The Implementation and Compliance Mechanism of the Paris Agreement

How should it be operationalised?

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1 Introduction

1.1 Topic and research question

The Paris Agreement on climate change was adopted on 12 December 2015 by the governments of 195 countries.\(^1\) The Agreement was adopted under the framework of the United Nations Framework Convention on Climate Change (UNFCCC),\(^2\) and entered into force, with unprecedented speed, on 4 November 2016.\(^3\) The Paris Agreement aims at tackling the threat of climate change by “[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1,5 °C above pre-industrial levels”\(^4\). This concretizes the objective of the UNFCCC, which aims for “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.\(^5\) The Agreement shall be operationalised and ready to come into effect from 2020,\(^6\) and will then join the UNFCCC and the Kyoto Protocol to the UNFCCC (Kyoto Protocol) as the international community’s main tools to tackle climate change.\(^7\)

Climate change is one of the most serious challenges the world is facing,\(^8\) and ensuring the effectiveness of the Paris Agreement is therefore of great importance.\(^9\) One factor that will be crucial for the effectiveness of the Paris Agreement, is whether parties implement its provisions and comply with its obligations.\(^10\) In this relation, Article 15 of the Paris Agreement establishes a mechanism “to facilitate implementation and promote compliance with the provisions of the Agreement”. This mechanism can be an important means to ensure that the Agreement achieves its goal of preventing dangerous climate change.\(^11\)

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\(^1\) Decision 1/CP.21.
\(^2\) Ibid., para. 1.
\(^3\) United Nations Framework Convention on Climate Change Newsroom (2016).
\(^4\) Paris Agreement Article 2 para. 1(a).
\(^5\) UNFCCC Article 2.
\(^6\) Decision 1/CP.17 para. 4.
\(^7\) The Kyoto Protocol is now in its second commitment period, which ends on 31 December 2020, cf. Decision 1/CMP.8.
\(^8\) Meld. St. 21 (2011-2012) p. 7.
\(^9\) The effectiveness of a treaty may be explained as the impact the treaty regime has on the problems it addresses, cf. Stokke (1996) p. 15.
\(^10\) Voigt (2016a) p. 161-162.
\(^11\) Dagnet (2107) p. 313-314.
Article 15 does, however, only map out the “skeleton” of this implementation and compliance mechanism, and more detailed modalities and procedures must be developed before it can become operational. For this purpose, the Ad Hoc Working Group on the Paris Agreement (APA) has been requested “to develop the modalities and procedures for the effective operation of the committee referred to in Article 15, paragraph 2, of the Agreement”.\(^\text{12}\) The APA shall complete this work by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement’s first session (CMA1).\(^\text{13}\) It is predicted that these negotiations will be controversial and time-consuming.\(^\text{14}\) The first part of CMA1 was held on 15-18 November 2016 (COP22), and the second on 6-17 November 2017 (COP23). However, the parties have yet to agree on any elements for the operationalisation of the mechanism. The deadline (so far) for the parties to agree on modalities and procedures for the mechanism is at COP24, which will be held 3-14 December 2018.

Against this background, this thesis seeks to answer the following research question: how should the Paris Agreement’s implementation and compliance mechanism be operationalised? This question leads to an analysis with two main steps. Firstly, it is necessary to analyse what elements and criteria Article 15 of the Paris Agreement establishes for the mechanism. These criteria will constitute the legal basis and starting point for the negotiations on the mechanism’s operationalisation. Because Article 15 is not yet operationalised, it will, however, not be possible to make definite conclusions on the exact meaning of many of its elements. Secondly, a suggestion for how the main elements of the mechanism can be designed will be presented.

## 1.2 Methodology

### 1.2.1 Introduction

The research question of this thesis leads to two types of analyses. The analysis of Article 15 of the Paris Agreement has a *lex lata* perspective; the purpose is to establish the content of existing law.\(^\text{15}\) The suggestion of the mechanism’s possible design will, on the other hand, take a *lex ferenda* perspective. The purpose here is to establish how the law should be.\(^\text{16}\) These analyses require different methodological approaches.

\[^{12}\text{Decision 1/CP.21 para. 103.}\]
\[^{13}\text{Ibid.}\]
\[^{14}\text{Voigt (2016a) p. 165.}\]
\[^{15}\text{Condé (2004) p. 150.}\]
\[^{16}\text{Ibid.}\]
In general, however, the thesis builds upon the methodology of international law. The relevant sources when examining a question of international law is reflected in Article 38 of the Statutes of the International Court of Justice (ICJ). While ICJ Article 38 is in principle only binding for the International Court of Justice, it is seen to reflect the accepted legal sources of international law.\textsuperscript{17} The legal sources that are mentioned in Article 38 are international conventions, international customs, general principles of law, judicial decisions, and teachings of qualified publicists. Judicial decisions and the teachings of publicists are subsidiary means.

1.2.2 Analysis of Article 15 of the Paris Agreement

The Paris Agreement is a treaty, as defined in the Vienna Convention on the Law on Treaties (VCLT).\textsuperscript{18} Article 15 will therefore be analysed according to the law on treaty interpretation as established by VCLT Article 31 and 32. According to VCLT Article 31 paragraph 1, a treaty shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. To establish the ordinary meaning of a term, the ICJ often turns to dictionaries.\textsuperscript{19} This will also be done in this thesis. Furthermore, the “object and purpose” is in this relation the objectives of the Paris Agreement, established in its Article 2 and 3, as well as the objectives of the UNFCCC.

The context of a treaty does, according to VCLT Article 31 paragraph 2, comprise of its preamble and annexes, as well as agreements relating to the treaty which was made between all the parties in connection with the conclusion of the treaty, and instruments which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. The context of Article 15 is in this relation made up of the preambles to the Agreement and the UNFCCC, and Decision 1/CP.21, which was adopted by the Conference of the Parties to the UNFCCC in connection with the adoption of the Paris Agreement. Furthermore, VCLT Article 31 paragraph 3 establishes that subsequent agreements between the parties “regarding the interpretation of the treaty or application of its provisions”, as well as subsequent practice in “application of the treaty which establishes the agreement of the parties regarding its interpretation”, can be taken into account together with the context. The Ad Hoc Working Group on the Paris Agreement (APA) has, however, not yet produced any agreements regarding the operationalisation of Article 15, and as the Article 15 is not operative, there is no subsequent practice in application.

\textsuperscript{17} Crawford (2012) p. 21-22
\textsuperscript{18} Rajamani (2016) p. 341.
\textsuperscript{19} Dörr (2012) p. 542. See e.g. Iran v. United States (Preliminary Objection) p. 803 para. 45.
Moreover, according to VCLT Article 32, preparatory works can supplement the interpretation after Article 31. The purpose of using preparatory works is to “discover the true meaning of what the parties agreed to in their treaty”.\(^{20}\) Preparatory work includes “all documents relevant to the forthcoming treaty and generated by the negotiating states during the preparation of the treaty up to its conclusion”,\(^{21}\) as well as the processes they underwent during the negotiations.\(^{22}\) The preparatory works of Article 15 of the Paris Agreement is comprised of draft texts of the Paris Agreements, compilations of drafts and submissions, and submissions from parties or groups of parties during the negotiations. In sum, the main sources in the analysis of Article 15 will be “the ordinary meaning of the wording in light of its context and objective and purpose” and the preparatory works. It must be mentioned that the negotiations under APA are ongoing and include negotiation texts concerning Article 15. However, because of the informal status and unclear content of these documents, they will not be included these in the analysis.

1.2.3 Methodology of the *lex ferenda* analysis

The suggestion on how the Paris Agreement’s implementation and compliance mechanism should be designed will be based on several parameters. Firstly, the criteria set out in Article 15 of the Agreement establish the legal basis and framework for the operationalisation of the mechanism, and is the most important parameter. Secondly, and within the framework of the criteria set out in Article 15, the design of and experience with so-called “compliance mechanisms” under other multilateral environmental agreements (MEAs), will be a parameter for the analysis. MEAs are international treaties, global or regional, that establish commitments to achieve environmentally-related objectives.\(^{23}\) While all MEAs have been negotiated separately and have different parties and content,\(^{24}\) experience has shown that measures to implement one MEA can inform the development of measures to implement other MEAs; “[l]essons can be learned, and approaches can be adapted to other contexts”.\(^{25}\) Additionally, the effectiveness and political feasibility of design options are relevant parameters when designing a compliance mechanism,\(^{26}\) and will be used when developing a suggestion for operationalising the mechanism.

\(^{22}\) Ibid.
\(^{24}\) Bruch (2006) p. 43.
\(^{25}\) Ibid.
\(^{26}\) Oberthür (2014) p. 44.
1.3 Limitations on scope

The topic of this thesis is the implementation and compliance mechanism set out in Article 15 of the Agreement. In terms of promoting implementation of and compliance with the Paris Agreement, there are, however, several other elements in the Agreement that are of relevance. Of particular importance are provisions on reporting, accounting and review, which create pressure on parties to implement and comply through exposing parties’ performance. Moreover, the Paris Agreement establishes several arrangements that aim at facilitating parties’ implementation of the Agreement, namely financial, technology and capacity building support. While these arrangements are also important for ensuring that the parties to the Paris Agreement follow up on their commitments, these elements will not be separately analysed in this thesis. They will, however, be touched upon where this is relevant.

Furthermore, in 2020, when the Paris Agreement's implementation and compliance mechanism is hopefully operationalised, it will most likely operate on basis of a detailed set of rules. There is consequently a multitude of elements that could be discussed when considering the possible design of the mechanism. However, due to its limited scope, the thesis will focus on main elements of a compliance mechanism: the mechanism’s overall functions, how the mechanism’s procedures can be initiated (triggers), some central aspects of the procedure, what measures the mechanism should be able to apply, and decision-making.

1.4 Structure

Chapter 2 consists of three parts. First, the main theoretical approaches to ensuring compliance with treaties will be introduced. Secondly, the meaning of “compliance” as well as “implementation” will be explained. There is some disagreement regarding the exact meaning of “compliance”, and the approach taken in this thesis must be clarified. Third, the specific regulatory category of MEA compliance mechanisms and their central elements will be introduced. Chapter 2 is intended to create a background for the following analysis of Article 15, and for the consideration of the possible design of the implementation and compliance mechanism. In chapter 3, Article 15 of the Paris Agreement will be analysed. The purpose is to clarify what elements and criteria it establishes for the implementation and compliance mechanism. Finally, in chapter 4, a suggestion for how the mechanism can be operationalised will be presented.

