). It is the basis of a functioning CS, as it ensures that the information needed to assess compliance is available and reliable. This is where the international ERTs come in: these independent experts have the task to review the validity of data provided by national governments, via either a desk study or a country visit. While the MRV system can formally be regarded as soft, a look at the practical functioning of the ERTs shows some interesting dynamics. This is partly linked to their mandate to trigger questions of implementation. Next to the Parties themselves (self-trigger and trigger through another Party), the third trigger is in the hands of the ERTs, which have the right to flag to the CC in case they find problems of compliance.

18.3 The working of the Compliance System – what role for soft instruments?

While the EB and the FB both took up their tasks in 2006, there are clear differences between them. Looking at the numbers of cases the two branches have dealt with up to now, the EB was far more active: in total it dealt with eight questions of implementation, while the FB had no case they could formally address. When considering only the number of cases addressed by the FB, one could conclude that this soft instrument has been neither very powerful nor useful. However, a look at another soft instrument shows a different picture. All questions of implementation have effectively been triggered by ERT reports (Oberthür, 2014, p. 41). This means that the Verification component of the soft MRV system has actually had the power to start compliance procedures. In addition, while according to the formal mandate the reviewing processes of the ERTs are of a purely technical nature, in practice a strong facilitative role was played by these experts. Interestingly, several disagreements, for

instance regarding the correctness of numbers provided in the GHG-emission inventories, were solved by the ERTs and the concerned Party themselves. In consequence, no question of implementation had to be raised, avoiding a procedure in the CC (Oberthür & Lefebvre, 2010, p. 147). This shows that the ERTs are not purely there to verify the data and do the technical preparatory work for possible cases to be dealt with by the branches. The fact that they actually have demonstrated the capacity to prevent questions of implementation shows their actual capabilities. This informal way of dealing with potential issues of compliance might be enhanced by the set-up of the compliance system. The actual “threat” perceived by a Party to be brought in front of the EB seems to play an important role. It can develop from a Party’s fear of “losing face” in front of the other Parties and the domestic constituency when being asked a question on non-compliance. In particular, when the EB concludes that a country is in non-compliance, this can lead to substantial reputational damage. Thus, Parties have an interest in solving potential issues already at the level of the review by the ERTs, trying to avoid that the ERTs have to file a question of implementation to the CC. An additional explanation for this phenomenon can be found in the “peer review like nature” of the reviews. As the reviewers are often also involved in the preparation of the reports for their home countries, they have an interest in a constructive review which allows facilitation and learning: they know that their own country will be reviewed by an ERT, i.e. their peers, as well.

To conclude this short and rather tentative assessment of the role of soft instruments within the CS, one can observe that they do indeed have an important role to play. Next to being “the” trigger for questions of implementation, informal facilitation has also helped to prevent additional compliance procedures. Also, peer dynamics among reviewers and reviewed countries and the fear of “naming and shaming” can be regarded as a sort of “pre-emptive” stick that has incentivised countries to take the soft instruments seriously and as a possibility to prevent issues of compliance. Nevertheless, the existence of the CC, and particularly the EB, still remains crucial, as it somehow increases the size of the stick with the threat of economic and reputational sanctions in case problems with compliance are found after review by the ERTs. It seems to be precisely this interplay between the incentives and facilitation that the MRV process and, at least in theory, the FB provide, and the sanctions of the EB, which resulted in an enhanced level of compliance. This means that, while it is rather difficult to isolate the effects of the soft instruments from those of the hard instruments, the former appear to play an important role as an integral part of the CS. The fact that the Parties have by and large met their emission targets for the first commitment period cannot be causally attributed to this fact alone, but it has certainly contributed to this achievement.

18.4 What role for soft instruments in monitoring a new climate deal?

While the preparations for COP 21 are reaching their climax, it is interesting to ask what the monitoring of the future climate agreement might and should look like. Reflecting on the experience under the KP described above, it seems that the experiment of combining facilitation and enforcement has been relatively successful. On the enforcement side, all eight cases of non-compliance that the CC has dealt with so far, except Canada, resulted in the Parties returning to compliance. On the facilitative side, the ERTs have proved to be effective in preventing, as well as – where needed – triggering compliance procedures. It is only the FB which has had difficulties in finding its role. This was partly due to the nature of the questions on implementation issues raised, as they came under the mandate of the EB. Another reason may have been linked to the pragmatic approach by the ERTs described above, which dealt with issues that otherwise could have been referred to the FB. Together with the cases the EB dealt with successfully, the present study has shown that soft and hard approaches went hand in hand, which makes it difficult to say whether facilitation or enforcement approaches have been more important. According to a well-informed guesstimate by a high-ranking expert, soft instruments are sufficient in around 80% of the cases to help Parties comply. Only in around 20% of the cases are hard instruments needed to bring struggling or unwilling Parties back to compliance.

