The Paris Agreement’s Compliance mechanism

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Abstract

In December 2015, 195 countries under the United Nations Framework Convention on Climate Change adopted the Paris Agreement. Seeing that implementation of agreed commitments under multilateral environmental agreements cannot be taken for granted, it is important that instruments promoting parties compliance is included in the framework. The Paris Agreement includes provisions for a compliance mechanism with this task and this paper examines its conceivable legal architecture and future operation. Seeing that the Agreement is still on a prototype level, the provisions have been put in relation to compliance systems adopted under other multilateral environmental agreements. This enabled a presentation of the Paris Agreement’s compliance mechanism’s conceivable features, structure and design, and the realistic alternatives and consequences regarding its formation and operation.
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1. Introduction

1.1 Background

Over the last decades, the problems of climate change have gained recognition in the international community. The environmental effects of pollution through released greenhouse gases and resource exploitation originating in one part of the world, have been linked with, for example, desertification and rising sea levels in other parts. Together with the signs that the biosphere has natural limits for how much environmental degradation that can be taken in from us human beings, there is however also the awareness of the growing demands on the use of natural resources as States continue to develop.Countries realisation of the need to cooperate in stabilizing greenhouse gas concentration to a level that allows the ecosystem to adapt naturally to climate change, whilst development of society is also enabled in a sustainable manner, has led to the creation of Multilateral Environmental Agreements (MEAs) to address these issues. The United Nations Framework Convention on Climate Change (UNFCCC) is the regime that sets out the ground framework and objectives for addressing climate change, but provide only limited guidance on the concrete actions and targets. Therefore, countries have needed to further negotiate agreements under the regime that provide the rights and obligations. Although the problem regarding climate change have gotten more and more apparent, forming and operating the substantive and procedural regulations under such agreements have over the years proven to be one of the most challenging issues in the history of MEAs. This can be explained by the complexity surrounding environmental obligations and the struggle to unite countries with huge differences with regard to contributions of greenhouse gases in the atmosphere, social and economic development and vulnerabilities to the effects of climate change. These considerations affect the development of future commitments as well as implementation and

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compliance with current ones. Addressing the issue of parties’ implementation and compliance with agreed commitments is important in all legal regimes, since it can otherwise undermine and limit the effectiveness of environmental obligations, as well as be a source of conflict and instability of the legal order. Therefore, sufficient means to promote compliance and react to non-compliance - the forming of a compliance mechanism - is one of the key questions when negotiating and operating MEAs. This has been experienced in relation to the Kyoto Protocol, adopted by the Conference of the Parties (COP) under the UNFCCC in 1997. Although the Kyoto Protocol established a complex compliance mechanism that was expected to provide strong incentives for the parties to implement and fulfil their obligations, experience has shown that many Parties have failed to do so. A need to develop a new agreement to deal with climate change therefore emerged and negotiations were set to arrive at this in the Copenhagen meetings in 2009. However, the attempts were unsuccessful at this time and were instead finalized in Cancun 2011, were the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) was mandated to develop ‘a Protocol, another legal instrument or an agreed outcome with legal force’. After adoption at the COP21 in December 2015, the efforts resulted in the forming of the Paris Agreement, with the purpose to sustain beyond the Kyoto Protocol. The target of the Agreement is to demonstrate an explicit signal for the world to shift towards climate-friendly, economic and social sustainable activities. To ensure Parties fulfilment of the agreed commitments the Agreement specifically provides for inclusion of a compliance mechanism. The mechanism is still under construction and in many regards lack concrete steps to make it possible to translate into a complete institution. A number of critical policy processes at the international level and implementation by domestic governments in regards to the obligations under the Agreement remains. However, the Agreement does provide certain foundations for the compliance mechanism’s formation and operation and when seeing the components in their interrelated

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4 Sands and Peel, above n 1, 136. 
context, as well as how it both follows and differs from previous international agreements, its features, structure and design can be analysed. From a jurist’s perspective I therefore thought it would be interesting to provide a presentation of the conceivable legal architecture and operation of the Paris Agreement’s compliance mechanism.

1.2 Purpose

The purpose of this paper is to examine from a legal perspective the conceivable features, structure and design, including composition, mandate, triggering, remedies and sanctions of the compliance mechanism to the 2015 Paris Agreement of the UNFCCC (the Paris Agreement) and to analyse what appear to be the realistic alternatives and consequences regarding its formation and operation.

1.3 Framing of Questions

Since the compliance mechanism is specifically formed by the obligations that it is to promote compliance with, examining its features, structure and design includes identifying and analysing the relevant substantive and procedural obligations arising from the Agreement. It also includes identifying and analysing the composition and mandate of the body that is to carry out the mechanism’s operation, how the procedures can be triggered and what remedies and sanctions that are to its disposal. In addition, in order to make a comprehensive analyse of the Paris Agreements compliance mechanism’s operation, similarities and differences compared to compliance mechanisms under other MEAs needs to be examined. Taking in previous experience of compliance mechanisms formation and operations will help analyse the realistic alternatives and consequences of the Paris Agreements compliance mechanism. Therefore, to reach the purpose described uphove, the following questions are to be answered:

- How are the features, design and structure of the Paris Agreement’s compliance mechanism linked to the substantive and procedural obligations?

- What are the conceivable features, structure and design of the Paris Agreements compliance mechanism with respect to composition, mandate, triggering, remedies and sanctions?
Compared to compliance mechanisms in other MEAs, which similarities and differences can be presumed in the Paris Agreement?

1.4 Method and Material

Since the Paris Agreement is still on a prototype level, identifying the characteristics of the Paris Agreement’s compliance mechanism means to examine something that does not yet fully exist. I have therefore chosen a method that can help me identify and understand the key aspects of ideas that permeate MEAs’ compliance mechanisms as a phenomenon, and then place the conceivable provisions of the Paris Agreement’s compliance mechanism in relation to these.9 A suitable way to identify and analyse these ideas is to work with dimensions when analysing the material. More specifically I have chosen to adopt Ronald B. Mitchell’s way of distinguishing three main parts of any compliance system. My dimensions are accordingly 1. Primary rule system 2. Compliance information system and 3. Compliance response system. I will describe these parts in more detail under the following chapter ‘Dimensions’ and in their respective chapters under ‘Compliance Mechanisms in MEAs’. After developing what each dimension entails, the Paris Agreements provisions will be analysed by placing and categorising them under one of these three dimensions. The dimensions are in this way used as reference points through which my material can be filtered. This method will help me identify and understand the linkage between the substantive and procedural obligations in the Paris Agreement with the features, design and structure of its compliance mechanism.

Each MEA is unique. They have been negotiated separately by their own parties and have their own separate legal status. However, experience have shown that the measures to achieve implementation and compliance of one MEA can inform on the development of the same in other MEAs. Lessons can be learned and approaches adopted from one regime to another.10 Therefore, in order to make a comprehensive analyse of the features, structure and design of the Paris Agreements compliance mechanism, a comparative analyse that draws on empirical studies of existing practices and experience of compliance mechanisms under other MEAs.

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10 Carl Bruch and Elizabeth Mrema, Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (UNEP, 2006) 43.
will be carried out. This enables conclusions to be drawn regarding the realistic consequences and alternatives of the Agreement’s compliance mechanism operation and function.

A big part of the material analysed consists of legal frameworks in MEAs, especially those regulating pollution issues, like the Kyoto Protocol, the compliance system of which have been subject to some critic, and the Montreal Protocol, which have been regarded a great success. The examination of MEAs’ frameworks will not be limited to provisions in the treaties and protocols, but also those created in relation to these. When examining the Paris Agreement this includes analysing its preparatory work and decisions taken by the COP. Hence, documents and practices leading up to the treaty that are of relevance to its compliance mechanism, under for instance United Nations Environment Programme (UNEP) and UNFCCC, will be examined. For example, there is the work of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) and the formal Decision of the 21st Conference of the Parties (COP21), which further maps out the development of the provisions in the Paris Agreement and the process of its formal entry into force.

Doctrine will play a vast role in finding, interpreting and making a critical analysis of provisions under MEAs that are of relevance to understand the compliance mechanisms’ functions and operations. Also, major declarations like the Stockholm Declaration, Rio Declaration and Johannesburg Declaration, which usually declare aspirations but, since they often put into words the general rules and principles of IEL, can be used to interpret the provisions in MEAs. In addition, cases of non-compliance by parties under international agreements and how international law has dealt with these can help to understand the compliance mechanisms’ operation in practise and the potential aftermath in the event of non-compliance by parties under MEAs.

The interpretation of documents always involves the interference of the readers’ previous experiences and standpoints, which makes it hard to stand totally unbiased before the material. Prejudice and previous knowledge makes it hard to make the interpretation of a text totally free from the researchers own values, which in turn can affect the result. However, my ambition was to bring forward a analyse in a relevant and reliable manner, by using a tool that made it possible distinguish ideas when interpreting the material and in this way answer the questions that was to fulfil the purpose of this paper. Reliable interpretation can be said to lie in providing the reader with a perceived insight, where the understanding is given room to be
re-evaluated, as well as in optimally summing up the gathered material by bringing forward the most realistic and possible understandings.\textsuperscript{11}

\textbf{1.4.1 Dimensions}

Ronald B. Mitchell distinguishes three parts of any compliance system through an empirical study of treaty provisions related to compliance systems across MEAs. Following his approach, general ideas behind the forming and function of compliance mechanisms can be extracted from varying activities, substances, media and geographical areas regulated.\textsuperscript{12} The first part consists of the primary rule system involving 'the actors, rules and processes related to the behaviour that is the substantive target of the regime'. The second part lies in the compliance information system composed of 'the actors, rules and processes that collect, analyse, and disseminate information on instances of violations and compliance'. Thirdly, there is the compliance response system in cases of non-compliance that consists of 'the actors, rules and processes governing the formal and informal responses - the inducements and sanctions - employed to induce those in non-compliance to comply'.\textsuperscript{13} These parts can be said to cover the broad core aspects of compliance mechanisms, namely their scope and coverage, institutional anchoring and capacity, as well as approaches taken in the response measures.\textsuperscript{14} What will become evident however is that the three parts are not separated from each other. They are often interlinked and form a spectrum moving from serving the aim of enhancing implementation and avoid non-compliance during the pre-breach phase to dealing with situations of non-compliance.\textsuperscript{15} Also, the description that Mitchell gives regarding the three parts are fairly concise for the purpose of this paper, why a broaden understanding of the dimensions is needed.\textsuperscript{16} I have for example added internal and external aspects to further describe the primary rule system and underlined aspects of facilitative and enforcing approaches, composition, mandate, triggering, remedies and sanctions under the compliance


\textsuperscript{13} Ronald B. Mitchell, (1994), 430.

\textsuperscript{14} Sebastian Oberthür, 'Options for a Compliance Mechanism in a 2015 Climate Agreement' (2014) 4 \textit{Climate Law}, 34.


respond system. My thought with this was to provide a clearer and deeper understanding of the compliance mechanism formation and operation.

1.5 Delimitations

The study of the Paris Agreement will be limited to provisions relevant to its compliance mechanism, and not set out to analyse whether the Agreement as a whole is sufficient to control and handle factors and impacts of climate change. It is also not possible at this stage to make definite conclusions about the Paris Agreement’s effectiveness in reaching compliance with its obligations. Important to emphasise is that this paper takes a legal perspective and the focus will be on analysing aspects that lie within treaties that affect compliance, the ‘treaty-induced’ compliance.\(^\text{17}\) However, other aspects such as political, economic and social circumstances are very much intervened with the formation and interpretation of these legal regimes. Hence, although evaluations of countries’ reasons and intentions to comply that are external from the compliance mechanisms’ formation and operation are to be left outside the examination as far as possible, there needs to be an understanding that such factors can often become internal and should be included to the degree they are relevant for the purpose of this paper.\(^\text{18}\)

When examining MEAs other than the Paris Agreement, the focus will be on operating major multilateral agreements. This is important because this is where actual experience in practice can be drawn and, similar to the Paris Agreement, they have a large number of parties, which takes in the special considerations regarding unifying the number of actors compared to, for example, bilateral ones. In addition, to include other international legal regimes than environmental ones could overlook the special nature of international environmental obligations and how they affect the compliance mechanism’s formation and operation. Also, since global MEAs are meant to be universal and widely ratified, there are often interlinkages between the regimes and their compliance mechanisms. However, besides reducing the research so it is realistic for the size of this work, there is a value in limiting the examination to MEAs with the same subject matter. This because they often share the service of the same United Nations bodies. UNEP is for example the body that services most of the hazardous substances conventions, which further explains the focus on comparing the provisions in the Kyoto Protocol and Montreal Protocol with the ones in the Paris Agreement.