27 Paris Agreement Article 9.
28 Ibid., Article 10.
29 Ibid., Article 11.
2 Compliance and compliance mechanisms in international environmental law

2.1 Approaches to compliance: enforcement or management

There is extensive research on why states comply or fail to comply with their treaty obligations, and how compliance with treaties is best promoted.\(^\text{30}\) In this relation, the management approach and the enforcement approach stand out as the main strands.\(^\text{31}\) The management approach builds on the assertion that states are generally inclined to follow up on treaty commitments.\(^\text{32}\) Non-compliance is seen to follow from a lack of capacity to comply\(^\text{33}\) and the ambiguity of treaty provisions,\(^\text{34}\) rather than from wilful disobedience.\(^\text{35}\) On this basis, the management approach considers coercive measures, such as sanctions, as mostly ineffective as means to promote compliance.\(^\text{36}\) Instead, a treaty regime should build upon “a strategy of integrated, active management of compliance that addresses the real sources of non-compliance”.\(^\text{37}\) The management approach therefore presents facilitation, through assistance measures such as recommendations, clarification of rules and capacity building, as the most effective way to promote compliance.\(^\text{38}\) Additionally, creating transparency around parties’ performance under the treaty, through systems for reporting, verification and monitoring, is seen as an important for managing compliance.\(^\text{39}\)

The enforcement approach, on the other hand, builds on the assumption that states’ compliance with international commitments is not driven by their capability to comply, but by a calculation of whether conforming or not conforming to the commitments is most cost-efficient.\(^\text{40}\) Included in this strategic analysis is a consideration of how the state’s reputation might be affected if it violates its international commitments.\(^\text{41}\) Accordingly, the enforcement approach assumes that states mainly conform to international law because the costs of

\(^{33}\) Ibid., p. 236-237.
\(^{34}\) Oberthür (2014) p. 32-33.
\(^{36}\) Brunnée (2012) p. 43.
\(^{38}\) Oberthür (2014) p. 33.
\(^{39}\) Brunnée (2012) p. 43.
\(^{41}\) Ibid.
violating the rules outweigh the benefits.\textsuperscript{42} For a treaty regime to effectively promote compliance, it must consequently raise the costs of not complying.\textsuperscript{43} Against this background, the enforcement approach presents negative incentives, typically sanctions, as necessary means to prevent states from disregarding their international commitments.\textsuperscript{44} Sanctions are here understood as a “broad range of measures that create costs and remove benefits”.\textsuperscript{45}

In sum, the management approach places the emphasis on facilitating compliance, while the enforcement approach considers coercive methods as necessary to promote compliance. The approaches consequently seem to stand in stark contrast to each other. However, in practice do the different causes of non-compliance; lack of capacity and strategic cost-benefit considerations, often co-exist.\textsuperscript{46} In relation to the design of a treaty’s compliance system, the approaches does therefore not have to be mutually exclusive.\textsuperscript{47} While this thesis will not take one of these specific approaches in the following analysis, the insights of these theories can function as a useful background when considering the possible design of the Paris Agreement’s implementation and compliance mechanism.

### 2.2 Implementation and compliance

The terms “compliance” and “implementation” are central in international law, and for understanding the Paris Agreement’s implementation and compliance mechanism. Compliance can, in the context of international treaties, be understood in different ways.\textsuperscript{48} One way of understanding compliance is as referring to whether parties adhere to treaty obligations.\textsuperscript{49} A different understanding is seeing compliance as referring to conformity with “the spirit or broad norm” of the treaty.\textsuperscript{50} This latter approach does not only, or not necessarily, point to parties’ adherence to the treaty obligations, but to its normative framework, typically established through a treaty’s preamble and initial provisions.\textsuperscript{51} It is, however, the first understanding of compliance - parties’ adherence to the treaty’s obligations – that seems to be generally accepted in scholarship on international law.\textsuperscript{52} The United

\begin{footnotes}
\item[42] Ibid.
\item[43] Brunnée (2012) p. 44.
\item[47] Ibid.
\item[51] Ibid. p. 4-5.
\item[52] See e.g. Brown Weiss (1998) p. 4-5 and Voigt (2016a) p. 166.
\end{footnotes}
Nations Environmental Programme (UNEP) has in their Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements (UNEP Guidelines)\(^{53}\) defined compliance as “the fulfilment by the contracting Parties of their obligations under a multilateral environmental agreement”,\(^{54}\) making this understanding valid also in the field of international environmental law.

An important feature of treaties is, however, that they often contain elements of both a “soft” and “hard” character; both legally and non-legally binding obligations.\(^{55}\) This feature opens up to different understandings of what types of treaty obligations compliance refers to.\(^{56}\) It is, however, generally argued by commentators that compliance is in a legal sense only relevant for provisions that set legally binding obligations for the treaty parties.\(^{57}\) The argument is that it is not possible to comply, or fail to comply, with something that does not impose a legal requirement.\(^{58}\) For the purpose of this thesis, compliance is therefore understood as a *party’s fulfilment of the legally binding obligations of a treaty*. Conversely, non-compliance is understood as a failure to fulfil legally binding obligations.

Furthermore, a state’s compliance with treaty obligations is closely related to implementation.\(^{59}\) Implementation is defined in the UNEP Guidelines as “all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/to take to meet their obligations under a multilateral environmental agreement”.\(^{60}\) In general, states implement treaty obligations in three phases; first, by adopting national implementing measures, second, by ensuring that the implementing measures as are complied with by subjects under the state’s jurisdiction and control, and third, by reporting to the treaty regime on the implementation measures.\(^{61}\) Taking implementing measures will often be a prerequisite for complying with an obligation. However, the fact that an obligation has been implemented does not necessarily mean that the requirement of the treaty obligation is fulfilled.\(^{62}\) A state can for instance adopt necessary domestic laws, but then fail to enforce these. Compliance

\[^{53}\] The UNEP Guidelines are non-binding and of advisory, cf. Guidelines on Compliance with and Enforcement of Multilateral Environment Agreements para. 3.
\[^{54}\] Guidelines on Compliance with and Enforcement of Multilateral Environment Agreements p. 2.
\[^{58}\] Voigt (2016a) p. 166.
\[^{60}\] Guidelines on Compliance with and Enforcement of Multilateral Environment Agreements para. 9(b).
does consequently refer to whether countries in fact fulfil treaty obligations, and can in this regard be seen as a broader concept than implementation.  

2.3 Compliance mechanisms in multilateral environmental agreements

2.3.1 Background and general characteristics

To encourage parties to implement their provisions and fulfil their obligations, a number of MEAs establish specific mechanisms dedicated to promote implementation and compliance.  

These mechanisms are generally referred to as compliance mechanisms or non-compliance mechanisms. The first compliance mechanism in a global environmental agreement was introduced in 1989 with the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol). Today, compliance mechanism can be found, inter alia, in the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal (Basel Convention), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Kyoto Protocol, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol), and the Minamata Convention on Mercury (Minamata Convention). Additionally, a number of regional environmental agreements contain compliance mechanisms. With the implementation and compliance mechanism that is set out in Article 15, the Paris Agreement does also contain such a mechanism.

An important backdrop to the development of compliance mechanisms in MEAs is that the traditional, adversarial approach to addressing non-compliance is not well suited for these agreements. The traditional ways of addressing non-compliance in international law is either that states seek damages for harm caused by another state’s injurious behaviour, or suspension

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65 Ibid.
68 Basel Convention Article 15 para. 5(e) and Decision VI/12.
69 Conference Resolution 14.3.
70 Kyoto Protocol Article 18 and Decision 27/CMP.1, annex II.
71 Minamata Convention Article 15.
or termination of a treaty as response to another state’s non-performance. These approaches do not represent good responses to non-compliance with MEAs for several reasons. Firstly, the nature of environmental damages will often make it difficult to establish the causal links that are sufficient for liability. Dispute settlement mechanisms under MEAs have therefore rarely been used. Secondly, MEAs are often established to protect common goods, and damage to these goods is in many cases irreversible or very difficult to restore. Consequently, if a state suspends or terminates its own performance under an MEA as a response to non-compliance, this will often have negative effects for the state itself. In general, these special features of international environmental law make it more important for MEAs to prevent cases of non-compliance, than to establish mechanisms to allocate responsibility after non-compliance has occurred. Damage to the climate system caused by emissions of greenhouse gases from human activities is an example of environmental damage that in practice is irreversible. Prevention of non-performance is therefore very important in the international climate change regime.

Against this background, MEA compliance mechanisms are conceptually different from dispute settlement mechanisms. They can generally be said to occupy a function between conciliation and dispute settlement, as they are mainly non-adversarial and non-confrontational, as well as multilateral rather than bilateral in character. They focus on enabling compliance with the treaty as soon as possible, rather than retroactively punishing non-compliance.

2.3.2 Central elements

In terms of their specific design, each MEA compliance mechanism has its own distinct features. However, some elements may be identified as fundamental parts of most of these
mechanisms. While the implementation and compliance mechanism of the Paris Agreement must be tailored to the specific features of this treaty, the common elements of MEA compliance mechanisms provide guidance for how this mechanism can be designed. These basic elements will therefore be briefly introduced.

2.3.2.1 Institutional arrangement and mandate

The institutional structure of compliance mechanisms varies. However, they usually fall into one of three institutional structures. This is either a small committee focused only on compliance issues, a general committee charged with a range of activities during an intersessional period, or the governing body takes on the role as compliance mechanism. If the mechanism is arranged as a separate body, an important element, which is solved differently in MEAs, is in what capacity the members of the compliance committee are serving. The members typically serve as either independent experts or government representatives. Existing mechanisms also differ in regard to whether the compliance organ is mandated to adopt decisions by itself, or if this is left for the governing body.

2.3.2.2 Objectives and functions

The objectives or functions of existing MEA compliance mechanisms are formulated in different ways. However, two main elements can be identified in these mechanisms objectives; providing assistance to parties in relation to their implementation of and/or compliance with the relevant treaty, and addressing instances of non-compliance. Many MEA compliance mechanisms combine these different functions. For example, the objective of the mechanism of the Cartagena Protocol is to “promote compliance […], to address cases of non-compliance by parties, and to provide advice and assistance, where appropriate”. An example of a mechanism that is established to focus on addressing non-compliance is the mechanism of the Montreal Protocol, as it shall determine “non-compliance with the provisions […] and for treatment of Parties found to be in non-compliance.” The Compliance Committee of the Kyoto Protocol shall “facilitate, promote and enforce

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88 Ibid., p. 66.
89 Ibid., p. 66.
90 Ibid., p. 67.
91 Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, para. 14(d)(iv).
93 Decision BS-1/7, section 1, para. 1.
94 Montreal Protocol Article 8.
compliance with commitments under the Protocol”.  

This gives the Compliance Committee a mandate to provide assistance, to address cases of non-compliance, and the objective expressly formulates an enforcement mandate, which makes it unique among MEA compliance mechanisms.

Furthermore, the procedure of many compliance mechanisms includes two types of review. Firstly, most mechanisms provide for reviewing and addressing individual cases of non-compliance. In connection with such procedures, most compliance mechanisms include rules to ensure due process for the party that is under scrutiny. Secondly, several existing compliance mechanisms provide for a general review of compliance with the treaty. The purpose of this procedure is to get an overview of the overall compliance with the treaty obligations.

### 2.3.2.3 Scope

The scope of a compliance mechanism can be explained as what and who it is mandated to assess and address. Scope can generally be divided into three dimensions; substantive scope, geographical scope, and temporal scope. The geographical scope of a compliance mechanism concerns what parties that the mechanism is mandated to examine and apply measures to. Moreover, the substantive scope of a compliance mechanism concerns what provisions it is mandated to consider. As established above, it is only possible to assess compliance with legally binding obligations. Where assessing parties’ compliance is part of a mechanism’s objective, the scope of the mechanism in terms of this objective will therefore be limited to the provisions that set legally binding obligations for the parties. Collective obligations, which is provisions referring to for example “parties”, and obligations without an express subject, will in most cases not establish legally binding obligations for individual parties, and will often fall outside the scope of a compliance mechanism in terms of assessing

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95 Decision 27/CMP.1, annex, section I.
96 Bulmer (2012) p. 70.
97 Ibid.
98 Ibid. See e.g. Basel Convention cf. Decision VI/12, appendix, para. 12, 14 and 15 and Montreal Protocol cf. Decision IV/5, annex IV, para. 2, 3 and 10.
99 Bulmer (2012) p. 70. See e.g. Minamata Convention Article 15 para. 2: “[…] shall examine both individual and systemic issues of implementation and compliance”.
100 Bulmer (2012) p. 70.
101 Oberthür (2014) p. 36.
102 Ibid.
103 Ibid.
104 Oberthür (2014) p. 36.
compliance. However, many compliance mechanisms do, as mentioned, also have an objective to assist parties in implementation of treaty provisions in general. In these cases, the scope of the mechanism may be broader, as provisions that do not contain legally binding obligations also fall under its scope.

