

# Fostering responsibility through compliance mechanisms

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## Abstract

The Paris Agreement (PA) has been described as a major leap for humankind. In ensuring treaty parties adapt their behaviour to this treaty, its complex and sophisticated design will present a major challenge. Traditional enforcement instruments are not fully equipped to rise to this (particular) challenge. Instruments of treaty management, however, such as compliance mechanisms, are capable of filling the resulting gap. The contribution argues that the reach of compliance mechanisms extends beyond achieving compliance with treaty norms. Indeed, they have the potential of fostering responsibility for the common goals and objectives of the treaty community. In this spirit, if designed diligently, its compliance mechanism can make a vital contribution to the PA's effectiveness.

## 1 Introduction

In 2015, delegates of states and the European Union (EU) agreed on a new instrument steering future climate action, the Paris Agreement (PA).<sup>1</sup> Marking a new beginning in international climate policy,<sup>2</sup> agreement on this treaty was described as a giant leap for humankind.<sup>3</sup> Despite a new beginning though, an old challenge will remain: ensuring that treaty parties implement their obligations and comply with them.

Arguably, this challenge of ensuring treaty compliance will be particularly pronounced in the context of the PA: On the one hand, the climate crisis has become more severe to the end that ever more ambitious action is necessary.<sup>4</sup> On the other, as

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- 1 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTC No 54113.
  - 2 See Charlotte Streck, Paul Keenlyside and Moritz von Unger, 'The Paris Agreement: A new beginning' (2016) 13 *Journal for Environmental & Planning Law* 3.
  - 3 John Vidal, Adam Vaughan, Suzanne Goldenberg, Lenore Taylor and Daniel Boffey, 'World leaders hail Paris climate deal as "major leap for mankind"' *The Guardian* (London, 13 December 2015) <[www.theguardian.com/environment/2015/dec/13/world-leaders-hail-paris-climate-deal](http://www.theguardian.com/environment/2015/dec/13/world-leaders-hail-paris-climate-deal)> accessed 15 October 2021.
  - 4 See Lukas Hermville, 'Climate change as a transformative challenge. A new climate policy paradigm?' (2016) 25 *GAIA* 19.

a consequence also of difficult and long negotiations,<sup>5</sup> the design of the PA presents both sophisticated and complex. In this way, the treaty's design emphasises the known shortcomings of enforcement instruments, thereby limiting their potential for ensuring compliance. Consequently, it is crucial to look beyond enforcement instruments and indeed towards another approach for inducing compliance with the PA. However, even more is necessary than mere conformity of state behaviour to treaty obligations, i.e., compliance. In view of the PA's specifics, it is necessary to foster responsibility for the common goals and objectives of the PA which underly these obligations.

The present contribution argues that treaty management and compliance mechanisms effectuating such management provide a promising avenue in this regard. It thus engages with their purpose and rationale, and demonstrates how compliance mechanisms are capable of filling the gap left by enforcement instruments. In this light, compliance mechanisms are complementing those latter instruments. The contribution then discusses several features of the compliance mechanism as designed under the PA. In doing so, it illustrates how the compliance mechanism under the PA can contribute to the treaty's effectiveness.

## 2 The Paris Agreement: A giant leap, and a challenge

Negotiations for an instrument steering international climate action after 2020 were held in light of experiences gained with the Kyoto Protocol.<sup>6</sup> In particular, the Protocol's top-down approach and the somewhat artificial distinction between groups of states had caused frustration.<sup>7</sup> Accordingly, it became clear that a future instrument would have to be based on a different approach.<sup>8</sup>

The resulting PA is based on a bottom-up approach, meaning that it relies heavily on the ambition of its treaty parties.<sup>9</sup> In this way, the PA is indeed a giant leap in international climate policy. Its success in addressing a 'major concern of [hu-

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5 See Jeffrey McGee and Jens Steffek, 'The Copenhagen turn in global climate governance and the contentious history of differentiation in international law' (2016) 28 *Journal of Environmental Law* 37.

6 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

7 Annalisa Saravesi, 'The Paris Agreement: An early assessment' (2016) 48 *Environmental Policy and Law* 14, 15.

8 Christina Voigt and Felipe Ferreira, 'Differentiation in the Paris Agreement' (2016) 6 *Climate Law* 58, 63.

9 See Alexander Proelß, 'Klimaschutz im Völkerrecht nach dem Paris Agreement: Durchbruch oder Stillstand?' (2016) *ZfU* 58, 65. More critical Felix Ekardt, 'Das Paris-Abkommen zum globalen Klimaschutz' (2016) *NVwZ* 355, 357.

man]kind'<sup>10</sup> depends, however, on how successfully the necessary ambition can be ensured.<sup>11</sup> Enforcement instruments, in view of their scope of application and ultimate rationale, are not quite equipped to fulfil this task. Instruments of treaty management, in contrast, prove more promising.

## 2.1 The Paris Agreement's sophisticated design

Given the sobering experiences with the Kyoto Protocol, the switch to a bottom-up approach for its successor instrument was described as a 'reasonable gamble'.<sup>12</sup> Indeed, this approach renounces traditional top-down ideas: 'Bottom-up' essentially embodies the idea that treaty parties are much more likely to fulfil self-imposed obligations than obligations imposed *on* them.<sup>13</sup> Accordingly, the respective treaty framework is less prescriptive to leave treaty parties appropriate scope of manoeuvre.<sup>14</sup> Shared aims and objectives, in turn, are meant to steer the necessary ambition in the interest of the treaty community.<sup>15</sup>

The design of the PA and its obligations must be understood in light of its bottom-up approach.<sup>16</sup> Accordingly, the temperature goal of well-below +2°C,<sup>17</sup> and the

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- 10 Resolution of the General Assembly 43/53, regarding the protection of global climate for present and future generations of mankind (6 December 1998) UN Doc A/RES/43/53. See further, Friedrich Soltau, 'Common concern of humankind' in Cinnamon P Carlane, Kevin R Gray and Richard G Tarasofsky (eds), *The Oxford handbook of international climate change law* (Oxford University Press 2016) 202.
  - 11 Of course, the effectiveness of an international agreement, understood as its capability of achieving its objective, must not be equated with compliance only. Compliance is still one of the essential elements permitting to assess the effectiveness of an international agreement. See for the PA, Vegard H Tørstad, 'Participation, ambition and compliance: Can the Paris Agreement solve the effectiveness trilemma?' (2020) 29 *Environmental Politics* 761.
  - 12 Meinhard Doelle, 'The Paris Agreement: Historic breakthrough or high stakes experiment?' (2016) 6 *Climate Law* 1, 20. On the need for such an approach, Richard B Stewart, Michael Oppenheimer and Bryce Rudyk, 'Building a more effective global climate regime through a bottom-up approach' (2013) 14 *Theoretical Inquiries in Law* 273, 276ff.
  - 13 Doelle (n 12) 3. Note also Louis Henkin's assertion that 'every nation's foreign policy depends substantially (...) on (...) the expectation that it will live up to international (...) obligations', Louis Henkin, *How nations behave* (2nd edn, Columbia University Press 1974) 52. Generally, for the role of reputation, and specifically a reputation for compliance, in international relations, Jana von Stein, 'The engines of compliance' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary perspectives on international law and international relations: The state of the art* (Cambridge University Press 2013) 477, 481f.
  - 14 Annalisa Savaresi and Francesco Sindico, 'The role of law in a bottom-up international climate governance architecture: Early reflections on the Paris Agreement' (2016) 26 *QIL Zoom-in* 1, 2.
  - 15 Doelle (n 12) 4, 16.
  - 16 See Proelß (n 9) 64f.
  - 17 Paris Agreement, Article 2(1)(a).