\(^{18}\) See ibid 327, where Mitchell distinguishes between the realist’s view from the institutionalist’s and international lawyer’s regarding why countries comply with treaties.
2. Compliance Mechanisms in MEAs

2.1 Primary Rule System

Compliance with MEAs can be defined as ‘the fulfilment by contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement’. Since compliance mechanisms are in turn defined as ‘the system adopted under MEAs to promote compliance’, the linkage between an agreement’s primary rule system and compliance mechanism begins to emerge - the scope and coverage of the compliance mechanism are dependent on formation and interpretation of the obligations that it is to measure and uphold compliance with. This because it is the obligations that defines who gets regulated and how, more precisely what actions a subject must, may do or must refrain from doing, and thereby sets the Agreement’s substantive, geographical/territorial and temporal scope.

Different normative techniques, meaning approaches, structures, contents and criteria, can be used when forming the obligations and the obligations substance can more or less tell what means and proportions parties must undertake to lawfully implement their obligations and how much is left to their own the discretion, which subsequently affect how and to which degree international governance can monitor, review and deal with compliance issues. Since multilateral supervision of national implementation of obligations implies costs on nations sovereignty, the stringency of the compliance mechanism is often a trade off with the participating parties willingness to commit to ambitious and well-defined actions. On the other hand, by ensuring effective implementation of obligations through multilateral supervision, compliance mechanisms can also contribute in building trust and confidence between the parties so that they to a higher degree is willing to participate and take actions to implement such obligations. Different normative techniques will in the following be presented by examining internal and external aspects of forming and interpreting obligations.

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19 Bruch and Mrema, above n 10, 59.
21 See Oberthür, above n 8, 36.
22 Ebbesson, above n 1, xxiii, 95,99.
23 Ibid 34.
2.1.1 Internal Aspects

Balancing norms is a regulatory approach that holds different interests against each other within the obligation and provides arguments and considerations in favour of a certain solution. Hence, when implementing international regulations containing this technique, a party is to consider and balance various arguments and interests. The obligation can be defined by certain criteria to be balanced against each other, but can leave open or imprecise what weight to put on different factors in the balancing.\(^\text{24}\) Hence, although the norm may provide some guidance, each party generally has discretion to determine the stringency and application of the obligation.\(^\text{25}\) If no minimum level of conduct is defined, such norms risks leading to a low degree of international governance under the compliance mechanism, since it becomes very hard to evaluate and determine compliance with the obligation.\(^\text{26}\)

Another normative technique is to form fixed norms, which means that the obligation includes certain facts and denotes what the solution is to be. The parties subsequently have less discretion to determine the intensity and implementation of the obligation and a higher degree of international governance can be expected. Examples of fixed norms are provided in regimes of atmospheric pollution where obligations include allowed levels of emissions or numerical reduction rates.\(^\text{27}\) For example, in the Kyoto Protocol fixed norms are applied by obligating developed countries\(^\text{28}\) to reduce their greenhouse gas emissions to a certain percentage under specific time periods.\(^\text{29}\) Norms like these are generally easier to evaluate compliance with since the criteria for doing so is included in the obligation.\(^\text{30}\) In addition, the clearer the obligation is regarding what a party needs to do to comply with, excuses such as inattention and misinterpretation from actors in potential situations of non-compliance can be avoided.\(^\text{31}\)

A third approach is goal-orientated norms, which, more or less precise, defines a factual situation to be established, maintained or avoided, but not the measures the Parties are to take to reach it. The approach’s impact on compliance management and control lies first and

\(^{24}\) Ibid 96. Citing the definition 'special consideration' in appendix 1 of Best Available Technology in the 1992 Baltic and North-east Atlantic Convention.
\(^{25}\) Ibid 87-88.
\(^{26}\) Ibid 96-97.
\(^{27}\) Ibid 90, 136.
\(^{28}\) See Annex 1 of the UNFCCC; Annex B of the Kyoto Protocol.
\(^{30}\) Ibid 90.
\(^{31}\) Mitchell, above n 17, 329.
foremost in that it reveals a framework structure that parties must follow, although it often needs to be supplemented by other norms to further form obligations on parties. When assessing States conformity with goal-orientated obligations, the evaluation will generally focus on if the factual situation is reached and if the party has, in the national context, implemented individual rights to reflect the goal-orientated norm. The discretion of States regarding what measures to take depends on how much is left open for different interpretations in the obligation. For example, if the obligation is only defined in terms of percentage reduction, as long as the party undertakes the reduction rate, the means of implementation can be decided by their own accord.

2.1.2 External Aspects

A related question to internal aspects of obligations is their external functions and motivations in these different categories. Although IEL has come to rely more and more on lex scripta and regime-building through forming of treaties and soft-law instruments to emphasis coordination, prevention and cooperation, rules and principles of general application under customary international law still have a say when it comes to evaluating parties compliance with their obligations. First of all, the distinct feature that the object for obligations is the environment gives rise to some special consideration. There is a need to recognize the pace, magnitude and irreversibility of environmental issues, and that our knowledge around the environment is connected with scientific uncertainty. Environmental damages can take a long time to reveal, can be wide spread and our shifting knowledge around the environment can lead to ongoing changes in our perception on how to interact with it. These challenges have led to the recognition that the protection of the environment goes beyond being a State responsibility not to cause damage to another country when using natural recourses that is under its own territory and sovereignty (no harm principle), into that it is a common concern of all human kind and needs to be protected as such (prevention

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32 Ebbesson, above n 1, 91.
33 Ibid 96.
34 Ibid 98.
36 Ibid 104 (emphasis original).
37 See Dupuy and Viñualez, above n 29, 23.
39 Dupuy and Viñualez, above n 29, 56. Citing the Trail Smelter case (United States v. Canada) and the Corfu Cannel case (United Kingdom v. Albania).
principle). This have in turn lead to emergence of concepts like *erga omnes* (obligations owed to everybody because of inherent rights in regards to the use and exploitation of shared recourses), and the realisation that countries need to cooperate to implement and apply appropriate measures and make impact assessments when activities are likely to have significant transboundary effects on the environment. The last obligation shows the broader expansion of prevention in the precautionary principle, which main objective is encouraging action even when an environmental problem is uncertain or poorly understood from a scientific standpoint. This means that when there is reason to assume that a linkage between a conduct and an adverse effect exists, protective measures are to be taken. Of importance is also that the international community involves other interests than just the protection of the environment. One aspect that needs to be taken into account is countries interest to look at the needs of their population and the continuant use of the earth’s recourses. This leads us in to the concept of sustainable development, which components have been expressed as the three interdependent and equally supporting pillars of economic development, social development and environmental protection. Also, it is important to understand that even though the protection of the environment is a common concern, there is a difference between the actors in the international community. Especially, developed and developing countries can differ both in regards to the historic and current contribution to international environmental degradation, and in the capacity to react to it. Environmental obligations are indeed linked with economic concerns. Laws adopted to protect the environment can potentially inflict substantial economic costs, and the capacity to deal with these costs differs between developed and developing countries. With developing countries

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40 See principle 21 of the Stockholm Declaration; Principle 2 of the Rio Declaration.
42 Dupuy and Viñuales, above n 29, 55. Citing the advisory opinion of the Seabed Chamber of the International Tribunal on the Law of the Sea on the *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011) (‘Responsibilities in the Area’), paras 145, 125-135.
44 Ebbesson, above n 1, 121.
45 See para. 5 of the Johannesburg Declaration; Dupuy and Viñuales, above n 29, 79-80.
46 Sands and Peel, above n 1, 215.
48 Sands and Peel, above n 1, 7.
often having pressing socio-economic concerns of their own, they often lack financial or technical resources to allocate in favour of global environmental issues.\textsuperscript{49} Something that also needs to be regarded is that the most devastating human and ecological effects will probably hit the countries with less capacity to deal with them.\textsuperscript{50} The balance of the different interests have led to creation of the principle of common but differentiated responsibilities (CBDR),\textsuperscript{51} situated between environmental protection and sustainable development, affecting the development and interpretation of environmental obligations.\textsuperscript{52} The considerations are also connected to the principle of equity, which means to ensure that equitable developmental and environmental needs of present and future generations are taken into account.\textsuperscript{53} It also shows the need for 'global partnership' and that countries should support each other to achieve environmental protection and sustainable development.\textsuperscript{54} Assistance is in this sense a mechanism that can bridge the position between developed and developing countries in treaty negotiations when forming the substantive obligations, as well as contributes in implementation of these, and be included in measures taken to deal with compliance issues.\textsuperscript{55}

2.1.3 The Relation Between Internal and External Aspects

While the rules and principles may complement each other in some situations, they can also differ in relevance from one context to another. It can for examples depend on the specific issue that is to be regulated, the scientific knowledge regarding the specific matter and if there is equality between the obliged parties’ economic capabilities in a specific situation.\textsuperscript{56} When using balancing norms in environmental obligations, different kinds of flexibility-substantive, temporal and geographical- can be implied to allow an elastic structure that can integrate different functions and motivations. If for example scientific knowledge improves or economic situations change over time, the balancing norms can enable different interpretation regarding what measures that parties are to take and different solutions. Also, the balancing norms can allow parties with less economic capacity to take less comprehensive measures than parties with more capacity.\textsuperscript{57} However, if conflict between different matters remains

\textsuperscript{49} French, above n 47, 35.
\textsuperscript{50} Ibid 50-51.
\textsuperscript{51} See principle 7 of the Rio Declaration.
\textsuperscript{52} Dupuy and Viñuales, above n 29, 73.
\textsuperscript{53} See e.g. art. 3.1 of the UNFCCC; Principle 3 of the 1992 Rio Declaration; Para. 6 of the Copenhagen Accord.
\textsuperscript{54} Sands and Peel, above n 1, 46. See e.g. principle 5 of the Rio Declaration.
\textsuperscript{55} See e.g Sands and Peel, above, 272.
\textsuperscript{56} Ebbesson, above n 1, 92-93.
\textsuperscript{57} Ibid 134.
unresolved in norms like these, it also enables parties with capacity to make self-serving interpretation of the obligations.\textsuperscript{58} The degree of how defined the frameworks of balancing norms are can vary, which subsequently affects the possibility for international governance and, depending on the context, also the appropriateness of using this legal technique. A common attribute when using balancing norms is the lack of assessable criteria for what constitute compliance with the obligations. To make the regulation more operational and assessable, balancing norms should therefore be further formed by, for example, fixed or goal-orientated norms.\textsuperscript{59}

Fixed norms usually form well-defined and specific obligations, often by prescribing similar conducts regardless of the obliged parties’ capacities. Therefore, such norms can be difficult to use where there are great differences between the parties that the obligations are to be put upon. However, this difficulty becomes less apparent if differentiated standards are used in relation to the parties’ different capacities. For example, this legal technique has been used in the Montreal Protocol in relation to industrialised and unindustrialised countries where the obligations are formed to take in different economic backgrounds and levels of pollution from the parties.\textsuperscript{60}

When using international obligations of goal-orientated norms, these can differ in preciseness. Vaguely formed recipient standards (in the pollution context meaning considerations to the receiver of emissions) leave room for a higher degree of self-serving interpretation regarding what actions that are required of the party. For example, although the use of recipient standards can take in the differentiation in ecosystems of the obliged parties, which could be a favoured approach of unindustrialised countries whose environment is not as polluted as industrialised ones and who want to able to strive for the same economic and social developments as these countries, if not combined with source standards (considerations to the degree of emissions), unindustrialised countries could in practise argue that they can pollute to the same level as industrialised countries, which goes against the concept of sustainable development and would lead to devastating climate change degradations.\textsuperscript{61}

2.1.4 In Sum…

\textsuperscript{58} Ibid 93.
\textsuperscript{59} Ibid 134-135.
\textsuperscript{60} Ibid 93.
\textsuperscript{61} Ibid 94.
The chosen normative approach and the stringency of obligations in a treaty are factors that set out to what degree international governance under the compliance mechanism can be carried out. In this sense, it can be harder to determine the legal value of balancing norms; if the substantive obligations are vaguely defined it may also imply that they are more of political incentives for further co-operation and actions rather than legal restraints. To be able to evaluate compliance with the treaty’s obligations, they need to provide some fixed criteria on which measures or which levels of reduction that are required by the parties. Distinction between the different legal approaches is not always clear and they can be used in combination with each other. Also, other factors like the complexity and proportion of what it is the regime tries to govern, together with relevant rules and principles, also needs to be considered when interpreting the lawfulness of the parties conducts. It is important to remember that the obligations are to be implemented under the jurisdiction of parties with various capacities and interests, why the degree of governance needs to be balanced with flexibility.