Finally, the temporal scope concerns at what time action can be taken under the mechanism. Two main approaches are available in this relation. Firstly, the mechanism can be activated \textit{ex post}, which means that it can assess whether a party has fulfilled its commitments after the deadline for achieving this has passed. Secondly, the mechanism can be activated \textit{ex ante}, which means to examine a party’s progress on implementation and compliance, before the deadline for achieving this has been reached. A full compliance assessment is, however, only possible \textit{ex post}.

\textbf{2.3.2.4 Triggers}

An important element of compliance mechanisms is how the mechanism’s procedures can be initiated. This element is often referred to as “triggers”, and the question is how a case can be brought to the attention of the compliance organ. Appropriate triggers are essential for the effectiveness of a compliance mechanism, as “[o]ne must ensure that compliance problems are actually brought to the attention of the compliance system if it is to address them”. Additionally, balance is essential to design appropriate triggers; too restrictive triggers will leave the compliance organ unable to carry out its functions, while triggers that make the organ very accessible may lead to “floodgates being opened to any grievance”. Triggers are considered to be a politically sensitive area, and the choice of triggers is often highly debated by parties when these are being established.

\begin{itemize}
\item[\textsuperscript{105}] Bodansky (2016) p. 8-9.
\item[\textsuperscript{106}] E.g. the compliance mechanism of the Minamata Convention, cf. Minamata Convention Article 15, para. 1 and the Facilitative Branch of the Kyoto Protocol’s Compliance Committee, cf. Decision 27/CMP.1, annex, section IV, para. 4.
\item[\textsuperscript{107}] Voigt (2016a) p. 166.
\item[\textsuperscript{108}] Oberthür (2014) p. 36.
\item[\textsuperscript{109}] Ibid.
\item[\textsuperscript{110}] Ibid.
\item[\textsuperscript{111}] Bulmer (2012) p. 67.
\item[\textsuperscript{112}] Lefeber (2012) p. 85.
\item[\textsuperscript{113}] Ibid.
\item[\textsuperscript{114}] Bulmer (2012) p. 67.
\item[\textsuperscript{115}] Jacur (2009) p. 373.
\end{itemize}
Existing MEA compliance mechanisms display that procedures can be triggered in various ways. A common feature, found for example in the mechanisms of the Kyoto Protocol and the Montreal Protocol, is that a party can trigger procedures with respect to itself (self-triggering). Another common feature is that procedures can be triggered by a party with respect to another party. Moreover, some mechanisms can be triggered by organs of the MEA, such as the secretariat, the governing body (COP or MOP), or the compliance organ itself. Furthermore, a few regional MEAs allow non-state actors to trigger proceedings.

2.3.2.5 Measures

Another central element of MEA compliance mechanisms is what measures the mechanism can apply to promote implementation of and compliance with the treaty. Existing compliance mechanisms use a variety of measures for these purposes, ranging from soft, facilitative measures, so-called “carrots”, to coercive or punitive measures, so-called “sticks”. Measures such as advice and financial or technical assistance are the softest types of measures available in existing compliance mechanisms, and are typical “carrots”. Requiring a party to develop a compliance plan, or to conduct additional reporting are more burdensome measures. Issuing a declaration that states that the party is in non-compliance is an example of a measure of a more punitive character. Finally, suspension of a non-compliant party’s rights and privileges, sanctions, is the strongest and most punitive measure available in existing compliance mechanisms.

With a view to above-mentioned theoretical approaches to compliance, existing compliance mechanisms mainly take a management approach to implementation and compliance, and place the weight on the “carrots”. However, there are some compliance mechanisms with a

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117 Decision 4/CMP.2, rule 14 (p. 23).
118 Decision IV/5, annex IV, para. 4.
120 Ibid. See e.g. Basel Convention cf. Decision VI/12, appendix, para. 9(b), Kyoto Protocol cf. Decision 27/CMP.1, annex, section VI, para. 1(b) and Montreal Protocol cf. Decision IV/5 para. 1.
127 Ibid.
mandate to apply sanctions.\textsuperscript{128} The enforcement branch of the Compliance Committee of the Kyoto Protocol\textsuperscript{129} is one example. If a party exceeded its assigned amount of greenhouse gas emissions under the Protocol, the branch could, \textit{inter alia}, suspend the party’s right to sell emission quotas.\textsuperscript{130}

3 Article 15 of the Paris Agreement

3.1 Introduction

Article 15 of the Paris Agreement establishes an implementation and compliance mechanism for the Paris Agreement. The establishment of a mechanism dedicated to address implementation and compliance under the Agreement is important for several reasons. Based on the experience with compliance mechanisms in other MEAs, such a mechanism may contribute to more effective implementation of the Agreement,\textsuperscript{131} by enhancing parties’ capacity to implement and comply with its provisions.\textsuperscript{132} Furthermore, a mechanism that directly addresses parties’ performance under the Agreement has potential to create a better climate for cooperation between the treaty parties, by contributing to create trust that other parties will follow up on their commitments.\textsuperscript{133} It may also prevent “free-riding”, by establishing measures to promote compliance with the Agreement’s legal obligations.\textsuperscript{134} However, exactly what contributions the mechanism set out in Article 15 may have, will depended on its specific features and mandate. In the following, the content of Article 15 will be analysed.

3.2 Article 15 paragraph 1

3.2.1 Functions

Article 15 paragraph 1 of the Paris Agreement states that “[a] mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established”. The formulation “a mechanism to” indicates that paragraph 1 establishes the

\textsuperscript{128} The mechanism of the Montreal Protocol is an example cf. Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, annex V, para. C.
\textsuperscript{129} The Compliance Committee of the Kyoto Protocol consists of two branches; the Facilitative Branch and the Enforcement Branch, cf. Decision 27/CMP.1, annex, section II, para. 2.
\textsuperscript{130} Decision 4/CMP.2, section XV, para. 5(c).
\textsuperscript{131} Dagnet (2017) p. 313.
\textsuperscript{132} Ibid.
\textsuperscript{133} Ibid.
\textsuperscript{134} Dagnet (2017) p. 313-314.
mechanism’s overall objective. This objective consists of two elements; facilitation of implementation and promotion of compliance.

It has been established above that the ordinary meaning of “implementation”, in the context of international law, refers to measures that parties take to meet treaty requirements.\(^\text{135}\) In this relation it is argued that the term is usually reserved for “situations in which the relationship between an international rule and the behaviour it aims to change is more attenuated”.\(^\text{136}\) This refers to the fact that implementation may concern very heterogeneous situations. In some instances, a state can implement its international obligations without taking any particular measures. In other situations, where there is a gap between state behaviour and the requirement of the provision, states must actively take measures to conform to the requirement.\(^\text{137}\) The mechanism shall “facilitate” implementation with the Paris Agreement’s provisions. To facilitate an action or a process does generally mean “to make it easier or more likely to happen”.\(^\text{138}\) Against this background, the ordinary meaning of “facilitate implementation” indicates that the mechanism shall assist the parties to the Paris Agreement in taking measures to fulfil requirements in the Agreement.

The second element of the objective is to “promote compliance with the provisions of the Agreement”. There are, as discussed above, disagreements regarding the ordinary meaning of compliance. However, it has been established that in the context of international law the term includes two important elements. Firstly, compliance refers to actual fulfilment of an obligation, which goes beyond implementation. Secondly, compliance refers to conformity with legally binding obligations.\(^\text{139}\) The mechanism shall “promote” compliance with provisions of the Agreement. The ordinary meaning of “promote” is to “help or encourage” something to “happen, increase or spread”.\(^\text{140}\) This indicates that the mechanism shall help or encourage parties to comply. During the negotiations, the alternative formulations “ensure compliance”\(^\text{141}\) and “enforce compliance”\(^\text{142}\) were suggested. These formulations are stronger than “promote”. The fact that the parties agreed on the softer wording “promote” supports understanding this wording as giving the mechanism a mandate to “help or encourage”, rather


\(^{137}\) Ibid.

\(^{138}\) Sinclair (2011) p. 552.

\(^{139}\) Voigt (2016a) p. 166.

\(^{140}\) Sinclair (2011) p. 1228.


\(^{142}\) Ad Hoc Working Group on the Durban Platform (13 February 2015) p. 82 (option I, option 2).
than forcing parties to comply. The ordinary meaning of “promote compliance” consequently indicates that the mechanism shall help or encourage the parties to conform to their legally binding obligations under the Paris Agreement. It follows that Article 15 paragraph 1 gives the Committee a mandate to encourage parties’ fulfilment of the Agreement’s legally binding obligations that goes beyond implementation assistance.

The ordinary meaning of “facilitate implementation” and “promote compliance” displays that Article 15 paragraph 1 establishes two objectives for the Committee that are of a different nature. While the objective of facilitating implementation refers to all provisions of the Agreement that require parties to take domestic action, the objective of promoting compliance only refers to the legally binding obligations. The fact that paragraph 1 is expressly referring to both elements support interpreting these objectives as distinct. Furthermore, the negotiation texts reveal that including “promote compliance” was first agreed on during the COP21, while there was agreement on including “facilitate implementation” earlier in the negotiation process. The fact that parties were reluctant to include “promote compliance”, but not “facilitate implementation”, supports the interpretation that these are distinct elements.

To sum up, Article 15 paragraph 1 establishes two distinct objectives for the mechanism, which may be seen to lead to two different functions that the mechanism shall fulfil. Paragraph 1 does, however, not specify how the mechanism shall carry out these functions, leaving this open for the APA negotiations. It can be added that commentators have stated that “the fact that the Paris Agreement addresses ‘compliance’ and not just implementation is a significant achievement for the EU, AOSIS [Alliance of Small Island States] and Norway, which had pushed for inclusion of a compliance mechanism in the negotiations”. This indicates that the formulation of the Committee’s objectives is a compromise between parties that wanted the Paris Agreement to include a compliance procedure, and parties that only wanted a mechanism to provide assistance and support.

### 3.2.2 Substantive scope

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143 This element is not agreed in Ad Hoc Working Group on the Durban Platform for Enhanced Action (5 December 2015) p. 17-18 (annex I, section A, article 11, option 1), which was the last draft text before COP21.


The mechanism established in Article 15 paragraph 1 shall facilitate implementation and promote compliance “with the provisions of this Agreement”. According to the wording, this formulation specifies what provisions of the Agreement the functions apply to. It consequently establishes the substantive scope of the mechanism. “[T]he provisions” is a wide formulation, which linguistically embraces all articles of the Paris Agreement. The wording consequently suggests that the mechanism has a very broad scope. However, the formulation must be considered in relation to its context. Especially important in this relation are the overall objectives of the mechanism; facilitate implementation and promote compliance.