aspiration for carbon-neutrality after 2050 set the overall framework for substantive climate action.<sup>18</sup> Under this framework, treaty parties are required to prepare, communicate and maintain their nationally-determined climate contributions (NDCs).<sup>19</sup> The quality of these NDCs is not determined by the treaty.<sup>20</sup> Rather, it is within the individual responsibility of each party to design its NDC in the spirit of the common goals and objectives.<sup>21</sup> While the PA requires those NDCs to be ambitious and to progress in their ambition,<sup>22</sup> it does not define such ambition in a normative way; after all, ambition is also dependent on the specifics of a treaty party.<sup>23</sup>

Effectively, the PA relies heavily on procedural obligations to ensure ambitious climate action.<sup>24</sup> Conversely, substantive requirements for climate action are rather expressed by means of expectations or aspirations.<sup>25</sup> These expectations and aspirations aim to inform the required action by treaty parties.<sup>26</sup> It is thus necessary to foster responsibility also for these expectations and aspirations in order to steer ambitious climate action.<sup>27</sup>

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18 Paris Agreement, Article 4(1). In the qualification as an aspiration and therefore non-obligations, see Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay between hard, soft and non-obligations' (2016) 28 *Journal of Environmental Law* 337, 345. Distinguishing these objectives from collective obligations, Alexander Zahar, 'Collective obligation and individual ambition in the Paris Agreement' (2020) 9 *Transnational Environmental Law* 165.

19 Paris Agreement, Article 4(1).

20 According to Article 4(4) Paris Agreement, developed countries should undertake economy-wide absolute emission reduction targets as part of their NDCs. However, this requirement can only be understood encouraging state to do so ('should') rather than constituting an obligation.

21 See further Benoit Mayer, 'Interpreting states' general obligations on climate change mitigation: A methodological review' (2019) 27 *RECIEL* 107, 112ff.

22 Paris Agreement, Article 3.

23 Christina Voigt, 'The Paris Agreement: What is the standard of conduct for parties?' (2016) 26 *QIL Zoom-in* 17, 24ff.

24 See Jonathan Pickering et al., 'Global climate governance between hard and soft law: Can the Paris Agreement's 'crème brûlée' approach enhance ecological reflexivity?' (2019) 31 *Journal of Environmental Law* 1, 13f. See further, also touching on the implementation phase, Johannes Saurer, 'Verfahrensregeln im internationalen Klimaschutzrecht. Bedeutung und Entwicklung von der Klimarahmenkonvention bis zum Rulebook zum Pariser Abkommen' (2019) 41 *NuR* 145, 148ff.

25 Note Ralph Bodle, Lena Donat and Matthias Duwe, 'The Paris Agreement: Analysis, assessment and outlook' (2016) 10 *Carbon & Climate Law Review* 5, 9.

26 Nuanced with a focus on NDCs, Benoit Mayer, 'International law obligations arising in relation to nationally determined contributions' (2018) 7 *Transnational Environmental Law* 251. On the purpose of the review mechanism in this context, see Manjana Milkoreit and Kate Haapala, 'The global stocktake: Design lessons for a new review and ambition mechanism in the international climate regime' (2019) 19 *International Environmental Agreements* 89, 92ff.

27 See Steinar Andresen, 'The Paris Agreement and its Rulebook in a problem-solving perspective' (2019) 9 *Climate Law* 122, 133.

## 2.2 How to induce compliance with the Paris Agreement

The PA is thus marked by a mix of hard, soft and even non-obligations. Together, all these types of obligations are designed to contribute to the agreement's objectives. Therefore, it is essential that parties deliver on all of them, whether legally binding or not. Ensuring that parties do that, however, is a challenge. While the traditional enforcement approach and its instruments are not entirely equipped to meet this challenge, treaty management appears to be.

### 2.2.1 The traditional approach: Treaty enforcement

Long-time, a rationalist understanding dominated the domain of international relations and the role of international law within them. In this understanding, states would only make international treaties where it was in their own rational interest.<sup>28</sup> Equally, following a treaty's conclusion, treaty parties would adapt their behaviour to treaty obligations only where it matched their interests.<sup>29</sup> Thus, where non-compliance was more favourable, they would choose not to observe their obligations.<sup>30</sup> Therefore, to prevent such course of action, non-compliance would ultimately have to appear less favourable than compliance.

Within this logic, enforcement instruments present a traditional solution to this problem. These instruments are designed to sanction non-compliant behaviour and thereby raise the costs of such behaviour.<sup>31</sup> Crucially though, the costs of non-compliant behaviour must be high enough to incentivise treaty parties to adapt their behaviour. Thus, typically, the higher the level of necessary adaption of state behaviour, the higher the costs of non-compliance must be.<sup>32</sup>

With its inherent call for ambition,<sup>33</sup> the PA is undeniably a case for a treaty which requires quite extensive changes to state behaviour. As a result, enforcement instru-

28 See Andrew T Guzman, *How international law works: A rational choice theory* (Oxford University Press 2008) 121ff.

29 Carmela Lutmar and Cristiane L Carneiro, 'Compliance in international relations', *Oxford Research Encyclopedia of Politics* (2018) 3 <<https://doi.org/10.1093/acrefore/9780190228637.013.576>> accessed 13 March 2022.

30 See Harold Hongju Koh, 'Why do nations obey international law?' (1997) 106 *The Yale Law Journal* 2599, 2602.

31 Tseming Yang, 'International treaty enforcement as a public good: Institutional deterrent sanctions in international environmental agreements' (2006) 27 *Michigan Journal of International Law* 1131, 1150.

32 See George W Downs, David M Rocke and Peter N Barsoom, 'Is the good news about compliance good news about cooperation?' (1996) 50 *International Organization* 379, 383f.

33 See e.g., the Report of 18 April 2019 on the 2018 stocktake on pre-2020 implementation and ambition, FCCC/CP/2019/2, para 9.

ments would have to raise the costs of non-compliance significantly in order to steer state behaviour. Its specific design, however, requires these costs to rise even more:

The PA is a typical case for a treaty which includes obligations owed to the community of treaty parties (*erga omnes partes* obligations).<sup>34</sup> In requiring states to fulfil their obligations even when others disregard them,<sup>35</sup> these obligations arguably lack an essential incentive for compliance.<sup>36</sup> Accordingly, enforcement instruments would have to raise the costs of non-compliance enough to compensate for that lacking incentive. However, the instruments available – the law of state responsibility and liability, and treaty-based dispute settlement – are not capable of doing so.