2.2 Compliance Information System

One of the pre-requisite for promoting implementation and identifying non-compliance is the agreement’s system of gathering and evaluating information on the actions parties have taken in this regard. As explained above, the operation of compliance mechanisms depends on the normative techniques and strictness of the obligations and these also affect from whom and to what extent the system can gather and evaluate information.

The tools used to govern compliance in the information system can for example contain the bottom up method of self-reporting and the top-down monitoring, verification and publishing of information gathered. Self-reporting often includes requirements on parties to submit annual national reports regarding quantifiable information of their actions taken, such as statistic or transactional data, and qualitative descriptive evaluations of laws and policies relevant to their commitments under the MEA. Monitoring then usually consists of evaluating the parties’ national performance regarding establishing systems to implement their obligations under the MEA and does not review the accuracy of the particular data that

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62 Baker & McKenzie, above n 7, 16; Ebbesson, above n 1, 16. 135.
63 Ebbesson, above n 1, 199-200.
64 Oberthür, above n 1 4, 32.
65 Mitchell, above n 12, 430.
66 Rose, Kurukulasuriya, Perera and Krebs, above n 20, 10.
Verification on the other hand is the process of testing the accuracy of received information. The evaluation of information is often stationed at an international level, since on-site reviews can impose difficulties both in regards to technique and sovereignty. Usually the MEA’s Secretariat is the body that organize and administer the report format and the receiving and distributing of reports.

Previous experience has shown that there can be a wide variance in the levels of self-reporting between regimes. States sometimes refuse to take part of obligatory reporting obligations and in this regard it is important to understand that such non-compliance is a treaty violation like any other and can go under an agreement’s compliance mechanism. Also, information provided can vary greatly and sometime fail to accurately reflect the country’s situation. In this regard it can help if rules and procedures in the agreement are formed to enhance information flow between the parties and the internal bodies of the regime, as well as provide increased recourse for improving information gathering, monitoring and verification technologies. The compliance information system can in this way be part of a facilitative management approach, which will be further explained below, by supporting an unceasing dialogue between parties, international institutions and organisations as well as with civil society and should generally be regarded as having conflict-avoiding purposes.

Another helping factor to enhance information flow is if the reporting regards activities previously regulated with an existing and functioning data collection and distribution system that the new treaty can take part of. Also, rewards of compliance can be made dependent on if the party supplies the required reports and allows inspections. Broadening the means authorized to collect, analyse and distribute information, for example by involving Non-Governmental Organisations (NGOs) and private divisions such as industry groups in the information system can also enhance its function and operation.

Through the compliance information system, a certain level of openness and transparency can be reached which, as will be further explained in relation to management of non-compliance,

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67 Ibid 21.
68 Ibid, 22.
69 Kolari, above n 15, 209.
70 Brush and Mrema, above n 10, 130; Rose, Kurukulasuriya, Perera and Krebs, above n 20, 29.
71 See Balakrishna Pispupati, Charlotte Boumal, Elizabeth Maruma Mrema and Alphonse Kambu, Issues of Compliance: Considerations for the International Regime on Access and Benefit Sharing (UNEP Division of Environmental Law and Conventions, 2009), 9.
72 Kolari, above n 15, 210.
73 Mitchell, above n 17, 330.
74 Ibid.
75 Ebbesson, above n 1, xxv.
can help find the causes behind non-compliance in a given case and decide which the appropriate measure are to be in these situations.\(^\text{76}\) It can also allow diplomatic ties and an awareness of the public to have complying effects on the parties.\(^\text{77}\) This justificatory approach to promote compliance is a school whose importance has more recently been highlighted,\(^\text{78}\) and builds on the appraisal, supported by for example Henkins and Young, that desires of gained reputation and respect from principled behaviour, and the fear of social shame and disgrace, motivates States to respect and comply with law.\(^\text{79}\) However, scholars like Koskenniemi warn against such recognition of ‘soft responsibility’ and questions their ability to prevent and address the most significant breaches of treaty obligations.\(^\text{80}\)

### 2.3 Non-Compliance Response System

Situations may occur were the information available indicates that a party is in non-compliance with its commitments under an agreement. To alter the non-compliant party’s behaviour in these situations constitutes a key factor for the bindingness and effective implementation of an agreement’s obligations.\(^\text{81}\) The appropriate responses type, likelihood and magnitude in situations of non-compliance are determined by the non-compliance response system.\(^\text{82}\)

#### 2.3.1 Facilitate or Enforce Compliance

The international community can roughly be said to have two types of approaches to deal with situations of non-compliance; diplomatic management and coercive enforcement.\(^\text{83}\) These approaches are represented within MEAs by the use of Non Compliance Procedures (NCPs) that can be said to range from the facilitative- the soft managerial approach that relies on cooperative problem solving, to a coercive- the enforcement approach that relies on

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\(\text{76}\) Dupuy and Viñualez, above n 1, 291.
\(\text{77}\) Kolari, above n 15, 209.
\(\text{78}\) Duyck, above n 5, 176. Writes that some scholars however have argued that this school is part of the managerial approach.
\(\text{81}\) Oberthür, above n 14, 31.
\(\text{82}\) Mitchell, above n 17, 330.
\(\text{83}\) Kolari, above n 15, 208.
deterring non-compliance or pressuring parties to return into compliance. Which response to take depends on what is seen as the underlying reason for parties’ non-compliance. The facilitative management doctrine goes in line with results of research showing that parties tend to comply with their commitments under treaty regimes when they can and that non-compliance is non-voluntary and occur because of lack of knowledge and capacity rather than lack of will. Therefore, in line with ideas of prevention and balance of interests, focus when addressing non-compliance with environmental obligations have moved away from first and foremost trying to determine liability and remedies for damages already caused, to preventing them occurring and if they do occur, resolving them peacefully in a non-contentious and non-adversarial manner. Facilitative measures are however not always enough to bring parties back into compliance; especially not in situations where they lack political will to cooperate. The enforcement doctrine is based upon the interpretation that non-compliance is a deliberate result of parties’ strategic calculations that expected costs of implementation trumps the benefits of fulfilling their obligations. The response should therefore be to enforce compliance by amplifying the diplomatic means to the use of firmer, coercing measures. In these situations, the NCP may be transformed into something simular of a judicial proceeding leading to determining liability and enforce compliance through remedies and sanctions when a wilful violation is detected. At this end of the spectrum, the compliance mechanism in the Kyoto Protocol have been considered especially exceptional with its including of an Enforcement Branch that have relative strong measures available to its disposal. It is important to keep in mind that the two doctrines of facilitative management and enforcement do not compete with or exclude each other, but instead reflects that a

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86 Sands and Peel, Above n 1, 136; Dupuy and Viñuales, above n 29, 58, 270.
88 Kolari, above n 1, 211.
differentiation in the responds taken is needed to reflect the various reasons for parties’ non-compliance. Involuntary and deliberate motivations and reasons for non-compliance can co-exist, mix and underpin each other, why a combination of management and enforcement responses could most effectively promote compliance.

2.3.2 Mandate and Composition

If the compliance response system is to effectively identify and address compliance issues, institutional anchoring and capacity are crucial. The recognition that the environment is a common concern of the international community and that IEL is a technical and scientifically difficult legal area that undergoes frequent normative changes and expansion have affected States consideration of jurisdiction and sovereignty into mandating special internal bodies within the MEAs to evaluate and deal with non-compliance. In addition, the parties concurrently control how the NCP is carried out, by keeping the proceedings internal, contrary to when an external third party is used in traditional dispute settlement.

The internal committees or panels can be composed of a varying numbers of country parties and/or experts, and their composition can be connected with the different function and approaches that will be favoured and also its effectiveness. For example, compliance committees composed by country representatives can be seen as more political, and those composed by experts more technical. When the composition opens up for political interference, there can be a risk of making the compliance assessment more ‘negotiable’. However, the political dimension of a NCP can also be seen as a necessary feature of their managing and non-confrontational role. Having a committee with country representatives can help support equitable geographic distribution and thereby ensure better reflection of the various interests at stake, see the different reasons for non-compliance, and help contribute to countries favouring cooperation instead of taking an adversarial approach. To instead use experts can favour independence of the compliance assessment from direct political interference, help take in the scientific difficulties of environmental obligations as well as

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90 Kolari, above n 15, 216.
91 Oberthür, above n 14, 33.
92 Ibid 37.
94 Ibid 13, 38, 39.
95 Dupuy and Viñualez, above n 29, 291.
decide how to best deal with non-compliance in this regard.\textsuperscript{96} Important to keep in mind however is that although bodies like Compliance Committees are often established and mandated to carry out the NCP, the final output is usually a decision by the regimes COP. In this way the parties are the ones with the final say in cases of non-compliance.\textsuperscript{97}

2.3.3 Triggering

The possibilities to trigger an NCP are crucial because they determine if there will only be capacity to address cases of full non-compliance, or if situations of potential non-compliance are included as well. To better understand the operation of NCPs, it helps knowing that the meaning of the concept ‘non-compliance’ in these procedures can differ from that of a ‘breach’ in deciding State responsibility under the traditional approach of dispute settlement. Although they overlap, non-compliance has a broader scope in NCPs. Besides clear breaches, these procedures can also be triggered in situations where a party is temporarily inconsistent with a primary obligation, procedural breaches and those that only signal potential breaches. The temporal scope, meaning when a compliance assessment can be triggered, of a full compliance assessment can normally only be possible once the deadline for achieving the obligation has passed (\textit{ex post}), but the assessment of the progress towards compliance (\textit{ex ante}) is also possible and adds value by providing an early warning function.\textsuperscript{98} In this way, the concept of non-compliance in NCPs seeks to avoid adverse implications brought by the concept of ‘breach’ and instead see non-compliance as a deviation that needs to be managed into conforming again, which goes in line with the forward-looking character of compliance mechanisms.\textsuperscript{99}

Regarding who can trigger the NCP, the capacity can vary greatly in MEAs. The main feature however is that it is not only a possibility for another party or an overseeing body of the treaty, but can also be done by the country that is in non-compliance (self-triggering) and in some cases by the public.\textsuperscript{100} Regarding triggering by another country, some regimes provide for this possibility without having to prove that they have been directly affected.\textsuperscript{101} As

\textsuperscript{96} Handl, above n 93, 13, 39-40; Oberhür, above n 14, 37.
\textsuperscript{97} Rose, Kurukulasuriya, Perera and Krebs, above n 20, 11; See also Brush and Mrrema, above n 10, 144.
\textsuperscript{98} Oberthür. above n 14, 36 (emphasis original).
\textsuperscript{99} Ibid 36; Dupuy and Viñualéz, above n 29, 44 (emphases original).
\textsuperscript{100} Cardesa-Salzmann, above n 41, 118; Handl, above n 93, 38; Dupuy and Viñuales, above n 29, 44, 289; See e.g., ‘Non Compliance Procedure’, Decision IV/5, 25 November 1992, UNEP/OzL.Pro4/15, Annex IV (Report of the Parties), as subsequently amended (‘Montreal NCP’), paragraph 44.
\textsuperscript{101} See e.g., para 1 of the Montreal NCP, above; ‘Procedures and Mechanisms relating to Compliance under the Kyoto Protocol’, Decision 27/CMP.1, 30 March 2006, FCCC/KP/CMP/2005/8/Add.3, Annex (‘Kyoto NCP’).
Delbrück argues, one of the most important features of treaties is that they are directed towards a commonly decided objective, why each party in relation to all other parties owes implementation and compliance of the agreed obligations. In virtue of this 'intra-treaty erga omnes-effect', when a possible violation of such obligations is detected, all parties under the treaty should be able to trigger measures against the non-complying party, regardless if the triggering party has suffered any direct injuries because of the violation. The possibility of self-triggering can be linked to the non-confrontational and helping nature of NCPs, especially when lack of capacity is the cause and financial or technical assistance can be the expected outcome to encourage the struggling party to return into conformity with the obligation. However, seeing that triggering can be a politically sensitive subject since it may introduce a confrontational element into the procedure, States can be reluctant to point finger at others or themselves. Therefore, it is important that other actors than governments can also trigger the NCP. This possibility emphasise the importance of the object protected by the agreement and that non-compliance can affect common concerns of the whole international community. Triggering by an overseeing body, like the Secretariat, might be less confrontational than if done by another party but at the same time raises questions regarding this body’s role in the regime. If the same body that administers the gathering of information can trigger the non-compliance procedure, parties might feel more hesitant to provide information in an open and transparent manner. Some environmental treaties provide actors outside the agreement with the capacity to trigger the NCP. The Aarhus NCP for example allows ‘any natural or legal person’, including NGO’s, to make communications regarding parties’ non-compliance. There is no requirement on proving a specific interest in the matter but the Committee have to consider the admissibility of the communications so that abusive use of the procedure can be avoided.

para VI 1(b).