3.2.2.1 Facilitating implementation

Treaty provisions are relevant for implementation if a party must take measures, typically domestic, to fulfils its requirements. The legal character of a provision, whether it sets a legally binding obligation or not, does not affect the question of whether a provision can be implemented or not.147 Apart from provisions that set requirements for the treaty regime, such as Articles 15-29, most of the provisions of the Paris Agreement have content that in one way or another call for measures from the parties. This is for instance provisions relating to the Agreement’s actions areas,148 which in addition to climate change mitigation149 is adaptation to climate change,150 and loss and damage.151 Another example, only applicable to developed country parties, is provisions on contribution of financial,152 technology153 and capacity-building support154 to developing country parties. Furthermore, the Agreement’s provisions on climate change education and access to information155 also require the parties to take measures. The provisions in the Agreement that are of a procedural character, such as provisions that require parties to report on and account for their performance, also require parties to take action.156 These are all examples of provisions that require parties to take actual measures. The mechanism’s scope in relation to facilitating implementation does consequently comprise of all provisions that necessitate action from the parties. The mechanism’s substantive scope in relation to facilitating implementation is consequently very broad, as it covers most of the provisions of the Paris Agreement.

147 Voigt (2016a) p. 166.
149 Paris Agreement Articles 3, 4, 5 and 6.
150 Ibid., Article 7.
151 Ibid., Article 8.
152 Ibid., Article 9.
153 Paris Agreement Article 10.
154 Ibid., Article 11.
155 Ibid., Article 12.
156 E.g. Paris Agreement Article 4 para. 2, 8, 9 and 13, Article 11 para. 4, and Article 13 para. 7 and 9.
3.2.2.2 Promoting compliance

It is, as mentioned, in a legal sense only possible to assess compliance with legally binding obligations.\(^{157}\) The objective of promoting compliance is therefore only relevant for the Paris Agreement’s legally binding obligations. To establish the substantive scope of the mechanism in relation to this function, the legally binding obligations of the Paris Agreement must consequently be identified. Providing a full analysis of the legal character of the Agreement’s provisions is beyond the scope of this thesis. However, a brief discussion of this aspect is necessary.

The legal character of a treaty provision depends on the prescriptiveness and precision of its wording.\(^{158}\) Prescriptiveness concerns how authoritatively the wording requires an act or omission, and the verb is decisive in this regard.\(^{159}\) Prescriptive wording such as “shall” does for example indicate a legal obligation, while “should” does not.\(^{160}\) Precision, on the other hand, concerns how accurate the wording is in regard to the subject, substance and time-line of the obligation.\(^{161}\) The subject of an obligation may be formulated in several ways, with different implications for the obligation’s legal character. If the subject of a provision points to individual parties or all parties, it creates individual obligations for these parties. However, if the subject is plural, referring for example to “parties”, it is generally seen to establish a collective obligation, rather than an obligation for individual parties.\(^{162}\) Moreover, provisions may in some instances not establish a clear subject.\(^{163}\) This creates institutional obligations for the treaty regime, rather than for individual parties.\(^{164}\) Furthermore, it can be added that the legally binding obligations of a treaty may be substantive, for example obligations to reduce emissions of greenhouse gases or to adapt to climate changes, or procedural, such as obligations to report measures taken to reduce greenhouse gas emissions.\(^{165}\)

There are many provisions in the Agreement that use the verb “shall”, and therefore have the required prescriptiveness. However, the preciseness of the subject and substance of these provisions must also be taken into account. The line between legally and non-legally binding

\(^{157}\) Voigt (2016a) p. 166.  
\(^{158}\) Oberthur (2016) p. 49.  
\(^{159}\) Bodansky (2016) p. 8.  
\(^{160}\) Ibid. p. 8.  
\(^{161}\) Oberthur (2016) p. 49.  
\(^{162}\) Bodansky (2016) p. 9.  
\(^{163}\) Ibid., p. 8-9.  
\(^{164}\) Ibid., p. 9.  
is somewhat fluid, and there is consequently some disagreement regarding which of the Agreement’s provisions that establish legally binding obligations for the parties. There does, however, seem to be more or less agreement on a handful provisions. These will be presented in the following.

In relation to mitigation of climate change, Article 4 paragraph 2 establishes a legal obligation for parties to “prepare, communicate and maintain successive nationally determined contributions that it intends to achieve”, and to “pursue domestic mitigation measures, with the aim of achieving the objective of such contributions.” These nationally determined contributions (NDCs) make up the parties’ contributions to reduce emissions of greenhouse gases. The content of the NDCs is established by the states themselves. Importantly, Article 4 paragraph 2 does not make the substance of the NDCs, in other words achieving them, a legally binding obligation for the parties. It rather establishes procedural obligations to establish NDCs, and to design measures that are necessary and effective to function as a means to achieve the NDCs. Moreover, paragraph 3 of Article 4 establishes a legal obligation for the parties to adopt NDCs that represent “a progression” beyond the party’s existing NDC, and that reflect its “highest possible ambition”. In addition, paragraph 9 binds parties to report an NDC every five years, and paragraph 8 to “provide the information necessary for clarity, transparency and understanding” when communicating the NDCs. Moreover, Article 4 paragraph 13 states that “[p]arties shall account for their nationally determined contributions”, and lists some legally binding criteria for this accounting.

Furthermore, with regard to adaptation, Article 7 paragraph 9 establishes a legal obligation for the parties to engage in “planning processes and the implementation of actions”. Moreover, Article 11 paragraph 4 legally bind parties “enhancing the capacity of developing country Parties to implement this Agreement” to regularly communicate on these actions. Moreover, in Article 13 the Paris Agreement establishes an “enhanced transparency framework”. Paragraph 7 of Article 13 establishes that “[e]ach Party shall regularly provide […] a national inventory report of anthropogenic emissions by sources and removals by

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167 See e.g. Abeyesinghe (2016) p. 9, Bodansky (2016) and Voigt (2016a) p. 166.
168 Bodansky (2016) and (2016a) p. 166.
169 First sentence.
170 Second sentence.
172 Voigt (2016b) p. 20.
173 Voigt (2016a) p. 166.
175 First sentence.
sinks of greenhouse gases [...] and [i]nformation necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4". Moreover, Article 13 paragraph 9 legally bind developed country parties to report on the support they have provided to developing country parties.

Against this background, only a small handful of the provisions of the Paris Agreement establish legally binding obligations for the parties. An important observation is that they are primarily of a procedural character, as they mainly establish obligations related to reporting and accounting. The obligation in Article 7 is substantive, and therefore an exception. However, the obligation is qualified by the criteria “as appropriate”, which weakens its legally binding character.\(^\text{176}\) Especially important is the observation that the substance of the parties’ mitigation commitments (the NDCs) is not legally binding. Interpreting the formulation “the provisions of the Agreement” in Article 15 paragraph 1 in connection with “promote compliance” does consequently limit the mechanism’s substantive scope severely in relation to this objective. To summarize, the mechanism’s scope is broad in terms of facilitating implementation, but limited in relation to promoting compliance.

### 3.3 Article 15 paragraph 2

#### 3.3.1 Institutional arrangements

Article 15 paragraph 2 states that “[t]he mechanism referred to in Paragraph 1 [...] shall consist of a committee”. This gives clarity about the institutional architecture of the mechanism: it shall consist of a committee dedicated to facilitating implementation and promoting compliance (referred to as the Implementation and Compliance Committee or the Committee in the following). It can, however, be noted that the formulation that is used is “shall consist of” and not “shall only consist of”. Paragraph 2 does therefore not expressly state that it is exhaustive with regard to the institutional arrangement of the mechanism.\(^\text{177}\) This may be interpreted as leaving the door open for including other institutional elements in the mechanism. On the other hand, in Decision 1/CP.21, the Ad Hoc Working Group on the Paris Agreement (APA) is only given a mandate to develop modalities and procedures for “the committee referred to in Article 15, paragraph 2, of the Agreement”.\(^\text{178}\) This indicates that paragraph 2 is in effect exhaustive in relation to the main institutional components of the mechanism.

\(^{176}\) Oberthür (2016) p. 50.  
\(^{177}\) Dagnet (2017) p. 315-316.  
\(^{178}\) Decision 1/CP.21 paragraph 103.
More specific criteria for the structure or composition of the Committee do not follow from Article 15. However, the accompanying Decision 1/CP.21 establishes central criteria for the composition of the committee. Paragraph 103 reads as follows:

“[…] the committee referred to in Article 15, paragraph 2, of the Agreement shall consist of 12 members with recognized competence in relevant scientific, technical, socioeconomic or legal fields, to be elected by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the basis of equitable geographical representation, with two members each from the five regional groups of the United Nations and one member each from the small island developing States and the least developed countries, while taking into account the goal of gender balance”.

Accordingly, the committee shall consist of 12 members. Moreover, the committee members must fulfill requirements in relation to their geographic origin. Each of the five UN regional groups shall have two members. The UN regional groups are the African Group, Asian-Pacific Group, Eastern European Group, Latin American and Caribbean Group, and Western European and Others Group. Of the two remaining Committee members, one must have his or her origin in a small island developing state, and the other in one of the least developed countries. Additionally, paragraph 103 states that a gender balance between the members must be taken into account.

3.3.2 Expert-based and facilitative in nature

Article 15 paragraph 2 sets out criteria for the operation of the Implementation and Compliance Committee. It establishes that the Committee shall be “expert-based and facilitative in nature”. A literal interpretation of the term “expert-based” indicates that the Committee shall be scientifically based, rather than politically based. The expression suggests that the members of the Committee shall be experts rather than government representatives. Moreover, Decision 1/CP.21 specifies what lies in “expert-based”. According to paragraph 103 of the Decision, the Committee members shall have “recognized competence in relevant scientific, technical, socioeconomic or legal fields”. This supports the understanding following from a literal interpretation; the Committee shall be of scientific character. This indicates that the Committee members shall serve in their own capacity, making the Committee a politically neutral organ.

Moreover, Article 15 paragraph 2 states that the Committee shall be “facilitative in nature”. As mentioned in relation to the analysis of Article 15 paragraph 1, the ordinary meaning of

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“to facilitate” is to make an action or a process “easier or more likely to happen”. Based on this, being facilitative must be understood as having an helping or assisting role. A literal interpretation consequently leads to the conclusion that the Committee shall be of assistance to the parties. Conversely, it indicates that forcing parties to implement or comply with the Agreement will not be part of the Committee’s mandate. The inclusion of “facilitative” as a core characteristic does consequently seem to preclude coercive elements from the Committee’s toolbox. This provides important guidance for the design of the Committee’s measures. Sanctions may be considered as coercive measures, because they seek to force parties to comply, by depriving them of rights and benefits if they do not conform. Sanctions are therefore not in accordance with a “facilitative nature”. Against this background, Article 15 paragraph 2 seems to preclude an “enforcement function” for the Committee when it decides that Committee shall be of a facilitative nature.

3.3.3 Transparent, non-adversarial and non-punitive

According to Article 15 paragraph 2, the Implementation and Compliance Committee shall “function in a manner that is transparent, non-adversarial and non-punitive”. These are central criteria for the functioning of the Committee.

3.3.3.1 Transparent

Firstly, the Committee shall function in a way that is “transparent”. A system or activity is transparent if “it is easily understood or recognized.” The Committee shall consequently operate in a manner that is easily understood or recognized. This criterion can relate to different aspects of the Committee’s operation, for example the information it receives or collects, its findings and conclusions, and how it reaches its findings and conclusions. The Committee can function in a transparent way in relation to the parties, for example by disclosing information about a non-compliance case to the other, non-involved parties. The Committee can also be transparent in relation to the public. In the preamble of the Paris Agreement the parties affirm “the importance of […] public participation, public access to information and cooperation at all levels on the matters addressed in this Agreement”. Interpreting the formulation in light of the object and purpose of the Agreement therefore indicates that transparency should be understood as, at least, referring to transparency towards the public.