In view of *erga omnes partes* obligations, the available enforcement instruments encounter difficulties already at the outset. As these obligations are owed equally to all treaty parties, it proves difficult to establish which state is entitled to rely on them.<sup>37</sup> These difficulties are furthered by requirements for a proof of causality between (in)action and damage,<sup>38</sup> and the need for actual damage.<sup>39</sup> Particularly in view of damage to the climate system and environmental damage caused as a result, both appears more than difficult.<sup>40</sup>

Some of these shortcomings can perhaps be overcome.<sup>41</sup> Yet, the recourse to enforcement instruments still remains unsatisfactory. Successfully invoked, enforcement instruments mainly entitle to financial or non-financial reparation, the latter in the form of compensatory measures. The possibility of either is questionable in the

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- 34 See for an analysis of other cases, Antonio Cardesa-Salzmann, 'Constitutionalising secondary rules in global environmental regimes: Non-compliance procedures and the enforcement of multilateral environmental agreements' (2011) 24 *Journal of Environmental Law* 103, 108ff.
  - 35 Maas M Goote, 'Non-compliance procedures in international environmental law: The middle way between diplomacy and law' (1999) 1 *International Law Forum Du Droit International* 82, 83f.
  - 36 Winfried Lang, 'Compliance control in international environmental law: Institutional necessities' (1996) *ZaöRV* 685, 685.
  - 37 See Alan Boyle, 'Saving the World? Implementation and enforcement of international environmental law through international institutions' (1991) 3 *Journal of Environmental Law* 229, 230.
  - 38 Martti Koskenniemi, 'Breach of treaty or non-compliance? Reflections on the enforcement of the Montreal Protocol' (1992) 3 *Yearbook of International Environmental Law* 123, 126.
  - 39 See Robert K Omura, 'Chasing Hamlet's ghost: State responsibility and the use of counter-measures to compel compliance with multilateral environmental agreements' (2010) 15 *Appeal: Review of Current Law and Law Reform* 86, 101f.
  - 40 See the contribution by Monika Hinteregger in this volume. On the notion of 'borderless' climate change impacts and its challenges for governance systems, see Magnus Benzie and Åsa Persson, 'Governing borderless climate risks: Moving beyond the territorial framing of adaptation' (2019) 19 *International Environmental Agreements* 369.
  - 41 See Alan Boyle and Catherine Redgwell, *Birnie, Boyle and Redgwell's international law & the environment* (4th edn, Oxford University Press 2021) 234. Note also the contributions in this volume by Kirsten Schmalenbach, Oliver Dörr and Erika Wagner.

context of environmental damage.<sup>42</sup> Ultimately though, neither is even desirable as the aim is to *prevent* environmental damage, and further damage to the climate system.<sup>43</sup> The reactive rather than proactive nature of the available enforcement instruments is thus not matching the approach of the PA.<sup>44</sup>

In the specific context of the PA, another shortcoming of enforcement instruments is equally significant. Enforcement instruments are designed with hard, legally binding obligations in mind.<sup>45</sup> Since a state is not required to observe a non-binding rule, it cannot be violated so as to affect another state's legal position. Consequently, a non-binding rule cannot serve as the basis for invoking the main enforcement instruments.<sup>46</sup> Therefore, these instruments cannot incentivise compliance with soft and non-obligations.<sup>47</sup> As highlighted though,<sup>48</sup> the observance and implementation of soft and non-obligations is equally important in view of the PA's objectives.

When applied to multilateral environmental agreements (MEAs),<sup>49</sup> and the specific context of the PA, enforcement instruments therefore clearly suffer from several shortcomings. In this way, not capable of ensuring states fulfil their commitments, they ultimately leave a responsibility gap.<sup>50</sup> Filling this gap, however, is crucial in order to ensure achieving the Paris goals.

### 2.3 The alternative approach: Treaty management

The managerial approach to compliance challenges the basic assumption underlying the enforcement approach. Its pioneers, Chayes and Chayes, argued that states would already enter their treaty relations with a propensity to comply. After all, states

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42 Pierre-Marie Dupuy and Jorge E Viñuales, *International environmental law* (2nd edn, Cambridge University Press 2018) 323f.

43 See Fitzmaurice and Redgwell (n 50) 41.

44 See Boyle (n 37) 230.

45 Note though in relation to legally binding obligations of conduct, Mayer (n 21) 138f.

46 See Koskeniemi (n 38) 145.

47 Similar problems are highlighted in view of result-oriented and action-oriented treaty obligations, Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum, 'Conclusions drawn from the Conference on ensuring compliance with MEAs' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring compliance with multilateral environmental agreements. A dialogue between practitioners and academia* (Brill | Nijhoff 2006) 359, 361.

48 See above, section 2.1.

49 Boyle (n 37) 230.

50 Malgosia Fitzmaurice and Catherine Redgwell, 'Environmental non-compliance procedures and international law' (2000) 31 *Netherlands Yearbook of International Law* 35, 37.

would simply need to participate in treaty relations to persist in this increasingly interwoven world.<sup>51</sup>

As a result of this propensity to comply, non-compliance could not be a wilful act of treaty parties.<sup>52</sup> Much rather, it was a consequence of different factors relating to the treaty design and the specific circumstances of a state party. Amongst the factors identified by Chayes and Chayes were the ambiguity and indeterminacy of treaties but also capacity problems and changing circumstances in a state.<sup>53</sup>

The explanatory power of this alternative problem structure may of course be challenged.<sup>54</sup> Prominently, Downs et al.<sup>55</sup> did so by arguing that Chayes and Chayes had merely studied treaties which require shallow cooperation. States would be much more likely to sign on to these types of treaties as they required less adaptation of state behaviour, if any at all.<sup>56</sup> Accordingly, compliance with these types of treaties is to be expected. The situation, however, would be entirely different with treaties requiring deep cooperation where calculated interests dictate any adaptation of state behaviour.<sup>57</sup>

Undoubtedly, in light of its objectives, the PA is indeed a treaty which requires states to adapt their behaviour significantly.<sup>58</sup> Interests thus surely play a role for compliance under this international agreement.<sup>59</sup> Nevertheless, the insights provided by the management school continue to be highly relevant:<sup>60</sup>

First, a recent analysis found uncontrollable social or economic changes to provide a convincing explanation for non-compliance under a treaty.<sup>61</sup> Undeniably, such changes would also impact on states' capacities to implement and maintain climate action; a fact that the recent pandemic has shown all too clearly. Second, the PA's

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51 Abram Chayes, Antonia Handler Chayes and Ronald Mitchell, 'Active compliance management in environmental treaties' in Winfried Lang (ed), *Sustainable development and international law* (Graham & Trotman | Kluwer 1995) 75, 75.

52 Abram Chayes and Antonia Handler Chayes, 'On compliance' (1993) 47 *International Organization* 175, 188.

53 Ibid 179.

54 Summarising Kal Raustiala and Anne-Marie Slaughter, 'International law, international relations and compliance' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds), *Handbook of international relations* (SAGE 2002) 538, 545.

55 Downs et al. (n 32) 380 'selection problems'.

56 Ibid 399.

57 See ibid 388.

58 See already above, section 2.2.1.

59 Pointing to the (domestic) actors also shaping such interests, Peter van den Bossche, 'In search of remedies for non-compliance: The experience of the European Community' (1996) 3 *Maasticht Journal of European and Comparative Law* 371, 378.