103 Dupuy and Viñuales, above n 29, 289; Brush and Mrema, above n 10, 144.
104 Pisupati, Bournal, Mrema and Kambu, above n 71, 12.
105 Oberthür, above n 14, 37.
106 Dupuy and Viñuales, above n 29, 289.
107 Pisupati, Bournal, Mrema and Kambu, above n 71, 12.
108 See e.g. 'Mechanism for the Verification of the Compliance with the Alpine Convention and its Implementation Protocols Compliance procedure', Decision XII/I, 7 September 2012, ACXII/A1/I, Annex ('Alpine NCP'), section II para. 2.3, which provides the triggering possibility to the public in general, but regarding NGOs limits the possibility to those that enjoys an ‘observing status’.
109 'Review of compliance', Decision I7/, 1 April 2004, ECE/MP.PP/2/Add.8, Annex ('Aarhus NCP'), para. 18.
2.3.4 Remedies and Sanctions

The measures that can be taken in NCPs are often a combination of incentives, such as technical and financial assistance, and disincentives, such as diplomatic pressure and sanctions.¹¹⁰ The emphasis in the procedures are usually on providing incentives to help the struggling party to return into compliance - a facilitative approach - at least when the violation is not wilful.¹¹¹ This shows the importance of finding the cause behind non-compliance in the NCP and the connection to the treaty’s compliance information system; when information gathered from reporting, monitoring and verification indicates that lack of knowledge or recourses lies behind the party’s non-compliance, the focus is on offering flexibility and positive incentives to enable parties to create capacity to comply.¹¹² The support measures often consists of ‘operational links’ between different components in the regime and includes enhanced international cooperation to help the non-compliant party in implementing its obligations.¹¹³ Clarifications of rules, advice and recommendations from panels together with financial and technical assistance from the regimes instruments can for example be provided.¹¹⁴ When assistance is invoked under the NCP it might be made conditional on that the receiving non-compliant party demonstrates bona fides in rectifying its non-compliance, for example by adopting a national action plan or domestic legislation.¹¹⁵

When a wilful, continuous and significant violation by a non-compliant party is detected, the outcome of the NCPs can range from simply requesting additional information, issuing warnings to even be sanctions.¹¹⁶ If sanctions are to be used they are always internal. They can only suspend benefits arising from the treaty and not trigger secondary norms of international responsibility.¹¹⁷ For example, a sanction could be that a party is to prepare a compliance plan that defines how the country is to meet their targets in future commitments periods,¹¹⁸ that additional and more stringent obligations of performance review information

¹¹⁰ Dupuy and Vinuales, above n 29, 285; Rose, Kurukulasuriya, Perera and Krebs, Above n 20, 31; See e.g. Annex V of the Montreal NCP, above n 100 (“Indicative List of Measures that Might be Taken by a Meeting of the Parties in Respect of Non-compliance with the Protocol”).
¹¹¹ Handl, above n 93, 13, 34.
¹¹² Kolari, above n 1, 209-210.
¹¹³ Handl, above n 93, 13, 32; Rose, Kurukulasuriya, Perera and Krebs, above n 20, 31.
¹¹⁴ Para XIV of the Kyoto NCP, above n 101.
¹¹⁵ Rose, Kurukulasuriya, Perera and Krebs, above n 20, 32.
¹¹⁶ Dupuy and Viñuales, above n 29, 44-45, 291.
¹¹⁷ Ibid 45.
¹¹⁸ See Decision of the Conference of the Parties: ‘Procedures and mechanisms relating to compliance under the Kyoto Protocol’, UN Doc., FCCC/CP/2001/13/Add.3, Decision 24/CP.7 (2002); para XV of the Kyoto NCP, above n 101.
are customised and put on the non-compliant party as well as the a party losing its access to
technology transfer or financial mechanisms and the right to produce, consume or trade with
substances controlled under the regime.\textsuperscript{119} For example, in the Kyoto protocol, the
Enforcement Branch of the NCP is empowered to order coercive sanctions like restricting
access to the flexible mechanisms of the regime or penalties in form of reducing the overall
amount of emissions available under the coming commitment period.\textsuperscript{120}
The use of facilitating measures does not exclude the use of enforcing sanctions; they can be
used in combination. For example, in the case of Russia’s non-compliance under the Montreal
Protocol,\textsuperscript{121} financial assistance, financial conditionality as well as threats of trade sanctions
were all used to make the party return into compliance.\textsuperscript{122} In addition, the distinction between
sanctions and other measures are not always obvious. For example, if a treaty body after
having received a national report that entails flaws in a party’s actions publishes it so that the
rest of the world can their failings, this can very well be seen as a sanction in the eyes of the
country in question who cares for its international reputation.\textsuperscript{123} To publish and distribute
information provides the basis for the ‘name and shame’ through governments, companies
and NGOs’ demanding responses when parties are showing signs of unconformity with
agreed international commitments.\textsuperscript{124}
The combination of measures that can be taken under the NCP shows an understanding that
there can be various reasons for non-compliance, that they can range from the free rider
advantage, to an inability to meet the commitments.\textsuperscript{125} It also shows that the NCP is forward-
looking in trying to protect the future integrity of the regime against potential failings, and
that it is more interested in taking a collective approach rather than the traditional bilateral
approach: relationship between just the non-complying State and the directly injured other

\textsuperscript{119} Rose, Kurukulasuriya, Perera and Krebs, above n 20, 31; See Art. 8 of the Montreal Protocol; See also Report
of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UN
Doc., UNEP/OzL.Pro.4/15 (1992), annex IV ‘Non- Compliance Procedure’ and annex V ‘Indicative list of
measures that might be taken by a meeting of parties in respect of non-compliance with the Protocol’ at 44-46.
\textsuperscript{120} Dupuy and Vinuales, above n 29, 47. Citing the Compliance Committees final decision: Greece, 17 April
2008. CC-2007-1-8/Greece/EB; Compliance Committee, Final decision: Croatia, 19 February 2010, CC-2009-
18/Croatia/EB; Cardesa-Salzmann, above n 41, 116.
\textsuperscript{121} See Report of the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the
\textsuperscript{122} Kolari, above n 15, 215.
\textsuperscript{123} Ibid 213.
\textsuperscript{124} Mitchell, above n 17, 330-331.
\textsuperscript{125} Fitzmaurice and Redgwell, above n 38, 40.
3. Compliance Mechanism in the Paris Agreement

3.1 Primary Rule System

Since compliance mechanisms are specifically formed by the obligations that it is to promote compliance with, the following chapter seeks to identify and analyse the relevant substantive and procedural obligations arising from the Paris Agreement. The word ‘relevant’ in this context means those parts of the Agreement that can be expected to go under the compliance mechanism. In order to assess which these parts are, guidance can first of all be given by looking at Article 15 in the Agreement, in which the compliance mechanism is anchored. It reads as follows:

‘1. A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.
2. The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties.
3. The committee shall operate under the modalities and procedures adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its first session and report annually to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.’

The article only states that ‘the provisions of this Agreement’ is the scope for the compliance mechanism and does not point out any specific parts that are to be included or excluded from its operation. This does however not mean that all provisions are automatically covered. As explained above, the coverage of the compliance mechanism, meaning how and to which degree it is to monitor, review and deal with compliance issues, is dependent on the formation and interpretation of the Agreement’s obligations since they tell what actions the Parties must
take to lawfully implement their commitments. An important aspect in this regard is to examine the legal status of the Agreement. This because only provisions that create legal obligations on the Parties actually binds them to adopt a determined behaviour, which in turn can be expected to be monitored and ensured under the compliance mechanism. The legal bindingness depends on what formal source of international law (for example a treaty, customary rules or general principles) that the provision originates from, and on its substance.\textsuperscript{128} Before going in to the specific content of provisions in the Paris Agreement, important aspects of its legal status will in the following be presented.

### 3.1.1 Legal Status of the Paris Agreement

The Paris Agreement is since the 22 April 2016, until the 21 April 2017, open for signature and enters in to force 30 days after at least 55 Parties, emitting at least 55 % of the global greenhouse gases, have placed ratification instruments, although the mitigation obligations do not formally begin until 2020. The question of the Paris Agreement’s legal status has remained a main issue throughout negotiations and there is still today misperception surrounding it.\textsuperscript{129} Even experienced scholars like Anne-Marie Slaughter seems to have trouble separating important aspects of the Agreements legal status when she expresses that for a treaty to be binding it must contain ‘enforceable rules’ with ‘sanctions for non-compliance’ and must be ‘ratified by domestic parliaments so that they become a part of domestic law’, and concludes that, since ‘none of these things’ are provided for in the Agreement, it is ‘essentially a statement of good intentions’ rather than law.\textsuperscript{130} Another international law scholar, Richard Falk, describes the whole Paris Agreement as ‘voluntary’ and lacking ‘even an obligation to comply’.\textsuperscript{131} What Slaughter and Falk have neglected in these positions, in relation to the matter of international law, is distinguishing between the legal form- if the Agreement as a whole qualifies as a formally ‘legally binding’ agreement on the parties who have signed it in accordance with the Vienna Convention on the Law of Treaties,\textsuperscript{132} from the

\textsuperscript{128} Sandrine Maljean-Dubois, Thomas Spencer and Matthieu Wemaere, ‘The Legal Form of the Paris Agreement’ (2015)\textsuperscript{1 CCLR}, 69.
\textsuperscript{129} See Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (March 22, 2016) \textit{Review of European, Comparative, and International Environmental Law}, Forthcoming, 35.
\textsuperscript{131} Richard Falk, \textit{Voluntary International Law and the Paris Agreement} (16 January 2016) \textltt{https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/}.
\textsuperscript{132} See art. 2.1(a) and art. 26 of the Vienna Convention on the Law of Treaties (VCLT).
question regarding the binding value of the Agreement’s provisions. Slaughter and Falk are right when they say that the Paris Agreements lacks legal form to automatically be applied by domestic courts, which is not unusual since this depends on each countries doctrine around judicial application of treaties. They are also right regarding that the Agreement may not achieve domestic legislative approval or become part of domestic laws. However, these considerations are not the requirements determining if the Paris Agreement qualifies as a treaty under international law. Seeing the structure of the Agreement and that it is created through a recognized law-making process, including ratification of the Parties, means that it has a legal form of a treaty, independent of the obligations legal value and possibilities to impose sanctions for violations of these.