3.3.3.2 Non-adversarial

Secondly, the Committee shall function in a manner that is “non-adversarial”. “Adversarial” may be defined in the following way: “If you describe something as adversarial, you mean that it involves two or more people or organizations who are opposing each other.” This criterion indicates that the Implementation and Compliance Committee shall function in a non-conflictual way, and avoid creating an oppositional setting in relation to its procedures. Importantly, this implies that the Committee shall not have a dispute settlement function. This conclusion is also supported by the context of Article 15 paragraph 2. Article 24 of the Agreement adopts the dispute resolution procedure in the UNFCCC, and consequently establishes a distinct dispute settlement procedure for the Paris Agreement. Additionally, UNFCCC Article 14 paragraph 8 states that the dispute settlement procedure in UNFCCC Article 14 shall apply to “any related legal instrument which the Conference of the Parties may adopt, unless the instrument provides otherwise.” These provisions could become superfluous if Article 15 of the Paris Agreement also includes a dispute settlement function.

3.3.3.3 Non-punitive

Finally, the Committee shall function in a manner that is “non-punitive”. Punitive actions “are intended to punish”. A literal interpretation of this criterion therefore indicates that the Committee shall not include elements of punishment. This seems especially relevant in relation to what measures the Committee will be able to apply to a potential case of non-compliance. Measures that include punitive elements must be considered as precluded on the basis of paragraph 2. However, exactly where the line between punitive and non-punitive measures shall be drawn is difficult to answer on basis of Article 15.

The parties’ submissions during the negotiations of Article 15 may give indications regarding this question. Norway proposed that the compliance organ should be able to clarify and resolve questions, provide recommendations, request a compliance action plan, and issue declarations of non-compliance. The Norwegian proposal expressly stated that “[t]he mechanism shall be […] non-punitive in nature”, and therefore gives clear indications of what measures it considered “non-punitive”. Additionally, a submission from Brazil states that “[c]ompliance should be promoted on the basis of positive incentives, rather than a

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183 UNFCCC Article 14.
punitive approach, for instance using the economic mechanism mentioned above.” The economic mechanism that Brazil points to is a mechanism “to create incentives for further action in developing countries; mobilize financial support to developing countries; and assist with the implementation of nationally determined contributions.” This is purely a “carrot”, and may indicate that Brazil draws the line between punitive and non-punitive measures far away from what are generally seen as “sticks”. Furthermore, the draft agreement texts from 23 October until 3 December 2015 included an option with two specific non-compliance response measures; request of development of a compliance action plan and issuance of a declaration of non-compliance. From 23 October until 3 December 2015 the draft texts also contained the option “the measures adopted by the CMA shall range from offering advice and assistance to the issuance of a statement of concern”, amongst others in relation to cases of non-compliance. These drafts also contained an option for the Committee to be non-punitive, either in general or specifically in relation to developing country parties. Even though there was never agreement on these measures, and the connection to “non-punitive” is not clear, the fact that these options were included in the drafts indicates that a declaration of non-compliance and a request for a compliance action plan are seen as “non-punitive” measures by some parties.

Against this background, it is not possible to conclude as to exactly where the line between punitive and non-punitive measure shall be drawn. What seems to be certain, however, is that soft measures, such as advice, assistance and facilitation of assistance, are “non-punitive” measures, and in accordance with Article 15 paragraph 2. Furthermore, penalties or sanctions, understood as suspension of a party’s rights and privileges, are clearly not in accordance with Article 15 paragraph 2. Linking the non-compliance procedures to for example a party’s participation in the market mechanisms set out in Article 6 of the Agreement, or making financial assistance dependent on implementation or compliance, is consequently precluded. This does also seem to follow from the Committee’s facilitative nature. Commentators have pointed out that the inclusion of the “non-punitive” criterion in Article 15 addresses the

concerns of those states that feared that the Paris Agreement would recreate the Kyoto Protocol’s Compliance Committee, which could apply sanctions in specific cases of non-compliance.¹⁹⁰

### 3.3.4 National capabilities and circumstances

The last sentence of Article 15 paragraph 2 states that “[t]he committee shall pay particular attention to the respective national capabilities and circumstances of Parties.” The term capabilities can be explained in the following way: “[i]f you have the capability or the qualities that are necessary to do something, you have the ability or the qualities that are necessary to do it.”¹⁹¹ Seen in relation to the rest of Article 15, capabilities must be interpreted to refer to parties’ ability to implement and comply with the provisions of the Agreement. A state’s capability may in this respect be thought to relate to different areas, such as financial, technical or knowledge-related capability.

Moreover, “circumstances” is generally understood as “the conditions which affect what happens.”¹⁹² According to the ordinary meaning, “circumstances of Parties” is a wide formulation. “Circumstances” may cover a range of factors, including the state’s capability to implement and comply. However, if the term is to have independent significance, it must refer to something more than the parties’ capabilities. An example of a national circumstance, that does not seem to fall under “capabilities”, and that is relevant in this context, is the political situation of a party. For example, political instability is likely to affect a party’s ability to implement and comply with provisions of the Agreement. Furthermore, the differences in parties’ substantive commitments under the Agreement may also be a national circumstance. According to the ordinary meaning in its context, “national […] circumstances” is a wide formulation, which may encompass a range of factors which may be seen relevant in relation to the overall purpose and scope of the mechanism.

There is no mention in paragraph 2 of separating between developed and developing country parties. Differences between developed and developing country parties, both in relation to capabilities and responsibilities for historic emissions of greenhouse gases, play an important role in the international climate change regime, through the principle of common but differentiated responsibility and respective capabilities (the CBDR-RC principle). This principle includes two elements; firstly, the common responsibility of states to protect the environment, and secondly, the need to take into account differing circumstances, particularly

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in relation to each state’s contribution to climate change and its capability to prevent and reduce this problem.\textsuperscript{193} Article 2 paragraph 2 of the Paris Agreement establishes CBDR-RC as a guiding principle for the implementation of the Agreement. The same follows from the Agreement’s preamble,\textsuperscript{194} and UNFCCC Article 3 paragraph 1, which establishes the CBDR-RC principle as a guiding principle for the Convention. The CBDR-RC principle shall consequently be guiding also for the implementation and operation of the Committee. Based on the similarity in the formulation, it can be asked if the last sentence of Article 15 paragraph 2 is actually an expression of the CBDR-RC-principle, and consequently incorporates the principle expressly into the functioning of the Committee. The formulation in Article 15 paragraph 2 is, however, different from the usual formulation of the CBDR-RC principle, because the term “responsibilities” is left out. A reason for formulating the last sentence of paragraph 2 differently than the CBDR-RC principle could be to signalise that it is distinct from the principle, and avoid that it is being seen as an express part of Article 15. The fact that the parties have agreed to a formulation that is not corresponding to the usual formulation of the CBDR-RC principle must be given much weight. This also indicates that the formulation is not an expression of the CBDR-RC principle.

Article 15 paragraph 2 establishes that parties’ circumstances must be taken into account in the functioning of the Committee. This conclusion leads to another; when stating that the parties’ circumstances must be taken into account, without separating between developed and developing country parties, paragraph 2 signalises that the starting point is that the mechanism has universal application.\textsuperscript{195} In sum, it follows from paragraph 2 that the geographical scope of the Implementation and Compliance Committee covers all parties, and that the Committee shall take into account parties’ capabilities and circumstances in its operation.

### 3.4 Article 15 paragraph 3

Article 15 paragraph 3 states that “[t]he committee shall […] report annually to the Conference of the Parties serving as the meeting of the Parties to this Agreement”. There is not, however, given any guidance on what the Committee shall report to the Agreement’s governing body. In light of the purpose and objectives of the Committee, however, a natural interpretation is that the Committee shall report to the Conference of the Parties serving as the meeting of the Parties (CMA) about its work on facilitating implementation of and promoting compliance with the provisions of the Agreement. This aspect touches upon the relationship

\textsuperscript{194} Paris Agreement preamble third paragraph.
between the Implementation and Compliance Committee and the CMA. According to Article 16 paragraph 4 of the Paris Agreement:

“[t]he Conference of the Parties serving as the meeting of the Parties to this Agreement shall keep under regular review the implementation of this Agreement and shall make, within its mandate, the decisions necessary to promote its effective implementation.”

The CMA shall consequently be overseeing the implementation of the Agreement and take decisions to promote its effective implementation. Article 15 paragraph 3 does therefore lead to the question whether the CMA will have to review and approve the outcomes of the Committee. This question is, however, left open by Article 15.

3.5 Summary

According to Article 15 of the Paris Agreement, and Decision 1/CP.21, the mechanism set out in Article 15 shall consist of an Implementation and Compliance Committee. The Committee shall serve two distinct objectives; facilitating implementation and promoting compliance with the Agreement. The geographical scope of the Committee is universal, and parties’ capabilities and circumstances must be taken into account. Furthermore, the Committee shall be facilitative in nature, and punitive measures seem to be precluded from its toolbox. The Committee is consequently not an enforcement mechanism, as the possibilities to force parties to implement and comply seem to be very restricted. Important questions such as how the Committee will be triggered, the content of its procedures, how decisions will be made, and what measures the Committee will be able to apply are, however, left open in Article 15. With the legal “starting point” for the development of modalities and procedures for the Committee now clarified to the extent possible, it is time to look at how the mechanism should be operationalised.

4 A suggestion for operationalisation of the mechanism

4.1 Overall structure

4.1.1 Operationalising the functions: providing implementation assistance and addressing non-compliance

The Paris Agreement does, as shown above, mostly contain non-legally binding commitments. However, there are a few legally binding elements, which are mainly of a
procedural character. An important starting point is therefore that the Implementation and Compliance Committee should be tailored to best capture this specific legal architecture.\textsuperscript{196} Moreover, it has been concluded that the Committee has two different functions. Firstly, it shall assist parties with implementing the Paris Agreement’s provisions. In addition, the Committee shall encourage compliance with the legally binding obligations of the Agreement. While facilitating implementation implies that the Committee shall have an assistance function, encouraging compliance may open up for another, somewhat different element; addressing individual cases of non-compliance.\textsuperscript{197} This is, as previously mentioned, an important component of the procedures of other MEA compliance mechanisms.\textsuperscript{198}

As discussed above, the substantive commitments of the Paris Agreement are in general not legally binding on the parties. The Committee will therefore not be able to assess individual non-compliance with these elements, which includes the parties’ mitigation commitments (the NDCs). However, the Committee will be able to assess compliance with a handful of important procedural commitments. An important observation in this relation is that the Paris Agreement, with its non-legally binding mitigation commitments,

“will rely more on procedural obligations and the compilation and assessment of countries’ political commitments to pursue national policies and measures […], rather than on substantive ‘target based’ obligations as found in the Kyoto Protocol”.\textsuperscript{199}

The Paris Agreement contains an elaborate transparency system, consisting of the Enhanced Transparency Framework set out in Article 13 and provisions on reporting, accounting and review throughout the Agreement. This transparency system plays an important role in the Paris Agreement’s architecture; it will expose parties’ fulfilment, or non-fulfilment, of the substantive commitments. For example, parties are legally obligated to report and account for their NDCs, and provide national inventory reports on greenhouse gas emissions. While achieving the substance of the NDCs is not legally binding for the parties, the mentioned transparency obligations will expose parties that do not fulfil their NDCs. Ensuring compliance with the transparency related obligations under the Agreement is therefore important to promote parties’ fulfilment of the non-legally binding substantive commitments.\textsuperscript{200} Enabling the Implementation and Compliance Committee to assess parties’ non-compliance with the legally binding obligations of the Agreement, is therefore an

\textsuperscript{196} Voigt (2016a) p. 166.
\textsuperscript{198} See e.g. Cartagena Protocol cf. Decision BS-1/7, section 1, para. 1 and Kyoto Protocol cf. Decision 27/CMP.1, annex, section I.
\textsuperscript{199} Dagnet (2017) p. 318-319.
\textsuperscript{200} Ibid. p. 318-319.
important option when operationalising Article 15. Because the Committee cannot assess non-compliance with the substantive obligations of the Agreement, however, it is very important that it can effectively assist parties with the implementation of these provisions. In sum, providing the Committee with a mandate to both assist parties with implementation and address cases of individual non-compliance, will enable the Committee to capture both the legally binding and the non-legally binding elements of the Agreement. Operationalising the functions of Article 15 paragraph 1 into these two elements; implementation assistance and a procedure for addressing non-compliance, is therefore suggested here.