What can we learn from these insights for a new climate deal in Paris? Regarding the ERTs, it seems preferable, and is actually also to be expected, that their role will not change substantially with the new agreements, as their independent, factual and non-politicised work has so far been generally highly appreciated by the Parties. The fact that the reporting itself, as well as the review criteria applied by the ERTs, have been based on benchmarks and indicators of the Intergovernmental Panel on Climate Change (IPCC), a widely recognised independent scientific body, has added to the credibility and acceptability of the MRV process, including the assessments by the ERTs. It would therefore be conducive to the support for any future CS if this practice is maintained. However, the division of labour between the ERTs and the FB should be reconsidered, as there seemed to be some mismatch in terms of the mandate of the FB and the actual work the ERTs were doing. In any case, it would be desirable to strengthen the soft instruments. This is necessary, as it is far from certain, and actually rather unlikely, that Parties to the new climate deal will actually agree on having another CS with “teeth”, meaning that it is well possible that the EB as it existed under the KP might not feature in the governance architecture of the next climate agreement.

Strengthening the soft instruments could be done by, first of all, further clarifying the tasks of the FB (or whatever it might be called in the new framework). Secondly, measures should be taken to enable the FB to actually fulfil its role. In order to strengthen a meaningful soft governance function of early warning and facilitation, it is critical for the branch to obtain timely data. This has not always been the case under

the KP, due to delays in submissions by Parties and the fact that comprehensive data was only available every four years. Furthermore, the FB's pre-emptive function could be incentivised, for instance by encouraging the branch to be more proactive. In light of this, COP 21 should try to take these deficits into account and, for instance, discuss options for improving the Parties' reporting modalities, without increasing the burden of reporting disproportionately. One idea is to link reporting on climate action under a new climate agreement to other reporting commitments that states have, for instance for the newly adopted Sustainable Development Goals. SDG-13 on climate action will certainly overlap with national commitments at COP 21, so a smart merging of these two monitoring tracks might be efficient and beneficial for maintaining momentum on both processes. However, it is rather unlikely that governments will decide upon many details regarding compliance monitoring in Paris, as this depends on the nature of the agreement. For instance, in the (rather likely) case that no legally binding targets are agreed, the monitoring can, formally speaking, not be focused on "compliance" either, but rather on voluntary implementation or accountability.

Finally, it is important to mention that the possible effect of the soft elements discussed above within the climate change regime, and the new compliance architecture in particular, strongly depends on the level of ambition of the new agreement reached at COP 21. While the negotiations regarding how the future monitoring is going to be structured are underway, these discussions are not (yet) in the focus of most policy makers. A truly global climate agreement, with universal or at least a high degree of approval among countries, seems to be prioritised over a strong CS. Considering the very low coverage of the KP, it seems sensible to do so initially. Having major GHG emitters ratify a new deal will be key, but only as long as there are also effective ways to monitor their progress and hold them to account for their commitments afterwards. If the collective ambition level remains insufficient to limit global warming to below 2°C relative to pre-industrial levels – an obvious problem of the KP – then the value of the monitoring also remains limited. However, the question of how monitoring is going to be designed in the future agreement is most likely to play some role in the Parties' decisions to sign up for such a commitment. It looks as if a compromise solution between a strong compliance system on the one hand and a substantial participation of states on the other will need to be reached. The need for consensus might compromise any "stick" of the future monitoring framework, for the sake of enabling a global agreement to be reached.

To conclude, the decision on the reach of the agreement will be crucial as, after all, it impacts on the effect a future compliance monitoring system can have. After all, compliance monitoring should not be an end in itself, but a means to achieve the substantive goals of climate mitigation. This implies that emerging emitters such as China, India, Brazil, South Africa, but also Russia, will need to be brought "on board". Only once a large number of emitters is actually bound under the climate deal, will the question which instruments (or combination thereof) are most useful to monitor

compliance actually become really relevant. So far, the Intended Nationally Determined Contributions (INDCs) submitted by states are still far from sufficient in terms of the required global ambition. However, the bilateral agreement between the USA and China in 2014, as well as the recent election outcomes in Australia and Canada, gives hope that a substantive global deal can be reached in Paris. Setting up an effective monitoring framework for these global commitments will be an additional challenge, and soft instruments should feature prominently in order to regularly remind Parties of their commitments and facilitate their compliance.

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