Regarding the binding value of the Agreements provisions, the fact that there are some that does not constitute legally binding obligations does not mean that none of them do. Looking at the wording used some provisions binds Parties to action by denoting the word ‘shall’ instead of shoul and these are the ones who in general implicate hard legal obligations by which Parties compliance is not voluntary. Regarding the normative structure and stringency of the obligations in the Paris Agreement, many obligations that are based on specific treaty provisions is often to be specified by decisions of the internal treaty bodies. Similar to most MEAs, it is the COP that is responsible for taking decisions to further design the implementation and operation of the Agreement. This can contribute in establishing the existence of norms potentially in dispute, the exact nature and scope of the individual Parties obligations and confirm compliance with these. However, questions arise about the legal status of such decisions made by internal bodies. Under the UNFCCC, the COP is not usually authorized to make legally binding decisions, but have in a few cases been provided with such legal force. In these cases, the decisions are taken in relation to specific provisions and are

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133 Bodansky, above n 129, 1-2; Baker & McKenzie, above n 7, 16.
134 See art. 20 of the Paris Agreement; Bodansky, above n 129, 2-3.
135 Bodansky, above 129, 2.
136 Baker & McKenzie, above n 7, 16 (emphasis original); Bodansky, above n 129, 2. However, the verb ‘shall’ in a non-binding instrument, like in the Copenhagen Accord, does not create a legal obligation.
137 Cf Dupuy and Viñuales, above n 29, 287; See e.g. Art 8 of the Montreal Protocol; Art 18 of the Kyoto Protocol; Art 34 of the Biosafety Protocol.
138 Brush and Mrema, above n 10, 54; See e.g. art. 4.10 of the Paris Agreement (regarding evolving common time frames for NDCs), art. 6.6. (insurance that a share of the proceeds from the new market mechanism is used to assist particularly vulnerable developing country parties). See also e.g art 8.5 of the Paris Agreement (giving mandate to the Warsaw Institutional Mechanism on Loss and Damage to collaborate with existing bodies).
139 Handl, above n 93, 13, 32.
phrased in mandatory terms.\textsuperscript{140} This position can be expected to be followed in relation to the COP21s Decision where legal obligations directed at the Parties are generally not created, most of them are directed at other internal institutions like the Ad Hoc Working Group on the Paris Agreement (APA), and when they are fixed directly at the Parties they do not usually use mandatory language like ‘shall’, but instead ‘invites’, ‘urge’ and ‘call upon’ Parties to different actions. Although the legal nature of such provisions can be discussed,\textsuperscript{141} the normative influence can in practise be significant.\textsuperscript{142} However, there are decisions that do use mandatory language. The Decision puts out obligatory legal time limits when it ‘decides that Parties shall submit’ future nationally determined contributions (NDCs), which will be further explained below, within nine to twelve months in advance of the relevant future COPs.\textsuperscript{143} Since there is a connection with the obligation under the Paris Agreement to communicate the NDCs every five years ‘in accordance’ with the Decision, this provision will become legally binding simultaneously with the Agreement stepping in to force. The same goes for the decision that the Parties are to apply guidance set out in the Decision to their future NDCs,\textsuperscript{144} if the decision is ratified by CMA, since the Agreement itself requires the Parties to create the NDCs in accordance with the guidance adopted by the CMA.\textsuperscript{145} Another decision is the one setting out that developed country Parties are to appropriately submit relevant information no less frequently than on a biennial basis.\textsuperscript{146} Although the relevant article in the Paris Agreement does not specifically give mandate to the COP in relation to this decision, it could be seen as reflecting the coexistent understanding of the Parties obligation to report ‘regularly’ under the Agreement.\textsuperscript{147} The Agreement also authorise the Conference of the Parties under the Paris Agreement (CMA) to adopt binding decisions when in a several cases providing that the Parties are to act in ‘accordance’ with the decisions made.\textsuperscript{148} However, the legal bindingness of these also depends on if they are put in mandatory terms or not.\textsuperscript{149} In sum, if anchoring in the Paris Agreement exists, it speaks for that the Parties have agreed that the COP or another internal body shall have mandate to further develop legally binding

\textsuperscript{140} See e.g. art 4.1 of the UNFCCC; Bodansky, above n 129, 10.
\textsuperscript{141} Dupuy and Viñuales, above n 29, 287-288.
\textsuperscript{142} Dupuy and Viñuales, above, 291.
\textsuperscript{143} Decision 3/CP.21, para 25. Bodansky, above n 129, 10 (emphasis original).
\textsuperscript{144} Decision 3/CP.21, para 32, referring to para. 31.
\textsuperscript{145} Art 4.13 of the Paris Agreement.
\textsuperscript{146} Decision 3/CP.21, para 91, referring to art. 13.7-10 of the Paris Agreement.
\textsuperscript{147} Art. 4.7 of the Paris Agreement; Bodansky, above n 129, 11.
\textsuperscript{148} See e.g. art. 4.8, 4.9, 4.11, 4.13, 7.3, 9.7 and 13.7(a) of the Paris Agreement.
\textsuperscript{149} Bodansky, above n 129, 11-12.
decisions. However, it is important to keep in mind political aspects in this regard and that it is unlikely that the individual Parties have intended to render too extensive control over the further development of legally binding obligations. Objections regarding their bindingness might be raised if a Party feels that obligations are created that it has no intention or capacity to comply with.

The impact of the Paris Agreements legal status is hard to predict. The fact that it has the legal form of a binding treaty under international law can be significant in relation to what H.L.A. Hart called the ‘internal point of view’- creating a sense that the Agreement is solely composed of legally binding obligations, why Parties should feel that compliance is required rather than optional. Also, in contrast to for example political agreements, treaties must after stepping in to force be formally ratified by the country Parties, which usually require approval of the domestic legislator. Hence, acceptance of a treaty can signal vaster domestic stimuli, tend to have more effect on domestic politics through governmental routines and promote organisation and empowerment of domestic actors. Also, reliant on that treaty commitments are taken more seriously than political commitments, non-compliance could be judged harder and, regardless if the specific provisions are binding or not, violations of these could thereby risks greater costs to Parties reputation and their international relations.

Regarding the legal value of the obligations under the Agreement, those legally binding could provide a greater signal of commitment and enhanced assurance of compliance. On the other hand, legal bindingness can also lead to States not complying or making less ambitious commitments, why transparency, accountability and precision in regards to the provisions can be just as important to evaluate and deal with compliance. Some even argue that the value of the obligations bindingness lies in the Agreement’s ability to enable public pressure, by providing the meaning of lawful implementation and information of the Parties actions in this regard, thereby empowering civil society actors to hold the Parties account of their fulfilment of the Agreements provisions.

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152 Ibid 13.
153 Ibid 1.
3.1.2 Mitigation

3.1.2.1 General Mitigation Goal

Turning to the substance of the provisions, the Paris Agreement set out a long-term goal-orientated mitigation target to hold the increase in global average temperature below 2 °C above pre-industrial levels, putting efforts to limit the increase to below 1.5 °C. During the negotiations there was discussions weather the limiting of the increase in global average temperature below 2 °C would be an unsatisfactory goal for some countries and that the target should more appropriately be set below 1.5 °C. In opposition to this, such a target could from a scientific standpoint be very difficult for the Parties to achieve, making compliance with the commitments unlikely. Therefore, the 2-degree target was selected to make the Agreement a viable regulatory framework and not just an aspirational one, with a mitigation goal that could the Parties can comply with. The 1.5-degree efforts were included to send a clear signal that more ambitious commitments are needed from those with the capacity if the sought stabilization of greenhouse gases in the atmosphere is to be achieved. The Agreement further sets out that the Parties are to reach their maximum emissions levels and reduce them as soon as possible in the second half of the century, meaning achieving net-zero emissions after 2050. The long-term mitigation goal does not however provide any specific actions that the individual parties are to take, but rather set out the ultimate objective of the Agreement. Therefore, evaluation and identification of individual Parties compliance in this regard will be difficult, since it must be possible to link an obligation and violation to a particular party. The more defined substantive regulation providing what Parties are to do to reach the mitigation goal will in the following be presented.

3.1.2.1 NDCs

The mitigation system in the Paris Agreement differs from the Kyoto Protocols fixed top-down mitigation targets and instead rests on the soft structure of bottom-up submissions by Parties nationally determined contributions (NDCs). The geographical/territorial scope of the mitigation obligations are decided through differential standards by, similar to the

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155 Art. 2.1(a) of the Paris Agreement.
156 Viñuales, Above n, 4; Cf. art. 2 of the UNFCCC.
157 Art 4.1 of the Paris Agreement.
158 See e.g. Ebbesson, above n 1, 164, 171, 178-179.
159 Art 3-4 of the Paris Agreement
Montreal Protocol, using the ‘contextual norm’ in imposing obligations on all parties,\textsuperscript{160} not excluding developing countries like in the Kyoto Protocol,\textsuperscript{161} but putting more extensive ones on developed countries and offering flexibility to developing countries.\textsuperscript{162} To truly take in different contributions and capacities of countries as a reason for differential treatment, the categorisation of which parties that are to be seen as developed or developing should be built on objective conditions, like in the Montreal Protocol,\textsuperscript{163} and also potentially use a review mechanisms to allow movement between the categories.\textsuperscript{164} Without a clear justification of the categorisation, one could think that whether a country is developed or developing is merely ‘a political manoeuvring in the UN system rather than an adequate descriptor for current social and economic ranking’, which could impose legitimacy and equity problems of the CDBR principle.\textsuperscript{165} To take in these considerations the Paris Agreement, in contrast to the Kyoto Protocol,\textsuperscript{166} does not specifically determine which Parties are to be seen as developed or developing.\textsuperscript{167} Instead the Agreement takes a self-differentiation approach in allowing the countries to themselves evaluate their position in the developed/developing spectrum but does not, other than ask the Parties to act in line with their national circumstances and capabilities, provide further explanation of the how the groups are to be defined, leaving it ambiguous on purpose. This approach involves an elastic structure in letting Parties, going under the same legal framework, by their own discretion, balance their national circumstances and capabilities with the level of environmental protection. The risk with this approach is that countries could potentially rank themselves down to avoid more extensive actions. Since there are no specific provisions showing what weight to put on different considerations, assessment under the compliance mechanism regarding if a Party have made a correct evaluation can get complicated. However, it should not be an impossible task when it is clear which consideration that should ‘tip over’ in an individual Party’s situation. The self-differentiation approach could prove valuable in situations when Parties, who might previously been seen as

\textsuperscript{160} See e.g. art 3 of the Paris Agreement.

\textsuperscript{161} According to their non-inclusion in Annex B of the Kyoto Protocol and Annex I of the Climate Change Convention.

\textsuperscript{162} Dupuy and Viñuales, above n 29, 74, 147, 150, 285 Citing Art. 5 and 4.7 of the Montreal Protocol.

\textsuperscript{163} Art. 5 of the Montreal Protocol.


\textsuperscript{166} See Annex 1 of the UNFCCC; Annex B of the Kyoto Protocol.

developing countries, today evidently have the capacity to take on heavier environmental commitments.

Regarding the substantive scope of the mitigation obligations, they are not to be determined internationally and expressed in the Agreement, but instead the Parties themselves decide the ambition of their mitigation contributions and propose how they will contribute to the long-term mitigation goal. This means that evaluation of a Party’s compliance with its NDC will first and foremost include an examination regarding if the country has done what it said it would do. Regarding what level of mitigation and actions a Party must take to lawfully implement its NDC, the absence of any clear criteria makes it hard to see how such aspects are to be evaluated under the compliance mechanism. Putting less weight on specifying the level of individual Parties actions could lead to less of an excuse for countries with higher capacity to lean back on their commitments, but a consequence of the non-regression requirement could also be that countries potentially start off by setting low unambitious NCDs to make sure they will be in compliance. In this regard, the Agreement does however provide that the Party’s actions are to reflect its highest possible ambition, which could be part of the evaluation regarding the level of mitigation in the Party’s NDC. Additionally, for countries that have submitted Intended National Determined Contributions (INDCs), these could count as their first NDCs under the Paris Agreement and subsequently no regression should be made from these. The Decision welcomes this but also acknowledges that the submitted INDCs are insufficient in reaching the Agreements mitigation goal. Also, the basis of setting the emission targets and their coverage differs in approach in these INDCs, showing the importance of guidelines being provided regarding what information the future long-term NDCs are to include to enable evaluation under the compliance mechanism. The existing current provision regarding this calls for the Parties to provide the necessary information for making the specific contents of the NCDs clear and transparent. It is the APA that has been entrusted to provide guidance to ensure this, which is to be adopted by the CMA. Hence, what it means to be in compliance in regards to the reference point from where the Parties set their targets, time-frames/periods for implementation, the scope and coverage, the assumptions and methodological approaches of the NDCs, remains to be

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168 See e.g. art. 4.3 of the Paris Agreement.
169 Decision 1/CP.19, para 2(b); Viñuales, above n 3, 5.
170 Decision 3/CP.21, para 12-13, 17.
171 Baker & McKenzie, above n 7, 3.
172 Art 4.8 of the Paris Agreement.
evolved.174 However, when deciding the NDCs, the Agreement provides some fixed obligations of conduct that the Parties have to follow. First of all, they are to submit their NDCs prior to the Agreement coming into force in 2020. Then the NDCs are to be progressive and regularly updated, meaning that they shall be strengthened every five years until the long-term mitigation goal is achieved.175 They are also to be recorded in a flexible ‘public register’ and provide information necessary for clarity, transparency and understanding.176 These fixed obligations provide clear criteria for evaluation of Parties implementation and compliance under the compliance mechanism. It also enables transparency and openness to the civil society and public pressure on the Parties regarding their mitigation actions, or lack thereof.177

The Agreement also includes a global stocktake to be done every five years, starting in 2023, to assess the collective progress towards the goals of the Agreement.178 Although this process is designed to influence Parties to increase the ambition of their NDCs, it is more focused on the overall effectiveness of the Agreement and less about specific provisions regarding Parties implementation of their commitments that could go under the compliance mechanism, why I will not go further in to an explanation of its structure and design.179

The soft structure of the mitigation commitments is important both legally and politically. Regarding the legal value of the NDCs, some argue that they are not binding because the substantive contains of these is not part of the Agreement itself. However, the fact that the mandatory obligation of creating NDCs is anchored in the Paris Agreement can be argued to be enough to build momentum for interpreting them as both binding individual acts and as a ‘subsequent agreement’ to the Paris Agreement. Therefore, the NDC’s can be seen as ‘provisions of the Agreement’ and thereby go under its compliance mechanism.180 Going to political aspects, MEAs determined internationally that provide outlined national obligations on specific parties, instead of imposing undefined additional obligations on all parties, can be expected to create more reluctance from countries to participate and comply.181 One explanation goes back to countries’ fear of constraining their sovereignty by well-defined

175 Art. 4.3, 4.9 of the Paris Agreement.
176 Art 4.12, 4.8 of the Paris Agreement.
177 Baker & McKenzie, above n 7, 4, 16.
178 Art. 14 of the Paris Agreement.
179 See Viñuales, above n 3, 9.
180 See art 15.1 of the Paris Agreement; Viñuales, above n 3, 5. Citing art. 31(3)(a) of the VCLT.
181 French, above n 47, 51. Citing the United Kingdoms’ declarative statement, in regard to arts. 20 and 21, to its signature of the Biodiversity Convention.
binding obligations.\textsuperscript{182} Hence, the Paris Agreement’s design, in letting the Parties decide their own NDCs, enables bringing all Parties, also high emitting developing countries, to contribute under the regulatory system, which in turn builds practical momentum for the CBDR principle.