4.1.2 Internal structure of the Committee

The main institutional feature of the implementation and compliance mechanism is settled, as Article 15 paragraph 2 and Decision 1/CP.21 decides that it shall consist of a committee. However, neither Article 15 nor the Decision decides or precludes anything concerning the internal structure of the Committee. Because the Committee shall serve two distinct functions, it seems to be two main options for how it can operate institutionally; it can either operate as a single body performing both functions, or it can be divided into two branches where one is responsible for assisting parties with implementation and the other for promoting compliance with the legally binding obligations. This latter structure has been proposed by Voigt, and was also suggested by Norway during the negotiations of the Agreement.

Speaking in favour of dividing the Committee into branches is first and foremost the fact that Committee shall fulfil two distinct functions. A branch-based structure could ease the Committee’s work, as the relevant branch would be able to focus on one function. Speaking against separate branches is firstly representation in the branches; the least developed countries (LDCs) and the small island developing states (SIDS) would be represented in only one branch each. Additionally, a branch-based structure could cause coordination problems; while facilitating implementation and promoting compliance are distinct functions, they are also closely connected and should be seen in relation to each other. Furthermore, the Committee’s limited size speaks against a branch structure. The potential branches would only consist of six members each, which seems to be a small number. Against this

201 Voigt (2016a) p. 166.
204 Voigt (2016a) p. 166.
206 Voigt (2016a) p. 166.
207 Abeysinghe (2016) p. 15.
background, the following analysis will be based on the Implementation and Compliance Committee operating as one body.

4.1.3 Outlining a possible procedure: an incremental process

Based on the Committee’s two functions, and the premise that it operates as a single body, the procedure could be arranged as *an incremental process*, moving along a spectrum of measures, from the most facilitative to stronger measures. The procedure of the compliance mechanism of the Basel Convention is an example of an incremental process like the one that is suggested here.\(^{208}\) It has also been argued by commentators that the Committee’s functions could be seen as such a continuum.\(^{209}\) The process could start with the Committee applying the most facilitative measures available, which could be various assistance and support measures. The Committee’s facilitative nature implies that assistance and support should constitute the main part of the procedure, in all cases. This part of the process would apply to both the non-legally binding and the legally binding elements of the Agreement, because the scope of the Committee in relation to “facilitate implementation” covers all provisions that are relevant for implementation.

If an issue is not solved through the above-mentioned assistance process, a non-compliance procedure could follow. It can in this relation be noted that research shows that compliance with treaty obligations is most effectively promoted by a combination of management and enforcement.\(^{210}\) This part of the process should therefore contain a determination of non-compliance and application of measures that provide some pressure on the non-compliant party. However, because it is only possible to assess compliance with obligations that are legally binding, this part of the process can only apply to the legally binding obligations of the Agreement (identified as Articles 4.2, 4.3, 4.8, 4.9, 4.13, 7.9, 11.4, 13.7 and 13.9). In the following, the proposed incremental process will be elaborated. In addition to the mentioned procedure, which focuses on the implementation and compliance of individual parties, a possibility for a systemic review of implementation and compliance is suggested.

4.2 Triggering the Committee

4.2.1 Introduction

\(^{208}\) Decision VI/12, appendix, para. 20.


\(^{210}\) Oberthür (2014) p. 33.
Before discussing the two main phases of the Committee’s procedures, it is necessary to establish how the Committee should be triggered. As described in part 2.3.2.4, arrangements under existing MEA compliance mechanisms display that such mechanisms can be triggered in several ways. There are especially two aspects that seem important when designing triggers for the Implementation and Compliance Committee. The first aspect is whether only the parties to the Paris Agreement should be able to trigger the procedures (party triggers), or if other actors, such as other treaty bodies or even the public, should be given such a mandate (non-party triggers). The second important aspect is whether the triggers should enable the Committee to take action only ex post, or also ex ante. Under the Paris Agreement, the parties’ mitigation commitments (the NDCs) shall function in five year-cycles.\textsuperscript{211} Ex ante action in the case of the Paris Agreement would therefore be to allow the Committee to take action during an NDC’s five-year period. The Committee’s objective of facilitating implementation, as well as its facilitative nature, strongly indicates that it shall be able to take action ex ante. Additionally, a possibility for ex ante action is necessary if the Committee shall be able to prevent non-performance under the Agreement.

4.2.2 Party triggers

Nearly all MEA compliance mechanisms can be initiated by the treaty parties, either through a self-trigger or a party-to-party trigger.\textsuperscript{212} To effectively facilitate implementation, the Committee should be able to provide parties with implementation assistance when they need it. Parties themselves will best know their own implementation difficulties, and should therefore be able to ask for the Committee’s assistance themselves.\textsuperscript{213} This could for example take the form of a written request to the Committee.\textsuperscript{214} Groups of parties could also be able to get together to file such a request.\textsuperscript{215} This could make requesting assistance less burdensome for parties with capacity shortcomings.

While these party-triggers are likely to be effective in relation to requesting assistance and support, experience from other MEAs indicates that they will not be effective in triggering non-compliance procedures. States are reluctant to initiate non-compliance procedures against themselves,\textsuperscript{216} and states rarely trigger “judicial or quasi-judicial proceedings in the “public

\begin{flushright}
\textsuperscript{211} Paris Agreement Article 4 para. 9. \\
\textsuperscript{212} Jacur (2009) p. 387. \\
\textsuperscript{213} Voigt (2016a) p. 168. \\
\textsuperscript{214} Ibid. \\
\textsuperscript{215} Ibid. \\
\textsuperscript{216} Bulmer (2012) p. 68.
\end{flushright}
interest” against other states”. On this basis, it is important that other actors than the parties can trigger the Committee. This conclusion is supported by experience with the Kyoto Protocol’s compliance mechanism. A major weakness of the Protocol’s mechanism was that only the parties to the Protocol could trigger the mechanism *ex ante.* This resulted in the mechanism being unable to act when Canada in 2007 declared its intention to not comply with its mitigation obligations, because neither Canada nor other parties triggered the mechanism’s implementation assistance function. Consequently, experience from other MEA compliance mechanisms tells us that other actors than the parties to the Agreement should be able to trigger the Committee in non-compliance situations, and that these non-party triggers should enable the Committee to take action *ex ante.*

4.2.3 Non-party triggers

4.2.3.1 The technical expert review and NDC registry

There seems to be a number of options for non-party triggers available to the Committee. An important set of options is provided by other arrangements under the Paris Agreement. One option is provided by the enhanced transparency framework in Article 13 of the Agreement. According to Article 13, each party shall provide “[a] national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases”, and “[i]nformation necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4”. Additionally, countries that provide financial, technology, and capacity-building support to developing country Parties under Articles 9, 10 and 11 of the Agreement shall provide information on these actions. This information shall undergo a technical expert review, which “shall consist of a consideration of the Party’s support provided […] and its implementation and achievement of its nationally determined contribution”. Importantly, the review shall identify “areas of improvement for the Party.”

220 Ibid.
221 Paris Agreement Article 13 para. 7 (a).
222 Ibid., Article 13 para. 7 (b).
223 Ibid., Article 13 para. 9.
224 Ibid., Article 13 para. 11.
225 Ibid., Article 13 para. 12.
226 Ibid., Article 13 para. 11.
Accordingly, the technical expert review will provide important information about individual parties’ implementation shortcomings.227

The information that shall go through the technical expert review is consequently highly relevant for the Implementation and Compliance Committee. Especially important is information and conclusions concerning parties’ performance in relation to their NDCs. When identifying areas of improvement in relation to parties’ implementation and achievement of their NDCs, the review will identify cases that the Committee should be able to address in terms of providing implementation assistance. The review will also in effect make it apparent whether the parties have provided a national inventory report and information on progress in implementation of the NDCs as required by Article 13 paragraph 7. These are legally binding obligations, and therefore relevant for the non-compliance procedure. In addition, information on whether developed country parties have provided information on their financial support, technology transfer and capacity-building support to developing county parties, cf. Article 13 paragraph 9.228 The support obligations do, as mentioned, most likely establish collective, and not individual, obligations. These provisions are therefore not relevant for the non-compliance procedure. However, the Committee can address shortcomings in developed country parties’ support contributions through implementation assistance.

The details of the technical expert review set out in Article 13 are not yet decided.229 How it will function and what will be the outcome of the review is therefore not clear. However, one option is to enable the technical expert team conducting the review, to refer cases to the Committee. Experience with the compliance mechanism of the Kyoto Protocol is an argument for establishing this arrangement. The compliance mechanism of the Kyoto Protocol could be triggered either by parties or by expert review teams (ERTs).230 The ERTs provided for technical assessment of “all aspects of the implementation by a Party” of the Protocol.231 All the requests that the Enforcement Branch of the Kyoto Protocol’s compliance mechanism addressed in substance between 2008 and mid 2014 were raised in ERT reports,232 making this an effective trigger. Continuing this successful arrangement in the Paris Agreement’s mechanism is therefore recommendable. If it is decided that the outcome of the technical expert review is a report, this could provide another possibility to link the Implementation and Compliance Committee and this review. In that case the Committee could become active on

228 Ibid.
229 Decision 1/CP.21 para. 91.
230 Decision 27/CMP.1, annex, section VI, para. 1.
231 Kyoto Protocol Article 8 para. 3.
its own initiative, on the basis of this report. However, some commentators argue that allowing the Committee to trigger itself can affect parties’ perception of the compliance organ as impartial negatively. On the other hand, it is likely to be a very effective trigger. It can be added that linking the technical expert review with the Committee was on the table during the negotiations. This indicates that such a trigger is supported by parties.

Another information channel under the Paris Agreement that could be utilised for trigger purposes is the public NDC registry set out in Article 4. According to Article 4 paragraph 12, NDCs shall be recorded in a public registry. Linking the Committee to this registry would enable it to determine whether parties have fulfilled their obligation to communicate their NDCs, cf. Article 4 paragraph 2 first sentence and paragraph 9, whether the parties have provided the information necessary for clarity, transparency and understanding of the NDC cf. Article 4 paragraph 8, and whether a party’s new NDC represents a progression compared to the party’s previous NDC, cf. Article 4 paragraph 3. These are legally binding obligations, and would therefore be relevant for implementation assistance and non-compliance procedures. With regard to the effectiveness of the Committee, it would be favourable to enable the Committee to become active on its own initiative, on the basis of information from the NDC registry.