60 Note Jutta Brunnée, 'The Kyoto Protocol: Testing ground for compliance theories?' (2003) *ZaöRV* 255, 260f, highlighting the interest-based rationale Chayes and Chayes employ.

61 Andreas Kokkvoll Tveit, 'Can the management school explain noncompliance with international environmental agreements?' (2018) 18 *International Environmental Agreements* 491, 506.



reliance on hard, soft and non-obligations may lead to different understandings of what parties actually owe.<sup>62</sup> Non-compliance as a result of any ambiguities would then indeed not be a wilful act. Yet, it would still need to be resolved.

As Chayes and Chayes argued, for addressing these reasons underlying non-compliance, enforcement instruments are not helpful.<sup>63</sup> In addition, these instruments would not be adequate as a response to any type of non-compliance, particularly as non-compliance was not binary.<sup>64</sup> Therefore, these problems ought to be addressed differently, prompting Chayes and Chayes to propose a shift towards treaty management.

Chayes and Chayes imagine treaty management with three different elements in mind:<sup>65</sup> First, mechanisms for capacity-building. Second, mechanisms for dispute settlement and dispute avoidance. Third, mechanisms to allow for the change and adaptation of treaty norms, thereby ensuring the continued relevance of the treaty. These elements of treaty management should together be designed to verify whether a treaty party complies with the treaty.<sup>66</sup> The idea is to achieve a level of 'appropriate compliance' rather than full compliance.<sup>67</sup> Such a level would have to be high enough to still allow for the functioning and the credibility of the treaty. In Chayes and Chayes' view, the competence to determine this level of compliance would best be placed within a dedicated institution.<sup>68</sup>

Significantly, and contrary to the enforcement approach, treaty management would be based on a dialogue amongst treaty institutions and parties.<sup>69</sup> The immediate aim of this inclusive and cooperative dialogue was to identify the reasons for non-compliance and find suitable solutions. Yet, ultimately, the resulting 'justificatory discourse'<sup>70</sup> would have a more far-reaching impact: it would create a common language and, over time, a common interest which influence state behaviour towards compliance.

Quite rightly, Koh stressed that this discourse can only partly explain why states ultimately comply with the resulting norms; their domestic internalisation was equally relevant.<sup>71</sup> Chayes and Chayes, however, had failed to take the crucial role of

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62 See Winfried Lang, 'Diplomacy and international environmental law-making: Some observations' (1992) *Yearbook of International Environmental Law* 108, 115.

63 Chayes and Chayes (n 52) 178.

64 Ibid 198.

65 Abram Chayes and Antonia Handler Chayes, *The new sovereignty* (Harvard University Press 1995) 197ff.

66 Ibid 228.

67 See Chayes and Chayes (n 52) 198. Note, in this context, Martti Koskeniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *European Journal of International Relations* 395, 406 who criticises the 'managerial vocabulary'.

68 Chayes and Chayes (n 52) 202.

69 Ibid 230f.

70 Chayes and Chayes (n 65) 26.

71 Koh (n 30) 2634.

social, political, and legal internalisation of international rules into account. However, Koh, in turn, failed to explain why and how international rules are internalised.<sup>72</sup>

Despite his critique, also Koh accepts the importance of continued social interaction of states for their compliance.<sup>73</sup> In doing so, he highlights how the legitimacy of the managerial approach ultimately depends on both procedural and substantive fairness: the first refers to the equal and non-discriminatory application of the process, the latter to the fairness and equity of the rules being applied.<sup>74</sup> Only where the discourse is based on such a fair process, the resulting norms induce a sense of obligation to comply with them.<sup>75</sup> As a consequence, compliance would be judged simply the appropriate behaviour under the treaty.<sup>76</sup> In this manner, the justificatory discourse can create benefits and advantages beyond the normative. For the present purpose, it has the crucial potential of creating a sense of responsibility for other than legally binding obligations.

### 3 The PA's compliance mechanism: Another giant leap?

The managerial approach and its idea of active treaty management underly the general development of compliance mechanisms in MEAs.<sup>77</sup> Within a rather short period of time, these mechanisms have become 'a sort of 'must'' in these treaties.<sup>78</sup> As such, they seek to complement enforcement instruments and thereby close the gap these instruments leave.<sup>79</sup>

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72 Andrew T Guzman, 'A compliance-based theory of international law' (2002) 90 California Law Review 1823, 1845.

73 Koh (n 30) 2656.

74 Ibid 2641.

75 Jutta Brunnée, 'Compliance control' in Geir Ulfstein, Thilo Marauhn and Andreas Zimmerman (eds), *Making treaties work. Human rights, environment and arms control* (Cambridge University Press 2007) 373, 373. See, however, Günther Handl, 'International "lawmaking" by conferences of the parties and other politically mandated bodies' in Rüdiger Wolfrum and Volker Röben (eds), *Developments of international law in treaty making* (Springer 2005) 125, 138.

76 Asher Alkoby, 'Non-state actors and the legitimacy of international environmental law' (2003) 3 Non-State Actors and International Law 23, 81.

77 Brunnée (n 75) 380.

78 Attila Tanzi and Cesare Pitea, 'Non-compliance mechanisms: Lessons learned and the way forward' in Tullio Treves et al. (eds), *Non-compliance procedures and mechanisms and the effectiveness of international environmental agreements* (Springer 2009) 569, 569.

79 Sebastian Oberthür, 'Options for a compliance mechanism in a 2015 climate agreement' (2014) 4 Climate Law 30, 33.

In this vein, it is not too surprising that the PA also provides for a compliance mechanism.<sup>80</sup> While the treaty defines certain basic features of this mechanism, details were left to subsequent decision-making by the parties.<sup>81</sup> Though this decision-making is not yet finalised, certain features have already been agreed or finally rejected. In light of general developments across compliance mechanisms, it can thus be discussed how the PA's compliance mechanisms seeks to contribute to the treaty's effectiveness.

### 3.1 General purpose and common features

While compliance mechanisms can include different elements,<sup>82</sup> they commonly all include a non-compliance procedure.<sup>83</sup> The purpose of this procedure is to support and assist parties in order to prevent and (again) achieve compliance. In doing so, ideally, disputes amongst parties as well as environmental harm are avoided in the first place.

Incorporating the cooperative spirit of international relations,<sup>84</sup> non-compliance procedures are designed as non-confrontational, non-judicial and non-discriminatory but inclusive processes.<sup>85</sup> Accordingly, these procedures are not designed to determine or attribute international responsibility, or to decide on a breach of treaty.<sup>86</sup> Rather, they aim at engaging parties in a dialogue to identify and solve past and possible future problems of compliance.<sup>87</sup> Such a dialogue permits to take into account

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80 Noting though how the inclusion was a 'significant achievement' given the opposition to any sort of compliance management, Christina Voigt, 'The compliance and implementation mechanism of the Paris Agreement' (2016) 25 RECIEL 161, 164.

81 Oberthür (n 79) 49.

82 See Malgosia Fitzmaurice, 'Environmental compliance control', *The Max Planck Encyclopedia of Public International Law III* (2012) 541, 545.