### 3.1.2.3 Common Determined Contributions

To promote compliance with the Parties mitigation commitments, the Paris Agreement includes cooperation provisions. Similar to the Kyoto Protocol,\textsuperscript{183} the Parties have the opportunity to together with other countries comply with their mitigation obligations by setting common determined contributions in addition to their own NDCs. Using common determined contributions is not an obligation but voluntary. However, if Parties choose to cooperate in this way, there are fixed obligations of conduct that they must follow. It includes notifying the Secretariat of the terms of the agreement and communicating the emission level allocated to each Party within the relevant time period, when they communicate their NDCs.\textsuperscript{184} Besides from evaluating if the Parties have complied with the fixed obligations of conduct, similar to the legal aspect of NDCs, the anchoring of the common determined contributions in the Agreement could speak for that evaluation regarding if the Parties have done what they have said they would do in these could be included under the compliance mechanism. Although in this regard, the use of common determined contributions is voluntary, which NDCs are not. Also, if included under the compliance mechanism, there is no top-down measured allowance for the common contributions that the Parties have to comply with, unlike in the Kyoto Protocol. This might however make the commitment seem less pressing to the Parties and together with the non-regression principle provided, such cooperation may prove valuable in cases when a country is likely to fall short of its own NDC, but through cooperation with another Party can comply with a common determined contribution.\textsuperscript{185} It could also allow greater collaboration between developed and developing countries to reach the mitigation targets under the Agreement.\textsuperscript{186}

### 3.1.1.4 SDM

Cooperation to facilitate compliance is also provided for in the sustainable development

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\textsuperscript{182} Bodansky, above n 129, 13.  
\textsuperscript{183} Art. 4 of the Kyoto Protocol.  
\textsuperscript{184} Art 4.16-18 of the Paris Agreement.  
\textsuperscript{185} Viñuales, above n 3, 13.  
\textsuperscript{186} Baker & McKenzie, above n 7, 7.
mechanism (SDM), established to ‘contribute to the mitigation of greenhouse gas emission and support sustainable development’. The SDM will resemble the features of the joint development (JI) and clean development mechanism (CDM) under the Kyoto Protocol, where projects can be established in developing countries and the emission offsets could be sold into carbon markets. The difference of the SDM in the Paris Agreement, compared to its operation in the Kyoto Protocol, goes back to the absence of division between Annex 1 and non-Annex 1 countries, and that the geographical/territorial scope of the SDM means that it may operate in any Party. The incentives for developed countries to engage in this mechanism have foremost been that it helps them to comply with their international commitments (the efficiency objective). For example, since assistance in form of capacity building to developing countries is one of the appropriate conditions for the involvement in such projects, it could contribute to developed countries complying with their obligations regarding support to developing countries. Thereby both sides could benefit.

Engaging in the SDM is similarly to common determined contributions voluntary. However, if choosing to participate in such operations, the Parties also in this case has some fixed obligations that they need to comply with that could be expected to go under the compliance mechanism. For example, they shall promote sustainable development as well as environmental integrity and transparency in their operations, especially by using resilient accounting to avoid double counting of mitigation actions (meaning that reductions counted for compliance of one Party cannot be counted for another). Regarding if clearer criteria for the assessment of lawful implementation of these obligations will be provided, Parties actions are to be consistent with guidance still to be developed and adopted by the CMA.

### 3.1.2.4 ITMOS

Another provision to encourage cooperation can be found in the Agreement’s resurgence to the role of international markets and the provisions for a linking process set out in the Agreement, having similar parallels with the Allowable Amounts under the Kyoto Protocol. This mechanism consists of recognising emission reductions through internationally transferred mitigation outcomes (ITMOs) in the Parties approaches to comply

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187 Art. 6.4 of the Paris Agreement; Viñuales, above n 3, 13.
188 Dupuy and Viñuales, above n 29, 39.
189 Ibid 39; French, above n 47, 45.
190 Art. 6.1, 6.4 of the Paris Agreement.
191 Art. 6.2 of the Paris Agreement.
192 See art. 17 of the Kyoto Protocol.
with their NDCs. The aim is to increase emission caps and efficiency gains by allowing Parties that have ‘unused’ emission units to sell the excess capacity to other Parties that are over their targets, for example through international emission trading systems where emission reductions derived from different sources in one country can be used in another. The linking process is once again allowed on a voluntary basis, but when used obliges the Parties to perform them so that sustainable development is promoted, participation of public and private parties is incentivized and facilitated, as well as double counting being avoided.\textsuperscript{193} The further details for the ITMOs is to be developed by the Scientific Body under the Convention and adopted by the CMA, which is also to design a body that will supervise the Parties engagement in such operations.\textsuperscript{194} This is a clear indication that the provisions are meant to go under the Agreement’s compliance mechanism.

3.1.2.5 REDD+

Another way to facilitate compliance with the emission targets is now explicitly anchored in the Agreement’s REDD+ provisions, which sets out that Parties should reduce their emissions through avoidance of deforestation and enhancement.\textsuperscript{195} Such provisions have previously been controversial in the climate regime because of the coverage issues and concerns over monitoring, verification and safeguards. But through civil society groups’ development of protocols and methodologies now widely accepted and decisions from COPs, the UNFCCC today provide a basis for a more robust framework governing aspects like these.\textsuperscript{196} However, looking at the wording used, the article does not place any obligations on the Parties to implement and support this framework, but instead ‘encourage’ them to do so, which might indicate that Parties actions in this regard is not to go under the compliance mechanism. Nonetheless, regardless of the provisions legal bindingness, forests are the primary means by which countries reach reduced mitigation outcomes and with gained political and financial support, the use of REDD+ can be expected to play a big role in the Parties’ formation and implementation of their NDCs,\textsuperscript{197} and thereby be evaluated under the compliance mechanism.

3.1.3 Adaptation

\textsuperscript{193} Art. 6.4, 6.5 of the Paris Agreement; Decision 3/CP.21, para 37; Viñuales, above n 3, 14.
\textsuperscript{194} Decision 3/CP.21, para. 38-39.
\textsuperscript{195} Art. 5 of the Paris Agreement.
\textsuperscript{196} Baker & McKenzie, above n 7, 10; Referencing to the Warsaw Framework for REDD+.
\textsuperscript{197} Ibid 10. Of the NDCs submitted, 54 % of the countries prioritized the land use sector.
Over the years, the need for a political profile on adaptation to reduce Parties vulnerability to climate change has gained importance. This has led to the Agreement setting out a specific adaptation goal to increase the ability for the parties to build and ensure resilience, as well as adapt, to the impacts of climate change and includes providing a consistent finance flow to enable this. The anticipated and measureable adaptation goal is to be achieved through a specific framework but many of the provisions under this framework are mostly aspirational. However, the article does contain some clear mandatory fixed obligations placed on each Party to engage in adaptation planning processes and implementation of such actions. This includes making national adaptation plans, although special configurations for developing countries are recognised, that summarize adaption priorities, efforts and support needed. These plans should be communicated, shall be recorded in a public registry maintained by the secretariat and included in the global stocktake. Once again, seeing that there are no exclusions from the coverage of the Agreement’s compliance mechanism, there is nothing that prevents these clear obligations on each party to be included under the compliance mechanism scope since the obligation to make adaption plans is anchored in the Agreement and the content of these could be seen as ‘provisions of this Agreement’.

3.1.4 Loss and Damage

While adaptation focuses on preventing damages occurring, loss and damage is primarily about response and potentially reparation of inescapable damages caused by climate change. To include obligations on Parties in relation to loss and damage has been a critical issue in the climate regime negotiations because, on the one hand, developing countries is calling out for responsibility for developed countries when dealing with climate change consequences, while developed countries on the other hand rejects such inclusions for fear of creating legal liability. The Paris Agreement does set out provisions regarding loss and damage, and the Decision provides that the Warsaw International Mechanism on Loss and Damage is entrusted to set up a working group to develop recommendations to avert, minimize and address adverse impacts related to climate change and authorise the CMA to supervise this mechanism. The operation should include early warning systems and emergency preparedness

198 Viñuales, above n 3, 6-7.
199 Art. 2.1(b), 2.1(c) of the Paris Agreement.
200 Art. 7.9, 7.3, 7.10, 7.12 , 7.14 of the Paris Agreement; Viñuales, above n 3, 6.
202 Art. 8 of the Paris Agreement.
to handle slow onset events and situations that involve irreversible loss, risk assessments and insurance, non-economic losses and climate resilience.\textsuperscript{203}

Although the framework on loss and damage can prove valuable for preventing and dealing with environmental damage, non-compliance of obligations under the Agreement is to be distinguished from determining liability in cases of environmental damages. This because such damages can occur even though there is no non-compliance with obligations under the Agreement. In this regard, compensation for loss already caused and climate change-related adverse impacts are not mentioned in the Agreement and the Decisions clarifies that the provisions for loss and damage is not to be seen as basis for liability or compensation.\textsuperscript{204}

Also, since the provisions of loss and damage in the Paris Agreement do not currently require Parties to impose a certain standard of performance in relation to pollution activities or uphold a certain quality of the environment, there are no obligations including any factual situations that can be evaluated or dealt with by the Agreement’s compliance mechanism.\textsuperscript{205} However, the article does provide that the operation of the Warsaw International Mechanism for Loss and Damage may be ‘enhanced and strengthened’ by the CMA.\textsuperscript{206} Thereby, it could be argued that there is anchoring for future COP decisions to provide such situations that could be evaluated under the compliance mechanism. However, when interpreting this possibility, it is important to keep in mind the question of legal bindingness and that such development is a political process that includes sovereignty aspects, why Parties might be reluctant to recognize any obligations created through these decisions.

3.1.5 Support

To promote compliance with the commitments and reach the objectives of the Agreement, providing support to Parties with less capacity is an important tool and way to do this is through climate finance. Agreeing on the terms of such assistance has however continued to be an issue throughout the negotiations of the Paris Agreement. Developing countries have sought reassurance from developed countries by scaled up finance to be able to participate and comply with the Agreement’s commitments, while developed countries have argued that wealthier developing countries also have to contribute in the financing. The result is a clarification regarding which Parties the obligation to pay is bestowed upon, namely

\textsuperscript{203} Decision 3/CP.21, para. 50; Viñuales, above n 3, 7-8; Baker & McKenzie, above n 7, 13.
\textsuperscript{204} Decision 3/CP.21, para. 52.
\textsuperscript{205} See Ebbesson, above n 1, 160.
\textsuperscript{206} Art 8.2 of the Paris Agreement.
developed countries and there is also encouragement placed on other Parties, likely meaning wealthier developing countries, to on a voluntary basis contribute in the financial support. The substantive scope of developed countries obligation is to provide financial assistance in mitigation and adaptation to developing countries. The obligation does however not place any fixed levels of financing on the individual Parties by which compliance can be evaluated, although it includes that actions taken should represent a progression compared to previous efforts and the Decision clarifies a collective quantified goal to be set by the COP before 2025 with the ground level of at least US$ 100 billion/ year. Nor is there any obligations regarding the nature of the financial support, only that they may come from both public and private recourses, although emphasises is on organisation through public involvement. It is the task of the Scientific Body under the Convention to develop the modalities for the accounting of such recourses. The article does however specify obligations on developed country Parties to biennially communicate analytical qualitative and quantitative information related to actions taken to implement financial support, including transparent and consistent information of assistance provided and organised through public involvement in accordance with modalities, procedures and guidelines still to be adopted by the CMA. Other Parties providing support are encouraged to provide such information. These provisions indicate that Party’s lawful implementation of the finance obligation can be evaluated and addressed under the Agreement’s compliance mechanism.