4.2.3.2 Other treaty bodies

Furthermore, the UNFCCC Secretariat could trigger proceedings through questions or requests to the Committee. Experience with other MEA compliance mechanisms shows that secretariat triggers are quite effective. However, linking the Committee directly to the technical expert review under the Enhanced Transparency Framework or the public NDC registry would probably be an even more effective trigger. It is therefore not sure if a secretariat trigger would add something to such an arrangement. In this relation it must be noted that it is considered important to not establish too many triggers when designing a compliance mechanism, as this could cause an overload of requests and questions to the mechanism. Another important option may, however, be to enable the CMA to trigger the

236 E.g. Ad Hoc Working Group on the Durban Platform for Enhanced Action (3 December 2015, 08:00) p. 22.
Committee. In political contentious cases, typically potential non-compliance cases, it could be necessary that the CMA itself is able to request the Committee to take action.

4.2.3.3 The public

Finally, it is an option to let public actors trigger the Committee. This element could especially be based on the preamble of the Agreement, which states that the parties are “[a]ffirming the importance of […] public participation, public access to information and cooperation at all levels on the matters addressed in this Agreement”. However, a public trigger involves a risk of “opening the floodgates” into the Committee. The access to public trigger would therefore have to be limited. To date, a public trigger only exists in the compliance mechanism of the Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention. This indicates that states are reluctant to let actors outside the treaty regime initiate procedures. While a public trigger has the potential to be effective, the likelihood that the parties will in fact agree on this arrangement is consequently small.

4.2.4 Summary

To summarise, the Implementation and Compliance Committee should, besides being triggered by parties, be able to trigger itself on basis of the public NDC registry. This follows from the importance parties’ mitigation commitments (NDCs) has under the Paris Agreement. It is also argued that the Committee should be linked to other review processes under the Agreement. These trigger arrangements will enable the Committee to take action ex ante. This will be in accordance with the facilitative nature of the Committee, avoid a paralyzed Committee such as experienced in the Canada incident, and improve the Committee’s ability to prevent non-performance under the Agreement. A public trigger would probably be very effective, but the actual feasibility of such an arrangement is small.

4.3 Implementation assistance

4.3.1 General elements

To facilitate implementation, the Implementation and Compliance Committee should be able to provide implementation assistance. The Committee’s facilitative nature indicates that this should be the first step of the procedure after it has been triggered, in all cases. Achieving

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clarity on the situation, what the issue is and what has caused it, will be important for the Committee to assist a party in the most effective way. In this relation, the Committee could ask the concerned party to conduct additional reporting.\textsuperscript{242} Importantly, this would have to take form of a request and not a demand. A demand for additional reporting would inflict an extra burden on the party, and could therefore be considered punitive after Article 15 paragraph 2. In addition, or alternatively, the Committee should be given a mandate to conduct its own examinations. Furthermore, on the basis of the facilitative and non-adversarial character of the Committee, the assistance process should be based on dialogue between the Committee and the concerned party.

4.3.2 Measures

When designing the Committee’s assistance measures, the insights of the managerial approach to compliance, presented above, can provide guidance. The managerial approach tells us that the Committee will facilitate implementation most effectively by focusing on the actual causes of a party’s implementation or compliance problem, and then address these. This should be a guiding star for the Committee’s assistance and support. Additionally, the Paris Agreement already provides parties and groups of parties with several “means of implementation”. This is financial support from developed country parties “to assist developing country Parties with respect to both mitigation and adaptation”,\textsuperscript{243} technology development and transfer,\textsuperscript{244} and capacity-building in relation to climate change mitigation and adaptation.\textsuperscript{245} These arrangements are also intended to facilitate parties’ implementation of the Agreement. The Committee’s assistance measures must therefore avoid duplicating these mechanisms, and instead add value as an addition to, and complement these mechanisms.\textsuperscript{246}

There are a number of options for the Committee to assist parties with implementing and complying that add value to the already established means of implementation. After being referred a case, or taking up one on its own initiative, the Committee could start by providing information and advice. Depending on the expertise of the Committee members, this could be technical guidance,\textsuperscript{247} or clarification of legal questions. The Committee could also early in

\textsuperscript{242} Abeysinghe (2016) p. 19.
\textsuperscript{243} Paris Agreement Article 9 para. 1.
\textsuperscript{244} Ibid., Article 10.
\textsuperscript{245} Ibid., Article 11.
\textsuperscript{247} Dagnet (2017) p. 317. See e.g. the mechanism of the Kyoto Protocol cf. Decision 27/CMP.1, section XIV, (b) and (c).
the process advise parties on how to access the means of implementation mentioned above, or other possible support arrangements.248 If information, advice or referral to other support mechanisms does not succeed in rectifying the implementation or compliance problem, the Committee could issue recommendations to a party regarding the specific issue.249 Here the Committee could for instance include examples of successful cases of implementation or compliance.250 Providing the party with financial assistance is also a measure that is in accordance with the facilitative nature of the Committee. However, because parties could also see this as an incentive to not implement effectively,251 this measure should be avoided.

If advice or recommendations do not prove sufficient to remedy the problem, the Committee could request the party to develop an implementation or compliance plan.252 Several other MEA compliance mechanisms make use of action plans.253 An action plan can be an important tool in the process of helping a party to implement or bringing it into compliance, and could contain an analysis of the problem’s causes, a description of measures the party will take to effectively implement or become compliant, and a timetable for achieving this.254 It has, however, been pointed out that developing an action plan is not costless to the party, as this will require extra work.255 The Committee could, however, only request the party to develop the plan. This would be in accordance with the Committee’s facilitative nature and the non-punitive criterion. Moreover, the Committee should be able to provide extensive assistance to the party in relation to the development of this action plan, in accordance with its facilitative nature.

Finally, it is recommendable that the Committee can follow up on cases it has been involved in.256 Several other compliance mechanisms include a possibility for the compliance organ to request a party to submit progressive reports on action it takes to implement or become compliant.257 Such an arrangement could enhance the effectiveness of the Implementation and

248 van Asselt (2016) p. 5
249 Voigt (2016a) p. 167. See e.g. the mechanism of the Kyoto Protocol cf. Decision 27/CMP.1, section XIV, (d).
250 van Asselt (2016) p. 5.
253 E.g. the mechanisms of Basel Convention, cf. Decision VI/12, appendix, para. 19, Kyoto Protocol cf. Decision 27/CMP.1, section XV, para. 5(b) and Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention cf. Draft Decision on Review of Compliance, annex, para. 40.
255 Oberthür (2014) p. 35.
256 van Asselt (2016) p. 5.
257 E.g. Protocol on Pollutant Release and Transfer Registers to the Aarhus convention cf. Draft Decision on Review of Compliance, annex, para. 40(c) and Basel Convention cf. Decision VI/12, appendix, para. 19(d).
Compliance Committee. Furthermore, Article 15 paragraph 2 decides that the Committee shall take into account parties’ national capabilities and circumstances. This can be done by allowing for more extensive assistance to countries that to a greater extent lack capabilities to implement or comply, decided on a case-by-case basis.\textsuperscript{258}

If these facilitative measures are not successful in making a party implement or comply, the way forward is different depending on whether the provision establish a legally binding obligation or not. If the commitment is of a non-legally binding character, such as the substance of the NDCs, the Committee’s will not be able to address the issue further. This is because the Committee only has a mandate to facilitate the implementation of the non-legally binding elements of the Paris Agreement. However, if the relevant provision entails a legally binding obligation for the party, the Committee could continue to a non-compliance procedure.

4.4 Responding to non-compliance

4.4.1 Determining non-compliance

The part of the process which concerns responding to non-compliance must start with a determination of non-compliance. The facilitative nature of the Committee implies that assistance should be at the forefront in the Committee’s procedures. Therefore, non-compliance should not be determined before the facilitative process has proved insufficient. Non-compliance could therefore be understood as persistent or reoccurring non-fulfilment of a legally binding obligation under the Agreement. In the determination of whether a party is in non-compliance, the Committee could take into account “the national circumstances and capacities” of the concerned party, cf. Article 15 paragraph 2. This could for instance result in the Committee granting parties with special capacity problems more flexibility, allowing them to use more time to become compliant.

4.4.2 Procedural elements

The Committee’s facilitative and non-adversarial character indicates that the procedures should avoid creating opposition and a conflictual setting. These criteria are especially relevant for the non-compliance part of the procedure, as this part has more potential to be experienced as conflictual than a purely facilitative assistance process. Making room for dialogue between the Committee and the non-compliant party should therefore be included

\textsuperscript{258} Voigt (2016a) p. 167.
also here. Furthermore, there is more controversy connected to a non-compliance procedure than to providing assistance; a party’s performance is under scrutiny, and the procedure may have negative implications for the party that is involved. It is therefore some specific elements that should be included in this step of the procedure.

Firstly, the procedure should include rules that ensure due process for the concerned party. Such rules can be found in the non-compliance procedures of most MEA compliance mechanisms.\(^{259}\) Because of the facilitative nature of the Committee, and the non-punitive criterion, the need for due process rules is not very pressing. Yet, a minimum of procedural elements to ensure due process should be included. For example, a party should be notified when the Committee receives a request from for example another party concerning its compliance,\(^{260}\) and should be able to provide its views on the matter during the Committee’s deliberations.\(^{261}\)

Secondly, this part of the procedure should include an element that makes it difficult for a party to withdraw from the Agreement during the procedure. The background of this suggestion is experience with the Kyoto Protocol’s compliance mechanism. This experience is also connected to the previously mentioned incident, where Canada in 2007 declared its intention of not fulfilling its mitigation obligations. Under the Kyoto Protocol, sanctions could not be applied until the end of the Protocol’s first commitment period, when the parties’ compliance with their mitigation obligations under this first period would be accounted for (ex post triggering). The first commitment period of the Protocol lasted from 2008 until 2012. Canada therefore withdrew from the Protocol in 2012 to avoid sanctions.\(^{262}\) That Canada could easily withdraw in this situation has been considered a major weakness of the Kyoto Protocol’s compliance mechanism.\(^{263}\) This should provide a lesson for the development of the Paris Agreement’s mechanism. During the negotiations of the Paris Agreement, Norway suggested the following formulation for Article 15; “[a] party shall not withdraw from this agreement during non-compliance procedures with respect to its own compliance”.\(^{264}\) It may be argued that there is not the same need for such an arrangement in the Paris Agreement, as in the Kyoto Protocol. The compliance mechanism of the Protocol could apply sanctions, which the Paris Agreement’s Committee cannot. On the other hand, the mere fact that it is


\(^{260}\) E.g. the mechanism of the Basel Convention cf. Decision VI/12, appendix, para. 13.

\(^{261}\) Found in e.g. the mechanism of the Montreal Protocol cf. Decision IV/5, annex IV, para. 2.


\(^{263}\) Ibid., p. 9-10.

involved in a non-compliance procedure can be negatively accepted by a party, and give it incentives to walk away from the Agreement. Consequently, a similar arrangement as the one suggested by Norway, should be included in relation the non-compliance procedure.

4.4.3 Non-compliance measures

The measures of the procedure’s assistance phase are all in accordance with a management approach to compliance; they focus on addressing the cause of the non-implementation or non-compliance and on helping the party in rectifying the situation. If the situation is caused by lack of understanding of the obligation, or lack of capacity to comply, these measures can be effective means for promoting compliance. However, if the non-compliance is calculated, these measures may not be effective. In these situations, the enforcement approach to compliance tells us that the Committee should be able to apply measures that entail some kind of cost for the non-compliant party. However, the Committee’s measures must be non-punitive and in accordance with its facilitative nature. This does, as mentioned, leave little room for enforcement, because punitive measures are precluded. Nevertheless, there may be a few measures that the Committee can apply, that provide some pressure, and are also in accordance with the criteria in Article 15 paragraph 2.