83 For the sake of simplification, the following thus uses the terms 'compliance mechanism' and 'non-compliance procedure' interchangeably.

84 Geir Ulfstein, 'Treaty bodies and regimes' in Duncan B Hollis (ed), *The Oxford guide to treaties* (Oxford University Press 2012) 428, 439.

85 Tim Enderlin, 'Alpine Convention: A different compliance mechanism' (2003) 33 *Environmental Policy and Law* 155, 156.

86 Antonino Ali, 'The EU and the compliance mechanisms of multilateral environmental agreements: The case of the Aarhus Convention' in Elisa Morgera (ed), *The external environmental policy of the European Union* (Cambridge University Press 2012) 287, 302.

87 See Jutta Brunnée, 'Enforcement mechanisms in international law and international environmental law' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring compliance with multilateral environmental agreements. A dialogue between practitioners and academia* (Brill | Nijhoff 2006) 1, 18.

the specific circumstances and challenges of a treaty party.<sup>88</sup> In this manner, the process seeks to build trust amongst treaty parties and thereby stabilises the treaty system.<sup>89</sup>

By ensuring compliance is being kept ‘within reasonable bounds’,<sup>90</sup> the procedure sets out to contribute to the effectiveness of a treaty.<sup>91</sup> In this context, the concept of compliance is a broad and inclusive one,<sup>92</sup> not limited to the notion of a violation of a treaty obligation.<sup>93</sup> Rather, as noted by Bodansky, these mechanisms view compliance and non-compliance as part of a continuum, in which the difference between compliance and breach becomes less significant.<sup>94</sup> In this light, such procedures are capable of responding to situations for which enforcement instruments are not designed.<sup>95</sup>

Ultimately, it is within the power of treaty parties to decide what obligations of the treaty they subject to non-compliance procedures.<sup>96</sup> Therefore, these procedures can also be applied to other than legally binding obligations. Nevertheless, it has been noted that in relation to soft obligations, generally, the effectiveness of compliance mechanisms requires nuanced assessment.<sup>97</sup>

While compliance mechanisms are tailored to the specific needs of a treaty,<sup>98</sup> their development is still marked by several common features. Notably, what can be observed, is an increased institutionalisation of these processes.<sup>99</sup> Indeed, more recently, compliance matters have increasingly been assigned to specifically-established, treaty-based institutions (‘compliance body’).<sup>100</sup> It is this body which establishes facts and assesses a possible situation of non-compliance.<sup>101</sup>

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88 Illustrative, Laura Pineschi, ‘Non-compliance mechanisms and the proposed center for the prevention and management of environmental dispute’ (2004) 20 *Anuario de Derecho Internacional* 241, 247.

89 See Oberthür (n 79) 33.

90 Dupuy and Viñuales (n 42) 344.

91 Lang (n 36) 695.

92 Farhana Yamin and Joanna Depledge, *The international climate change regime: A guide to rules, institutions and procedures* (Cambridge University Press 2004) 380.

93 See Lang (n 36) 693.

94 Daniel Bodansky, *The art and craft of international environmental law* (Harvard University Press 2010) 248.

95 Gerhard Loibl, ‘Compliance procedures and mechanisms’ in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research handbook on international environmental law* (Edward Elgar 2010) 426, 442.

96 See Jutta Brunnée, ‘Environment, multilateral agreements’, *The Max Planck Encyclopedia of Public International Law III* (2012) 484, 496.

97 Peter Lawrence and Daryl Wong, ‘Soft law in the Paris Climate Agreement: Strength or weakness?’ (2017) 26 *RECIEL* 276, 281.

98 Loibl (n 95) 428.

99 See Birnie, Boyle and Redgwell (n 41) 239, 242.

100 Peter G G Davies, ‘Non-Compliance – a Pivotal or secondary function of CoP governance?’ (2013) 15 *International Community Law Review* 77, 78.

101 Brunnée (n 75) 380.

The main political body of a treaty, the Conference or Meeting of the Parties (CoP or MoP), retains final decision-making powers on compliance matters.<sup>102</sup> The normative quality, if any, of the findings on non-compliance is still disputed.<sup>103</sup> Yet, independent of this uncertainty, observers stress that there appears to be general political willingness to accept such findings.<sup>104</sup>

Moreover, it has been highlighted that, over time, compliance mechanisms have become more judicialised. Indeed, such a development was noted in view of different procedural aspects of the compliance mechanism of the Kyoto Protocol,<sup>105</sup> the PA's predecessor.<sup>106</sup> The respective aspects included amongst others rules on conflict of interests, and, significantly, a right to appeal.<sup>107</sup>

For the institutions governing non-compliance procedures, no such judicialisation was argued in general.<sup>108</sup> Nevertheless, members of compliance bodies are growingly required to also dispose of legal expertise.<sup>109</sup> At the same time, they often exercise their function independently of their state governments. Yet, neither do these aspects amount to the typical judicial guarantees, nor is there a case of a compliance body

102 Dupuy and Viñuales (n 42) 350 'necessary feature'.

103 See Laurens Ankersmit, 'An incoherent approach towards Aarhus and CETA: The Commission and external oversight mechanisms' in Inge Govaere and Sacha Garben (eds), *The interface between EU and international law* (Hart Publishing 2019) 321, 321f. Highlighting how even parties to treaties which establish non-compliance procedures have different views on the subject, Xueman Wang and Glenn Wiser, 'The implementation and compliance regimes under the Climate Change Convention and its Kyoto Protocol' (2002) 11 RECIEL 181, 197f.

104 See Peter H Sand, 'The role of environmental agreements' Conferences of the Parties' in Yann Kerbrat and Sandrine Maljean-Dubois (eds), *The transformation of international environmental law* (Editions A. Pedone and Hart Publishing 2011) 89, 92.

105 See e.g., Sebastian Oberthür and René Lefeber, 'Holding countries to account: The Kyoto Protocol's compliance system revisited after four years of experience' (2010) 1 Climate Law 133, 140f; Loibl (n 95) 442; Yamin and Depledge (n 92) 386; Philippe Sands, 'Non-compliance and dispute settlement' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring compliance with multilateral environmental agreements. A Dialogue between practitioners and academia* (Brill | Nijhoff 2006) 353, 357.

106 Further on the distinctive design of the compliance mechanism under the Kyoto Protocol, Meinhard Doelle, 'Compliance and enforcement in the climate change regime' in Erkki J Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate change and the law* (Springer 2013) 165, 170ff. For an evaluation of this mechanism, Sebastian Oberthür, 'Compliance under the evolving climate change regime' in Cinnamon P Carlarne, Kevin R Gray and Richard G Tarasofsky (eds), *The Oxford handbook of international climate change law* (Oxford University Press 2016) 120.

107 Jan Klabbers, 'Compliance procedures' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford handbook of international environmental law* (Oxford University Press 2007) 995, 999.