To further promote implementation of the commitments under the Agreement, a new technology framework is included to guide coordination between the Technology Mechanism and the Financial Mechanism under the UNFCCC. The only obligation in this article is the one placed on all Parties to, by recognising existing technology arrangements and distribution, strengthen their cooperative actions on technology development and transfer in the implementation of their mitigation and adaptation actions. Assistance is to be given to developing countries to do this. There are no provisions in the article regarding what measures Parties are to take to lawfully implement the obligation, this is left to the Parties own discretion. But seeing the obligations on Parties to provide information regarding their

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207 Art. 9.2 of the Paris Agreement.
208 Art. 9.1 of the Paris Agreement.
209 Art. 9.3 of the Paris Agreement; Decision 3/CP.21, para. 54.
210 Art. 9.3 and 9.7 of the Paris Agreement. Decision 3/CP.21, para. 58.
211 Art. 9.5, 9.7 of the Paris Agreement.
212 Art. 10.2, 10.6 of the Paris Agreement.
mitigation and adaptation actions as discussed above, these could include information regarding how and if a Party have strengthened its technology development and transfer. The Agreement moreover provides for country-driven capacity building actions, by asking the Parties to cooperate to increase developing countries capacity through enhanced support from developed countries.\textsuperscript{214} Looking at the wording used in the article, there are no obligations put on the Parties to use capacity-building, it is voluntary. However, if used, the supporting Parties are obliged to regularly communicate on such actions and developing countries ought to inform on their implementation progress in this regard.\textsuperscript{215} The use of capacity-building could be seen as necessities for proper implementation and accounting for Parties mitigation commitments and the information provided could thereby go under the compliance mechanism.\textsuperscript{216}

3.2 Compliance Information System

Despite resistance from some countries,\textsuperscript{217} the Agreement provides for a new international transparency framework with the task of measuring, reporting and verifying (MRV) the individual Parties commitments relating to action and support. This is to be done so that the Parties progress to achieve their obligations can be compared and assessed in a consistent and transparent manner.\textsuperscript{218} Regarding action, the aim is to track the progression of Parties individual NDCs and adaption commitments.\textsuperscript{219} Looking at support, the aim is to provide clarity of support provided and received by the individual Parties under mitigation, adaptation, finance, technology transfer and capacity building.\textsuperscript{220} Monitoring and verifying implementation and compliance within the environmental treaty like this could prove to be especially valued by developed countries who might be worried that they will be giving support to developing countries that are not complying with their obligations but still gets the economic benefits.\textsuperscript{221}

It is the task of the APA to develop recommendations regarding the modalities, procedures and guidelines for the MRV, to then be adopted by the CMA.\textsuperscript{222} The Agreement emphasise

\begin{itemize}
\item Art. 11.2-3 of the Paris Agreement.
\item Art. 11.4 of the Paris Agreement.
\item Viñuales, above n 3, 12.
\item Ibid 9.
\item Art. 13 of the Paris Agreement: Baker & Mckenzie, above n 7, 7.
\item Art. 13.5 of the Paris Agreement. Notice the excluding of provisions regarding loss and damage.
\item Art. 13.6 of the Paris Agreement.
\item Sands and Peel, above n 1, 8.
\item Decision 3/CP.21, para. 92.
\end{itemize}
the nature of the framework by stating that it is to be implemented in a ‘facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties’.223 Regarding the geographical/territorial scope, the MRV framework is to apply to all countries but the need for flexibility and differentiation in the provisions, in order to take in the Parties different capacities, is acknowledged.224 This is further expressed in the Decision as providing flexibility to developing countries in implementation, including the reports scope, frequency and level of detail, together with the scope of review.225 The substantive content of the national communications depends on the type of Party. Common to all Parties is that they are obliged to provide national inventory reports regarding their national anthropogenic greenhouse gas emissions that are prepared through methodologies accepted by the Intergovernmental Panel on Climate Change (IPCC) and agreed upon by the CMA, as well as provide information necessary to track the progress of implementing and achieving their NDCs.226 Regarding adaptation, actions and climate change impacts, the Parties ought to do so.227 Developed country Parties are obliged to, and other Parties that provide support ought to, report on their financial, technology transfer and capacity building actions given to developing country Parties and developing countries ought to provide information on support received in these areas.228 The obligatory information submitted is then to go through a ‘technical expert review’, which is mandated to assess implementation and achievement of the Parties NDCs and support actions, in light of the flexibility and differentiation emphasised in the article.229 This speaks for that the MRV is to carry out more than a review of the provided information’s correctness, the procedures can also be expected to consider when and how Parties are in non-compliance with their obligations. Towards this speaks the inclusion of assessing implementation in the MRV’s mandate, together with the temporal scope setting out that Parties national communications are to be reported and updated at least on a biennial basis,230 indicating that both potential and full non-compliance could be identified ex ante, before the deadline for achieving the obligation has passed.231 This could for example be when the information provided shows that a Party is not taking the

223 Art. 13.3 (in fine) of the Paris Agreement.
224 Art. 13.1, 13.2 and 13.3 of the Paris Agreement.
225 Decision 3/CP.21, para. 90.
226 Art. 13.7 of the Paris Agreement.
227 Art. 13.8 of the Paris Agreement.
228 Art 13.9-10 of the Paris Agreement.
229 Art 13.11, 13.12 of the Paris Agreement; Viñuales, above n 3, 10.
230 Art. 13.4 of the Paris Agreement. See also Decision 3/CP.21, para. 91.
231 See Oberthür, above n 14, 43.
measures needed to lawfully implement an obligation, or when it at an early stage is obvious that a Party will not reach a set out target. However, seeing the nature of the MRV and that the primary aim is on enhancing transparency, together with the fact that the technical expert review is only to identify areas of improvement for a Party and not decide any concrete measures, contrary to the framework in the Kyoto Protocol there are no provisions for the MRV to move in to the field of compliance response in situations of found non-compliance.232

3.3 Non-Compliance Response System

3.3.1 Composition and Mandate

The Paris Agreement establishes that the compliance mechanism will consist of a Compliance Committee composed of 12 experts.233 The election of experts are to be carried out by the CMA in accordance with parameters set out in the Decision, requiring competence in relevant legal fields, equitable geographical representation and gender balance.234 The Committee is to report annually to the CMA and the rules and modalities for its operation are still to be developed by the APA and also adopted by the CMA.235 This can be compared to the Kyoto Protocol’s Compliance Committee, which consists of 20 experts that explicitly are to act in their ‘individual capacity’ and which decisions does not require confirmation or can be overruled by the COP.236 Although such provisions are not stated in relation to the Paris Agreement’s Compliance Committee, the fact that experts are used instead of country representatives still emphasise that the members are to serve in their independent capacity in an impartial and objective manner.237 This is further indicated by the nature of the Compliance Committee in that it is to operate in a transparent, non-adversial and non-punitive manner, taking in to account the Parties national capacities and circumstances.238

The mandate of the Paris Agreement’s Compliance Committee can be expected to follow those in other MEAs and function to receive, consider and report on submissions regarding non-implementation with the regimes obligations and, in cases when concerns of non-compliance has risen, to request additional information regarding the potential violating

232 Ibid 32, 42; Cf. art. 5,7 and 8 of the Kyoto Protocol.
233 Art. 15 of the Paris Agreement.
234 Decision 3/CP.21, para. 103.
235 Ibid para. 104.
236 See para. XIV of the Kyoto NCP, above n 101; Oberthür, above n 14, 41.
237 See Brush and Mrema, above n 10, 156.
238 Art. 15.1, 15.2 of the Paris Agreement.
conduct of a Party. Although the Paris Agreement’s Compliance Committee might not have the same independence as the one under the Kyoto Protocol and not be provided with mandate to adopt final decisions regarding what the response is to be in situations of non-compliance, the expression in the Agreement does at least indicate that it will be authorized to make recommendations or present draft decisions to the CMA. The less intrusive nature of the Committee could also indicate that it is to take final decisions when it comes to softer, facilitating measures.

Regarding the Compliance Committee’s substantive scope, there is nothing in article 15 of the Agreement that indicates any limitations regarding what provisions it is mandated to consider, although there is the possibility that such limitations might be developed through the rules and modalities still to be adopted by the CMA. A broad coverage would however go in line with those in other MEAs, were the Committees’ mandate have covered all commitments under the agreements. This has also been the case regarding the Kyoto Protocol’s Compliance Committee but its mandate has however been divided between the Enforcing Branch, whose coverage is limited to certain central commitments related to mitigation, and the Facilitative Branch, who can address all other questions of implementation of obligations and includes an early warning function regarding non-compliance with emission targets and methodological and reporting requirements at an pre-breach phase, before it falls under the mandate of the Enforcement Branch. The Paris Agreement’s Compliance Committee has however no division between different branches but instead emphasise a facilitative nature. This speaks for a more collaborative approach compared to the punitive nature in the Kyoto Protocol, which Committee had deep investigation and measurement powers to address non-compliance and was thereby more intrusive in a State sovereignty aspect.

Regarding the geographic/territorial scope, the Compliance Committee can be expected to cover all Parties. This is a difference compared to the proceedings under the Enforcement Branch of the Kyoto Protocol Compliance Committee, which is only to apply to developed
countries. In regards to its Facilitative Branch, although developing countries is not excluded from its mandate, given that the primary rule system only puts obligations on developed countries, the result has been that it is unlikely that these Parties will be addressed by the Committee. In the Paris Agreement’s however, obligations are placed on both developed and developing Parties and differentiation is already provided for in the forming of these, as well as further emphasised in the nature of the Committee’s operation.

3.3.2 Triggering

Regarding the temporal scope, the triggering of the NCP in the Paris Agreement could be expected to follow those in other MEAs by enabling assessment both ex post and ex ante. In the division of mandate in the Kyoto Protocol, the early warning function under the Facilitative Branch has largely remained unused, showing an inability to address situations of non-compliance at an early phase, which could be explained by the lack of effective triggering provisions. In the Paris Agreement however, the lack of such divisions indicates that there are no time-limitations for when the NCP can be triggered. Seeing that the focus is on facilitating compliance, it is more likely that the procedures are to step in as early as possible so that potential non-compliance can be managed into conformity. This is further indicated by that the MRV is to gather and assess Parties actions on a biennial basis and not only, for example, at the end of a Party’s implementation period of its NDC.

Regarding who will have capacity to trigger the compliance mechanism, the Agreement’s provisions seems to provide opportunity to raise questions of non-compliance through other channels than the Parties themselves. For example, similar to the Kyoto Protocol, the team of experts under the MRV that are to review the information from Parties could be provided with such capacity, seeing that their operation includes identifying and assessing questions of Party’s support actions and implementation and achievement of their NDCs in their review reports. The focus on transparency and openness in the Agreement could also indicate that the public and non-party actors, like NGOs, can play a part in triggering the NCP. For

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244 See Oberthür, above n 14, 36, 41.
245 Ibid 40-41. The major example in this regard being the potential non-compliance by Canada, which government at and early phase declared that it did not plan to meet its emission target, which was subsequently confirmed by emission data, but the Compliance Committee under the Kyoto Protocol failed to address the matter effectively.
247 Art. 13.11-12 of the Paris Agreement; Cf. Oberthür, above n 14, 37, 41.
example, the preamble specially affirms the importance of public participation at all levels of the matters addressed in the Agreement. However, it could also be argued that such possibilities are unlikely to be accepted by the Parties, since States are generally hesitant against providing power to actors outside the agreement. The fundamental objections are usually that it could undermine the non-confrontational and co-operative nature of the NCP, as well as that the Committees’ workload becoming overwhelming. Less controversial is the possibility that the Compliance Committee will be able to use information and possibly the expertise from NGOs when the NCP have been triggered. This role is supported by the fact that a majority of NCPs provides authority to seek ‘experts’ and advisers’ opinions. The benefit with letting other actors than the Parties identify and bring individual cases of non-compliance to the Compliance Committee’s attention, and during the proceedings submit related factual information and technical advice to find the causes of non-compliance and the appropriate responses to these, could be that it would significantly improve the effectiveness of the compliance mechanism. For example, NGOs are typically less, if at all, constrained by considerations of ‘diplomatic appropriateness’ than States are when raising delicate concerns of parties’ non-compliance.