A possible first step of this part of the procedure, after determining non-compliance, could be issuance of a cautionary note to the concerned party. A possibility to issue a cautionary note can for instance be found in the procedure of the Basel Convention’s compliance mechanism. This measure would not inflict costs on the party, but would make it aware of being in the Committee’s focus. This awareness could create pressure on the party to comply. While a cautionary note is not purely facilitative, it can be made non-punitive. Firstly, the cautionary note could be designed more like information to the party regarding the non-compliance situation than an actual warning. Secondly, the cautionary note could be provided directly to the party, and not be disclosed to other parties or the public. While Article 15 paragraph 2 decides that the Committee shall function in a transparent manner, the Committee’s effectiveness is an argument in favour of allowing cautionary notes to be exempted from disclosure. Issuance of a cautionary note seems to be one of few measures that are not purely assistance-centred, but that may still be considered as non-punitive. If these have to be disclosed to other parties or the public, it would be much more difficult for the Committee to apply this measure. Finally, the cautionary note could be accompanied by offers of further support to the party, to avoid creating a conflictual setting.

265 Oberthür (2014) p. 35.
267 Decision VI/12, appendix, para. 20(b).
If a cautionary note is not sufficient to make the party comply, a possible next step could be issuance of a declaration of non-compliance.268 This measure is used by several other MEA compliance mechanisms.269 Article 15 paragraph 3 decides that the Committee shall report annually to the Conference of the Parties serving as the meeting of the Parties (CMA). The Committee could therefore include declarations of non-compliance in its report to the CMA. This would inform all parties of another party’s non-compliance. Furthermore, the transparency-criterion in Article 15 paragraph 2 could be an argument in favour of the report to the CMA being made publicly available. This would display the non-compliance to amongst others the media and non-governmental organisations. This would place pressure on the party to comply.

Issuing a declaration of non-compliance may, however, be considered punitive. While it will not involve extra work for the non-compliant party, or deprive it of rights or benefits under the Agreement, it may inflict reputational or political costs. It is therefore debatable whether this measure is compatible with the “non-punitive”-criterion. Where the line between punitive and non-punitive measures will be drawn in the negotiations on the operationalisation of Article 15 is not possible to predict. However, the fact that “promote compliance” was included in paragraph 1 of Article 15, and not just “facilitate implementation”, indicates that the Committee shall have the possibility to apply some measures that are not centred on assistance and support. Furthermore, the impression that paragraph 1 is a compromise, is an argument in favour of including such declarations in the mechanism’s non-compliance toolbox. The parties that wanted a strong non-compliance mechanism will want a Committee that can apply at least some pressure in cases of non-compliance. Against this background, it is argued here that the Committee should be able to issue declarations of non-compliance, to be included in the report in to the CMA. This would be a way to give effect to the compromise that paragraph 1 seems to be. However, declarations of non-compliance should be used only as a last resort; after all other available measures have been attempted,270 preferably several times and with extensive time-frames for improvement.

4.5 Systemic review of implementation and compliance

In addition to focusing on facilitating individual parties’ implementation and compliance, the Committee could conduct a systemic review of the parties’ general implementation and compliance under the Agreement. Other MEA compliance mechanisms also include this

269 See e.g. the Kyoto Protocol cf. Decision 27/CMP.1, section XV, para. 1(a).
270 Same in Basel Convention cf. Decision VI/12, appendix, para. 20.
function.\textsuperscript{271} The global stocktake that is set out in Article 14 of the Paris Agreement provides a good opportunity for the establishment of such a review. Article 14 paragraph 1 decides that the CMA shall periodically take stock of the implementation of the Agreement “to assess the collective progress towards achieving the purpose of the Agreement and its long-term goals”. The global stocktake shall include a review of “mitigation, adaptation and the means of implementation and support”.\textsuperscript{272} The information collected in the global stocktake can consequently provide a basis for triggering a consideration of systemic implementation issues on important areas of the Agreement.\textsuperscript{273} The specific modalities and procedures of Article 14 are not yet agreed.\textsuperscript{274} It is therefore not possible to point out exactly how the Committee can be linked to the global stocktake. However, a possibility is to give the Committee a mandate to develop general advice or recommendations based on the outcome of the stocktake.

4.6 Decision-making

An additional element that must be determined is how decisions related to the Committee’s functions shall be made. This will typically be decisions on adoption of assistance or non-compliance response measures. The UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements can serve as a starting point in this relation. With regard to decision-making the Guidelines state:

“The final determination of non-compliance of a party with respect to an agreement might be made through the conference of the parties of the relevant multilateral environmental agreement or another body under that agreement, if so mandated by the conference of the parties, consistent with the respective multilateral environmental agreement.”\textsuperscript{275}

The question is consequently whether the Committee should be able to make decisions, or if this must be left for the Conference of the Parties serving as the meeting of the Parties (CMA). For the purpose of answering this question, it can be useful to look at how it is solved in compliance mechanisms of other MEAs. The rules of the compliance mechanism of the Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention provide an interesting solution. Under this mechanism, measures of a facilitative nature are entrusted to the compliance organ itself to decide,\textsuperscript{276} while the more serious measures, such as declarations

\textsuperscript{271} E.g. Minamata Convention Article 15 para. 2.
\textsuperscript{272} Paris Agreement Article 14 para. 1.
\textsuperscript{273} Dagnet (2017) p. 317.
\textsuperscript{274} Decision 1/CP.21 para. 101.
\textsuperscript{275} Guidelines on Compliance with and Enforcement of Multilateral Environment Agreements, para. 14(d)(iv).
\textsuperscript{276} Draft Decision on Review of Compliance, annex, para. 40.
of non-compliance, are decided by the governing body.\textsuperscript{277} Letting the Committee make decisions is likely to lead to quicker decisions.\textsuperscript{278} Therefore, this arrangement would to a greater extent make it possible for the Committee to provide assistance and support, or take other measures, at the time that the need for this becomes apparent.\textsuperscript{279} This would be in accordance with the need for the Committee to prevent non-compliance. Also, the reference to ‘expert-based’ in Article 15 paragraph 2 suggests that decisions should be kept at a technical level, which points to the Committee being responsible for decision-making itself.\textsuperscript{280} It is therefore recommendable that the Committee can make decisions regarding assistance-related measures itself. Possible cautionary notes and declarations of non-compliance should, on the other hand, be left for the CMA to adopt. These decisions are of a more serious character than rest of the proposed measures, and would require the legitimacy provided by adoption by a governing body.

5 Concluding remarks

The overarching aim of this thesis has been to answer the following question: \textit{how should the Paris Agreement’s implementation and compliance mechanism be operationalised?} To answer this question, it has been necessary to clarify what criteria the Paris Agreement establishes for the mechanism and its further design. For this purpose, Article 15 of the Agreement has been analysed. This analysis has displayed that Article 15 establishes a Committee of experts that shall facilitate implementation and promote compliance with the provisions of the Agreement. It has been concluded that these overall objectives provide the Committee with two distinct functions; the Committee shall both assist parties in implementing the Agreement, and promote compliance with a handful of legally binding obligations. The Implementation and Compliance Committee’s facilitative nature, and the non-punitive and non-adversarial criteria for its operation, leaves the Committee with a mandate to primarily assist and support parties’ in implementing and complying with the Agreement. Sanctions and penalties are precluded, which gives the Committee little “teeth” when facing the sovereign parties to the Paris Agreement. Against this background, the Committee takes a management approach to implementation and compliance, rather than relying on coercive methods. It has also been concluded that the mechanism shall have universal application, but that parties’ capabilities and circumstances must be taken into account.

\textsuperscript{277} Draft Decision on Review of Compliance, annex, para. 41.
\textsuperscript{278} Dagnet (2017) p. 317-318.
\textsuperscript{279} Ibid.
\textsuperscript{280} Ibid.
Furthermore, the thesis has presented a suggestion on how the Paris Agreement’s Implementation and Compliance Committee should be operationalised. The specific legal architecture of the Paris Agreement is an important starting point in this relation. The Paris Agreement establishes very few legally binding obligations for the parties. These are mainly related to parties’ reporting and accounting of measures they take to reduce greenhouse gas emissions, and performance on other action areas. The substantive commitments in the Agreement do, with some minor exceptions, not establish legally binding obligations for the parties. Importantly, this includes the substance of the parties’ mitigation commitments (the NDCs). This legal architecture makes it very important that the Implementation and Compliance Committee is designed in way that allows it to address both the legally binding and the non-legally binding elements of the Agreement.

Against this background, it has been proposed to design the Committee’s procedure as an incremental process. This process starts with application of the most facilitative assistance measures, and then gradually moves on to apply more pressure. Due to the Committee’s facilitative nature, it has been argued that the emphasis should be on the assistance-centred part of the process. Furthermore, the Committee’s mandate is limited to assistance in relation to the Agreement’s non-legally binding elements. Potential implementation problems with the non-legally binding commitments, such as the NDCs, can therefore only be addressed in this facilitative phase. This fact makes it very important that the mechanism can effectively provide the parties with assistance. To assist parties in implementing the Agreement, it has been suggested that the Committee can apply measures ranging from information, advice and referral to other organs, to non-binding recommendations and request for an implementation or compliance action plan.

The legally binding elements of the Paris Agreement are, however, also relevant for the non-compliance procedures at the “stronger” end of the incremental process. In this relation, it has been argued that there is some room within paragraph 2 of Article 15 to provide the Committee with means that are not purely facilitative, but that enable it to apply pressure towards non-compliant parties. While this room does not seem to be large, it may provide for some effective non-compliance measures. It has here been argued that the Committee should be given mandate to issue cautionary notes and declarations of non-compliance. This would provide the Committee with effective tools to promote parties’ compliance with important procedural obligations.

Furthermore, experience from other MEAs have been useful in the analysis of what triggers will enable the Committee to fulfil its functions as effectively as possible. It is suggested that the Committee can be triggered by parties, potential technical expert review teams under Article 13, the CMA, and also by itself. The suggested triggers will allow the Committee to
take action during the five-year cycles of the parties’ mitigation commitments (NDCs). It can, *inter alia*, identify that parties have not fulfilled the legally binding obligation to prepare new NDCs, and identify parties’ problems in implementing their NDCs domestically through the technical expert reviews. These features are important if the Committee shall be able to prevent parties’ from neglecting their emission reduction targets, and is consequently important for the Agreement’s possibility to achieve the ultimate goal of preventing dangerous climate change.

The analysis of Article 15 has shown that it leaves much room for the parties to negotiate. Consequently, what modalities and procedures the parties to the Paris Agreement will eventually agree on for the Committee is still a very open question. The analysis in this thesis has, however, pointed out some main elements that the parties should include, when they meet for COP24 in December 2018. Firstly, as the non-legally binding obligations of the Paris Agreement cannot be addressed in a non-compliance procedure, they should be addressed by extensive and effective assistance measures. Secondly, although few, the legally binding reporting obligations can play an important role in ensuring implementation and achievement of the non-legally binding elements. The parties should therefore use the room that exist within Article 15 paragraph 2 to establish effective means to promote parties’ compliance with these obligations. This should include measures that allow the Committee to apply some sort of pressure. Third, there are important lessons to be learned, especially from the operation of the Kyoto Protocol’s compliance mechanism. These should be drawn upon when the parties operationalise the mechanism set out in Article 15. If these elements are included in the operationalisation, the Implementation and Compliance Committee can play an important role for the effectiveness of the Paris Agreement in tackling climate change.
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