108 Note though Lang (n 36) 687.

109 Alessandro Fodella, 'Structural and institutional aspects of non-compliance mechanisms' in Tullio Treves et al. (eds), *Non-compliance procedures and mechanisms and the effectiveness of international environmental agreements* (Springer 2009) 355, 369.

comprised of lawyers only.<sup>110</sup> Based on the function these bodies exercise though, it may very well be possible to compare them to quasi-judicial bodies.<sup>111</sup>

### 3.2 The design of the PA's compliance mechanism<sup>112</sup>

The PA's compliance mechanism is established by Article 15.<sup>113</sup> In line with well-known practice though,<sup>114</sup> decision-making on the details of the mechanisms were left to the treaty parties. To assist in this decision-making, an Ad hoc Working Group was mandated to develop the necessary modalities and procedures.<sup>115</sup>

In December 2018, the parties to the PA, represented in the CMA,<sup>116</sup> agreed on the respective modalities and procedures.<sup>117</sup> However, in their decision, the parties also set deadlines for further work to be undertaken. In particular, it mandated the future

110 In practice, this is the case for the compliance committee under the Aarhus Convention, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447. However, this is not mandated by the treaty or subsequent treaty-based decisions-making, see Decision I/7, para 1f. Rather, it can be understood as a logical necessity of the treaty as it constitutes a procedural treaty, thus mainly raising legal questions.

111 See Beyerlin, Stoll and Wolfrum (n 47) 366. For the Implementation Committee of the Montreal Protocol in view of its function, Feja Lesniewska, 'Filling the holes: The Montreal Protocol's non-compliance mechanism' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research handbook on international environmental law* (Edward Elgar 2010) 471, 479. Also, with reference to the function but also the composition of the body, Veit Koester, 'The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)' in Geir Ulfstein, Thilo Marauhn and Andreas Zimmerman (eds), *Making treaties work. Human rights, environment and arms control* (Cambridge University Press 2007) 179, 204. Rejecting a quasi-judicial function of the CoP, Enrico Milano, 'The outcomes of the procedure and their legal effects' in Tullio Treves et al. (eds), *Non-compliance procedures and mechanisms and the effectiveness of international environmental agreements* (Springer 2009) 407, 408.

112 The following section was updated since the presentation of the paper at the conference in November 2018. It now reflects the state of affairs as of September 2021.

113 Insightful on the negotiation history of the mechanism, Voigt (n 80) 162ff.

114 Oberthür (n 79) 49.

115 Decision I/CP.21, Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1, para 103. The work of the Ad Hoc Working Group on the Paris Agreement in relation to the compliance mechanism (item 7) is available at United Nations Framework Convention on Climate Change, 'Information on APA item 7' <<https://unfccc.int/process/bodies/subsidiary-bodies/ad-hoc-working-group-on-the-paris-agreement-apa/information-on-apa-agenda-item-7>> accessed 15 October 2021.

116 Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement, PA, Article 16(1).

117 Decision 20/CMA.1, Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, FCCC/PA/CMA/2018/3/Add.2.

compliance committee,<sup>118</sup> subsequently elected in 2019,<sup>119</sup> to develop the rules of procedure to be applied in the process.<sup>120</sup> These rules were scheduled to be adopted at CMA 3, in 2020.<sup>121</sup>

However, recent events have required changes to the respective timeline: In view of the Covid-pandemic, the compliance committee could only hold two virtual meetings in 2020, impacting on the progression of the development of its rules of procedure.<sup>122</sup> At the end of the second meeting, in October 2020, the committee had managed to agree on a list of possible elements for their rules of procedure, yet their finalising had to be postponed to 2021;<sup>123</sup> the start of the PA's operation. With decision-making on the PA's compliance mechanisms expected for CMA 3 in November 2021,<sup>124</sup> at the time of writing, certain features of the compliance mechanism are thus not finalised,<sup>125</sup> yet, the existing drafts still allow for a discussion.

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118 The first compliance committee was to be elected by November 2019, Decision 20/CMA.1, para 8.

119 Members of the compliance committee were indeed elected at CMA 2 in 2019, with nominations for (alternate) members from certain regions outstanding at that time, see Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its second session, held in Madrid from 2 to 15 December 2019, FCCC/PA/CMA/2019/6, para 8f. The current composition of the committee is available at United Nations Framework Convention on Climate Change, 'Committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement' <<https://unfccc.int/playground-20/level-2/level-3/committee-to-facilitate-implementation-and-promote-compliance-referred-to-in-article-15-paragraph-2#>> accessed 15 October 2021.

120 Decision 20/CMA.1, para 17.

121 Ibid.

122 Annual report of the Paris Agreement Implementation and Compliance Committee to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, FCCC/PA/CMA/2020/1, para 9.

123 Committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, 'Report of the second meeting of the committee referred to in Article 15, paragraph 2, of the Paris Agreement' (2-5 December 2018) UN Doc PAICC/2020/M2/7, Annex 3.

124 United Nations Climate Change Secretariat, 'Message to parties, observers states and observer organizations on information regarding new dates for CoP 26', CAS/MTP/O/COP 26 (28 May 2020) <<https://unfccc.int/news/cop-26-to-take-place-from-1-12-november-2021>> accessed 15 October 2021.

125 Meanwhile, until the CMA in 2021, the committee relies on interim organisational arrangements, Committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, 'Report of the second meeting of the committee referred to in Article 15, paragraph 2, of the Paris Agreement' (26-28 October 2018) UN Doc PAICC/2020/M2/7, Annex 2.

### 3.2.1 Independent expert-based compliance body

The treaty text merely establishes that the compliance committee, forming part of the compliance mechanism, shall be expert-based.<sup>126</sup> In the decision adopting the agreement though, this feature was fleshed out further: the CoP decided that this expert-based treaty-body should consist of 12 members. The members ought to dispose of recognised competence in relevant scientific, technical, socioeconomic or legal fields.<sup>127</sup>

The decision for experts from different disciplines rather than administrative experts can be explained by the nature of the agreement. For one, the agreement is based on the best available science. For another, implementing climate action must be understood and assessed against the background of scientific evidence.<sup>128</sup> Scientific knowledge is thus crucial to understand the workings of the PA. Nevertheless, the decision can also be understood to recognise more generally the importance of legal expertise to facilitate implementation of and compliance with the agreement. In doing so, the requirement can be understood to take account of the legal complexities reflected in the PA.

According to the adopting decision, the election of the committee members has to observe the goal of equitable geographical representation.<sup>129</sup> Thus, the members stem from the five regional groups of the United Nations, from the small island developing States and the least developed countries. What remained unclear was whether these members, while being experts, were to represent the views of their respective governments.

In line with more recent trends,<sup>130</sup> the CMA in 2018 decided that members of the compliance committee shall serve in their individual expert capacity.<sup>131</sup> Thus, they exercise their function independent of state governments. Critically though, in other agreements, such a requirement has not prevented nominations of members who were at the same time governmental civil servants.<sup>132</sup>

The decision for an independent, expert-based body suggests that both qualities are considered to raise the legitimacy of that body: The expertise of the committee

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126 Paris Agreement, Article 15(2).

127 Decision 1/CP.21, Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1, para 102. These requirements are repeated in the modalities and procedures of the compliance mechanisms, Decision 20/CMA.1, para 5.