3.3.3 Remedies and Sanctions

There are not yet any clear provisions regarding what kind of measures that is to be available under the Paris Agreement’s response system. Guidance can however be provided by the approach favoured in the Compliance Committee’s operation. Seeing that a facilitative nature is emphasised, the responses to non-compliance can be expected to go in line with the development and function of non-adversarial internal Compliance Committees set out in other MEAs. However, even though the emphasis is on facilitation rather than enforcement, a bandwidth from soft to strong measures have also been available to take in that there can be various reasons for Parties non-compliance. This is the case in regards to the Compliance Committee under the Montreal Protocol, which favours the management approach and first tries to find a friendly solution to non-compliance satisfactory to the parties involved, but if such a solution is not adequate, the Committee is authorized to apply stricter means to restore

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248 See e.g. section VIII, para. 4 of the Kyoto NCP, above n 101.
249 See e.g. ibid para. 5; para 25(d) of the Aarhus NCP, above n 109; Pierre-Marie Dupuy and Luisa Vierucci (eds), NGOs in International Law: Efficiency in Flexibility? (Edward Elgar Publishing, 2008), 188.
250 Dupuy and Vierucci, above, 183.
251 See Oberthür, above n 14, 49; See e.g art 18 of the Kyoto Protocol.
respect for compliance with the obligations in line with the enforcement approach. Guidance on the responses available is also given to a high degree from the primary rule system, since the tools are routed in the design of the treaty itself. For example, the Montreal Protocol’s Compliance Committee can take trade measures because trade restrictions related to controlled substances are included under the agreement in the first place. Also, the treaty’s design can allow ‘operational links’ between different components of the regime to promote compliance. An example of this is the possibility for the Facilitation Branch under the Kyoto Protocol to provide advice from the Agreement’s scientific panels in combination with providing support, including from its technology transfer and capacity building instruments, when a party is showing signs of being in non-compliance with the treaty obligations.

Seeing the provisions included in the Paris Agreement and the focus on regularly gathering information so that the road towards compliance can be evaluated, the measures can be expected to include assistance from the regime’s support instruments, as well as recommendations from the expert groups under the regime, when the reason for non-compliance seems to be non-voluntary. Seeing the focus on transparency and openness, the measures could also include making public findings and declarations of non-compliance, as well as requests on the Parties to develop an action plan to show how they are to return in to compliance, and thereby include public pressure to promote compliance. To further emphasise the importance of Parties taking own incentives to return in to compliance, the measures can also be interlinked by, similar to the Montreal Protocol, making continued financial assistance to developing country Parties in non-compliance dependent on their progress towards compliance. To deal with situations where it is clear that it is not incapacity but lack of will that is the reason for a Party’s non-compliance, the use of stronger enforcing sanctions could be available. Seeing that sanctions have to derive from benefits arising from the Agreement, they could include ban or restrictions from the Agreements

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252 See Art. 8 of the Montreal Protocol; Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UN Doc., UNEP/OzL.Pro.4/15 (1992), annex IV ‘Non-Compliance Procedure’ and annex V ‘Indicative list of measures that might be taken by a meeting of parties in respect of non-compliance with the Protocol’, 44-46.
253 Oberthür, above n 14, 35.
254 Handl, above n 93, 13, 32.
255 Para XIV of the Kyoto NCP, above n 101.
256 Obertür, above n 14, 35.
cooperation and support instruments, like participation in the SDM and IMTO systems and reduced access to the regime’s financial pools.\textsuperscript{257}

4. Conclusion

How are the features, design and structure of the Paris Agreements compliance mechanism linked to the substantive and procedural obligations?

Article 15 of the Paris Agreement states that the compliance mechanism’s coverage extends to ‘the provisions of this Agreement’, but seeing that compliance means Parties fulfilment of their obligations under the Agreement, only those provisions that binds the Parties to adopt a determined behaviour could be expected to go under the compliance mechanism. In this regard, some critics have argued that the Paris Agreement lacks any enforceable obligations and that the whole Agreement is voluntary and express good intentions rather than law. This however seems to be an inadequate description seeing that obligations’ legal bindingness depends on what formal source they originate from, and on their substance, and the Parties have in this regard created an Agreement with the legal form of a treaty and the provisions’ normative structure and stringency includes legally binding obligations.

Different normative techniques create more or less precise obligations considering what actions the Parties are to lawfully implement and how much is left to their own discretion in this regard. This subsequently affects how and to which degree the Parties implementation and compliance can be evaluated and addressed under the compliance mechanism. Common to a number of regimes on environmental protection, the Paris Agreement provides a legal framework through first setting out goal-orientated norms, which then have been or are to be complemented with more precise obligations defined by fixed norms that could further provide assessable criteria for Parties’ compliance. Further specification of obligations through decisions of internal treaty bodies, like the COP, could be created and be included under the compliance mechanism’s scope where they have anchoring in the Agreement and are formed in mandatory terms. The Paris Agreement also uses balancing norms in letting the Parties by their own discretion decide where they belong in the developing-developed-spectrum and in taking a different bottom-up approach by letting them set out their own

\textsuperscript{257} Cf. ibid 40.
national mitigation commitments. The balancing norms provide an elastic structure in allowing movement between the categories and in the level of actions, as countries economic and social situations changes. In regards to evaluating compliance however, the Parties to a high degree have opportunity to, by their own discretion, determine how the obligations are to be implemented.

Extensive obligations might create incentives for Parties to act, but it can also cause fewer States to participate and comply with their commitments. The obligations in the Paris Agreement could be said to be realistic rather than aspirational and in many of the provisions the main aim is not to empower the UN to bind countries and enforce compliance, but to influence human behaviour that causes climate change to be kept within maintainable boundaries by reinforcing international momentum and using social pressure (by transparency so that citizens, civil society and other countries can see on a regular basis who does what), as well as provide incentives for interests (providing cooperative and support mechanism), to achieve compliance with its provisions.\(^{258}\) The formation of obligations under the Paris Agreement in this way adopts a soft belly and refined implementation approach, with a comprehensive reach to get all Parties to participate and at the same time provides room for differentiation by imposing more and heavier requirements on those actors most likely to fulfil them, although not fully excluding other Parties, and by providing instruments to support and create incentives for implementation both at the pre-breach phase and in cases of non-compliance. To provide differentiation in the design of the primary obligations like this may prove politically justifiable and enables the compliance mechanism to act accordingly.

What are the conceivable features, structure and design of the Paris Agreements compliance mechanism with respect to composition, mandate, triggering, remedies and sanctions?

To deal with cases of non-compliance, the Agreement establishes a non-compliance response system with a Compliance Committee at the core. The Committee shall consist of 10 legal experts representing geographical balance, which indicates that the aim is on having an independent and impartial body with the necessary legal, scientific and technical expertise to adequately evaluate and deal with Parties compliance issues. Regarding the Compliance Committee’s mandate, the Agreement does not provide any exclusion from its scope.

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\(^{258}\) Viñuales, above n 3, 15-16.
However, roughly speaking, only provisions relating to the sharing of progressing NDCs at a five-year interval, the making of national adaptation plans and those placed on developed country Parties to provide support to developing countries and report on this every two years, provides well-defined obligations expressing mandatory conducts that can be expected to be addressed under the Agreement’s compliance mechanism. The Paris Agreement further specifies mandatory obligations by requiring all Parties to, through the MRV framework, provide national inventory mitigation reports and information necessary to demonstrate how they are implementing and complying with their NDCs, as well as developed country Parties having to report on their financial, technology and capacity-building actions given to developing countries. These informative obligations form the core of compliance assessment and the determination of adequate responses to non-compliance. Although final decision in cases of non-compliance might be taken by the COP, the Compliance Committee should at least have mandate to recommend what measures that are to be taken in regards to Party’s non-compliance, and also possibly make decisions when it comes to facilitative responses.

Regarding the temporal scope of triggering the NCP and getting relevant cases to the Compliance Committee, the MRV sets the base for an effective compliance mechanism that can detect and address compliance issues in an early phase, maybe even before non-compliance occurs, an thereby serve to identify and open up for discussions ex ante, as well as ex post. Seeing the facilitative nature of the compliance mechanism and the focus on transparency and openness in relation to Parties’ actions under the Agreement, the capacity to trigger the NCP can be expected to go beyond the Parties and be provided to independent internal bodies and maybe even the public, although this is more controversial seeing Parties unwillingness to render power over the Agreement’s operation to actors outside the regime.

When deciding what measures to take, the focus can be expected to be on taking in the reasons for non-conformity by looking at Parties’ national capacities and circumstances. If non-compliance is found to be non-voluntary, non-adversial and non-punitive responses to facilitate Parties’ compliance by providing incentives, like for example advice and support, will most likely be favoured. However, if wilful non-compliance is found, stricter measures could be included to enforce compliance, like for example making declarations of Party’s non-compliance, financial penalties and loss of privileges arising from the Agreement.

Compared to compliance mechanisms in other MEAs, which similarities and differences can be presumed in the Paris Agreement?
Similar to other MEAs, the Paris Agreement’s compliance mechanism can be expected to have a broad scope, covering all obligations arising from the Agreement. This is indicated by the absence of any provisions excluding any obligations from its mandate and also by the different approach compared to the Kyoto Protocol’s compliance mechanism in that there is no division of its mandate between a Facilitative and Enforcing Branch. The Paris Agreement’s compliance mechanism instead follows those in other MEAs, by emphasising that its aim is on facilitating and promoting compliance. Another indication for a broad coverage is found in the fact that the Agreement’s obligations are less formalistic than in the previous Kyoto Protocol by not pointing out which specific Parties obligations are but upon. This approach has been used in the Montreal Protocol, which also only uses objective conditions for categorising the parties as developed or developing, although these are defined by more easily assessable criteria. By not defining exactly which Parties obligations are put upon, no one is excluded from the mechanisms operation. In the Kyoto Protocol, developing countries were in practise excluded since obligations were only placed on specific developed country parties.

Another difference in regard to the Kyoto Protocol’s compliance mechanism that follows with the exclusion of different branches, and the focus on facilitating compliance, is that no time-limitations for triggering the NCP should be likely. Instead the Paris Agreement’s compliance mechanism can be expected to follow those in other MEAs by enabling triggering both ex ante and ex post. This is further indicated by the emphasis on transparency of Parties actions showing that rather than using robust enforcement mechanisms in situations of full non-compliance, like the ones in the Kyoto Protocol, evaluation of Parties’ implementation should be carried out regularly with support from the MRV framework.

Following the facilitative approach in other MEAs, the Paris Agreement’s Compliance Committee can be expected to take more collaborative responses to non-compliance then the one in the Kyoto Protocol, which had deep investigation and measurement powers to address non-compliance. Incentives to prevent non-compliance even occurring can be expected when potential non-compliance is found and when full compliance occur, they should be solved in an non-adversial and non-punitive manner, although more coercive measures could be used if wilful violations are found. However, contrary to the Kyoto Protocol, the Paris Agreement’s Compliance Committee might not have independency to take final decision regarding Parties non-compliance, this might instead be done by the COP.
4.1 Some Final Thoughts

One thing is clear; the focal point of the Paris Agreements compliance mechanism lies in communication, transparency, cooperation and assistance. The Agreement shows that it is in the interest of the governments, companies and organisations to consider both the challenges and the financial, regulatory and social opportunities that come with climate change and that countries who are proactive and takes the lead to implement and comply with their commitments under the Agreement and transferring them into their domestic policy and legal frameworks can potentially advantage in achieving greater international reputation and getting access to the large and growing pools of climate finance.

To those who criticise the stringency of the Paris Agreement obligations and its compliance mechanism; we humans do not always act rational, moral, fair or obedient. We are imperfect and maybe the Paris Agreement, because of its imperfection, stands a better chance to reach compliance with its objectives than earlier multilateral attempts. To cite Viñuales, ‘maybe this is one of those times when less is more’.259 To me this means that although the clarity of extensive obligations that are to be enforced through a punitive compliance mechanism cannot be contested, such approach might be less effective in promoting Parties achievement of their commitments then if forming realistic obligations that are to be ensured in a facilitative and non-adversial manner.

259 Viñuales, Above n, 16.
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