128 See Gu Zihua, Christina Voigt and Jacob Werksman, 'Facilitating implementation and promoting compliance with the Paris Agreement under Article 15: Conceptual challenges and pragmatic choices' (2019) 9 *Climate Law* 65, 75f.

129 Decision 1/CP.21, Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1, para 102.

130 Loibl (n 95) 430.

131 Decision 20/CMA.1, para 10.

132 Koester (n 111) 193.



members enhances the substantive legitimacy of the body's work.<sup>133</sup> The independence and impartiality of the members enhances its procedural legitimacy.<sup>134</sup>

### 3.2.2 Triggering by parties and the compliance body

Non-compliance procedures can be initiated in different ways ('triggering'). In line with the supportive nature of the procedure, it is always possible for treaty parties to trigger the procedure with regard to their own situation.<sup>135</sup> In addition, there may be a trigger for other treaty parties. At times, there is also a possibility for other treaty-bodies to trigger the mechanism.<sup>136</sup>

The CMA decided for the possibility of self-triggering.<sup>137</sup> At the same time, it follows from the CMA's decision that parties are not capable of triggering the process in view of another party.<sup>138</sup> This decision is quite surprising as such trigger possibilities are generally considered to highlight the common interest underlying the treaty.<sup>139</sup> In this vein, such possibilities are considered a 'rational strategy in the collective 'self-interest' of parties'.<sup>140</sup> Under the PA's compliance mechanism, this rational strategy is omitted. It appears that views according to which such trigger rights are not a rational strategy but resemble adversarial judicial proceedings have prevailed.<sup>141</sup>

Similarly, triggering possibilities by the compliance body are often considered to compensate for any reluctance by treaty parties to initiate procedures themselves.<sup>142</sup> At the same time though, with such powers, the compliance body's role is arguably no longer that of a neutral institution.<sup>143</sup> As a result, the procedure would convey the

133 Petra Lea Láncoš, 'Flexibility and legitimacy – the emissions trading System under the Kyoto Protocol' (2008) 9 German Law Journal 1625, 1650.

134 See Fiona Marshall, 'Two years in the life: The pioneering Aarhus Convention Compliance Committee 2004-2006' (2006) 8 International Community Law Review 123, 128.

135 See Brunnée (n 75) 383.

136 See Markus Ehrmann, *Erfüllungskontrolle im Umweltvölkerrecht* (Nomos 2000) 422.

137 Decision 20/CMA.1, para 20.

138 Decision 20/CMA.1, para 21 'verifying'.

139 Fodella (n 109) 366ff.

140 Peter H Sand, 'Institution-building to assist compliance with international environmental law: Perspectives' (1996) ZaöRV 774, 784.

141 See e.g., Hugh Adsett et al., 'Compliance committees and recent multilateral environmental agreements: The Canadian experience with their negotiation and operation' (2004) 42 Canadian Yearbook of International Law 91, 108 'the very antithesis of a non-confrontational process'.

142 See Oberthür and Lefebvre (n 105) 141.

143 Cesare Pitea, 'The non-compliance procedure of the Aarhus Convention: Between environmental and human rights control mechanisms' (2006) 16 The Italian Yearbook of International Law Online 85, 94; Geir Ulfstein, 'Dispute resolution, compliance control and enforcement in environmental law' in Geir Ulfstein, Thilo Marauhn and Andreas Zimmerman (eds), *Making*

image of an inquisitorial process.<sup>144</sup> This image, however, would not be matching the supportive and facilitative nature of the compliance process.

In view of these considerations, the triggering powers of the PA's compliance committee appear to be a compromise solution. The initial draft negotiation text included two different options: one broader possibility for the compliance committee to initiate proceedings, the other more selective.<sup>145</sup> The latter option found agreement amongst the parties represented in the CMA.<sup>146</sup>

Some triggering possibility for the compliance committee were still agreed though. Indeed, the compliance committee can initiate proceedings where a party has not observed selected procedural obligations.<sup>147</sup> In doing so, the content of the item associated with the procedural obligation, the contributions, communications, information and reports, are not addressed.<sup>148</sup> This distinction thus matches the approach reflected in the PA as a whole.

### 3.2.3 Decision-making powers of the compliance committee

The decision-making powers of the compliance committee were slightly modified by the decision of the CMA.<sup>149</sup> What remained though is a distinction based on who initiated the procedure. Accordingly, where a procedure was initiated by self-triggering, these decision-making powers are more limited; they relate to soft measures only, such as the facilitation of a dialogue.<sup>150</sup> The compliance committee can take these measures directly in view of the non-compliant party. In its decision-making, the committee is thus not dependent on confirmation by the main political body. However, in line with standard models of compliance mechanisms,<sup>151</sup> other

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*treaties work. Human rights, environment and arms control* (Cambridge University Press 2007) 115, 127.

144 See Veit Koester, 'The compliance mechanisms of the Aarhus Convention and the Cartagena Protocol on Biosafety: A comparative analysis of the negotiation histories and their outcomes' in Tullio Treves et al. (eds), *Non-compliance procedures and mechanisms and the effectiveness of international environmental agreements* (Springer 2009) 277, 297.

145 Draft text on APA 1.7, agenda item 7, Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, para 2, of the Paris Agreement, Version of 8 December 2018, para 22.

146 Decision 20/CMA.1, para 22.

147 Decision 20/CMA.1, para 22(a). Currently, there is not agreement as to the exact rules to be followed by the committee in this context, Report of the 5th meeting of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, PAICC/2021/M5/3, Annex 3, Rue 21.

148 Decision 20/CMA.1, para 23.

149 See Draft text (n 145) para 29.

150 Decision 20/CMA.1, para 30(a)-(b).

151 See Loibl (n 95) 436.

measures than advice and assistance are limited to recommendations.<sup>152</sup> They are thus not binding the respective non-compliant party.

It is unclear whether such recommendations are meant to serve as the basis for subsequent decision-making by the CMA. Within other compliance mechanisms this is indeed the case, to the effect that the respective main political body can take further measures on the subject.<sup>153</sup> However, already their mere confirmation by the main political body is deemed to provide any such recommendations with more authority.<sup>154</sup> The relationship between the compliance committee and the CMA is thus one of the issues to be clarified in the rules of procedure.<sup>155</sup>

Where the compliance committee initiated the non-compliance procedure, it can also adopt a further measure: it can issue findings of facts.<sup>156</sup> In view of the facilitative and cooperative nature of compliance mechanisms, such a measure is considered a hard measure.<sup>157</sup> The finding of facts exposes a non-compliant party not only to other treaty parties but also to the outside world. Therefore, relying on a 'name and shame' approach, it works similar to a sanction.<sup>158</sup> Accordingly, it can only apply where the procedure was not initiated by the non-compliant party itself. The initially proposed possibility for the issuing of a statement of concern, also working as a sanction, was not confirmed by the CMA.<sup>159</sup>

### 3.3 A role for civil society?

The crucial role of civil society in bringing about the PA is frequently acknowledged.<sup>160</sup> In a similar vein, authoritative voices have highlighted the role civil society could play in ensuring that states effectuate the PA.<sup>161</sup> However, this role is not immediately reflected in the context of the treaty's compliance mechanism.

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152 Decision 20/CMA.1, para 30(c)-(d).

153 See Lang (n 36) 694.

154 See e.g., Milano (n 111) 414.

155 Committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, 'Report of the second meeting of the committee referred to in Article 15, paragraph 2, of the Paris Agreement' (26-28 October 2018) UN Doc PAICC/2020/M2/7, Annex 2, Section I, institutional arrangements.

156 Decision 20/CMA.1, para 30(a)-(c).

157 See Ulfstein (n 84) 442.

158 See Adsett et al. (n 141) 111.

159 Draft text (n 145) para 29(e)(i).

160 E.g., Maria Ivanova, 'Politics, economics and society' in Daniel Klein et al. (eds), *The Paris Agreement on Climate Change. Analysis and commentary* (Oxford University Press 2017) 17, 25.

161 E.g., Harro van Asselt, 'The role of non-state actors in reviewing ambition, implementation, and compliance under the Paris Agreement' (2016) 6 *Climate Law* 91, 103f.

Most importantly, the CMA did not decide for a trigger possibility for civil society actors. While this is indeed regrettable,<sup>162</sup> renouncing civil society triggering ultimately matches the general pattern: The provision of trigger possibility for civil society in selected compliance mechanisms is regularly explained by reference to the topic and content of the respective MEA.<sup>163</sup> In short, where treaties grant the public rights or affect its position, compliance mechanisms are more likely to allow for submissions by the public to defend their rights.<sup>164</sup> However, while the PA acknowledges that climate change, adaptation and mitigation affects the situation of the public,<sup>165</sup> it does not grant the public any rights.<sup>166</sup>

What is still unclear though is whether the public can *indirectly* engage in non-compliance procedures under the PA. Generally, compliance mechanisms tend to allow for such involvement via the avenue of information.<sup>167</sup> In the context of the PA, this avenue appears to be still open; at least, it appears not to be entirely closed.

Usually, compliance committees can receive information on a compliance matter from different sources. As such rules are often rather broadly termed,<sup>168</sup> in practice, it permits specifically environmental non-governmental organisations (eNGOs) to submit information to the treaty body. How the body proceeds with this information, is of course left to the body's discretion.<sup>169</sup> Yet, examples from compliance practice

162 Recently highlighting the valuable role non-governmental organisations play in the climate regime, Esther Shari Kosa, 'Das Übereinkommen von Paris zum Klimaschutz: Einbindung und Rolle nicht-staatlicher Akteure' (2020) EurUP 17, 20f.

163 The Aarhus Convention, the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 June 1999, entered into force 4 August 2005) 2331 UNTS 202; Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 21 May 2003, entered into force 8 October 2009) 2626 UNTS 119.

164 Cesare Pitea, 'NGOs in non-compliance mechanisms under multilateral environmental agreements: From tolerance to recognition?' in Tullio Treves et al. (eds), *Civil society, international courts and compliance bodies* (Cambridge University Press 2005) 205, 207f.

165 Preamble, para 14.

166 Note though Annalisa Saravesi and Joanne Scott, 'Implementing the Paris Agreement: Lessons from the global human rights regime' (2019) 9 *Climate Law* 159, 160f. See further, Svitlana Kravchenko, 'Procedural rights as a crucial tool to combat climate change Symposium: International human rights and climate change' (2009-2010) 38 *Georgia Journal of International and Comparative Law* 613.

167 Markus Ehrmann, 'Procedures of compliance control in international environmental treaties' (2002) 13 *Colorado Journal of International Environmental Law* 377, 399 'compensation'.

168 E.g., CITES Resolution Conf. 14.3, para 16, according to which the Secretariat as the treaty body competent to trigger non-compliance procedures can act upon 'information it receives about that Party's compliance'.

169 Astrid Epiney, 'The role of NGOs in the process of ensuring compliance with MEAs' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring compliance with multilateral environmental agreements. A Dialogue between practitioners and academia* (Brill | Nijhoff 2006) 319, 334.

show that non-compliance procedures are quite often triggered based on such external information.<sup>170</sup> In any case, within non-compliance procedures, such information permits to review and assess information provided by a party.<sup>171</sup>

In the context of the PA, the respective provision for receiving and relying on external information is somewhat ambiguous. On the one hand, it limits information the committee can receive to ‘processes, bodies, arrangements and forums under or serving the PA’;<sup>172</sup> this would clearly exclude civil society actors. On the other though, the provision states that the committee can seek expert advice. This reference is not qualified in any way, neither in the CMA Decision, nor in the latest version of the committee’s proposed rules of procedure, which has not yet found support in the committee.<sup>173</sup> The open wording thus prompts the question whether at least the organised public, i.e., eNGOs, could be understood to provide such expert advice.<sup>174</sup> Taking this view would certainly leverage the role of non-state actors within the non-compliance procedure, and the PA’s implementation more generally.<sup>175</sup> Hopefully, the issue will soon be clarified at CMA 3.

#### 4 Conclusion and outlook

The PA has been hailed as a giant leap for humankind. Indeed, in view of its bottom-up approach and its nuanced mix of obligations, it is a turning point in global climate policy. Whether it can deliver on its goals and objectives will depend on the effective implementation of its provisions. This effective implementation must include all of the agreement’s provisions, whether hard and legally binding or not.

However, by focusing merely on an enforcement approach, it is doubtful that compliance with all of the PA’s provisions can be ensured. After all, the available enforcement instruments are not fully equipped to deliver on this task. Other contri-

170 See, for the example of CITES, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 UNTS 243, Susan Biniarz, ‘CITES compliance regime’ in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring compliance with multilateral environmental agreements. A dialogue between practitioners and academia* (Brill | Nijhoff 2006) 89, 95.

171 Fodella (n 109) 364.

172 Decision 20/CMA.1, para 35.

173 PAICC/2021/M5/3, Annex 3, Rule 24.2(1) which includes a requirement for consent by the Party concerned, though.

174 E.g., Aarhus Convention MoP, Decision I/7, para 25, for which the relating Guidance Document highlights the instrumental role of NGOs in this information gathering, UNECE (ed), *Guidance document on the Aarhus Convention compliance mechanism* (2nd ed 2019) para 33.

175 See Yamide Dagnet and Eliza Northrop, ‘Facilitating implementation and promoting compliance (Article 15)’ in Daniel Klein et al. (eds), *The Paris Agreement on Climate Change. Analysis and commentary* (Oxford University Press 2017) 338, 349.

butions have demonstrated that it is possible to make the available instrument work to some extent. Yet, whilst doing so, it is fruitful to consider complementary avenues that can secure the effective implementation of the PA.

Treaty-based and tailored compliance mechanisms can present such an avenue. In particular, it could be shown how this mechanism is adaptable to the carefully designed mix of obligations used in the PA. While focusing on procedural obligations, its reliance on expert knowledge and information processed within treaty mechanisms allows addressing substantive issues.

The effectiveness of such a mechanism depends greatly on its design and the willingness of treaty parties to use it. In remaining an inclusive and supportive process though, it can potentially create a sense of obligation and responsibility for the treaty's undertaking. If this potential is successfully exploited, the compliance mechanism can foster the necessary ambition to deliver on the Paris goals.

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