

The Paris Agreement: Options for an effective compliance and implementation mechanism

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The Paris Agreement

Options for an effective compliance and implementation mechanism

Achala Abeysinghe and Subhi Barakat

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With a record number of parties to the UNFCCC ratifying it in the 11 months since its adoption, the Paris Agreement will enter into force before the end of 2016. Its parties will then be legally bound to comply with their commitment to implement it. The agreement establishes a mechanism to facilitate its implementation and promote compliance with its provisions. This paper explores options for the parties, who must now develop modalities and guidelines for the mechanism to ensure the agreement's full and effective implementation.

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Summary

Just as the rule of law has a significant influence on how states behave, the effectiveness of any multilateral agreement depends on the extent to which parties meet their obligations. Participation and ambition are of little value if parties fail to deliver what they agreed to do or refrain from complying with their obligations.¹ So facilitating implementation and promoting compliance with obligations set out in an agreement are important determinants of effectiveness.² Having a functional mechanism to facilitate implementation and promote compliance in a multilateral agreement helps establish trust and confidence among the parties to that agreement,³ increasing both participation and ambition. A legally binding regime with a robust compliance mechanism can also provide much-needed certainty around the enforceability of agreed provisions, and helps ensure that parties can meet the targets they have set. Provisions for compliance give an assurance that parties are serious about their self-determined contributions. And not only can they support effective implementation; they can also prevent parties who are unwilling to contribute – but will eventually benefit from other parties' sacrifices – from free riding.

For these reasons, many environmental treaties include compliance procedures that aim to facilitate implementation and prevent non-compliance.⁴ But it is important that parties develop provisions for compliance under multilateral agreements carefully. A

rigorous, punitive compliance mechanism might deter parties from participating and can have a dampening effect on the ambition of contributions and the overall agreement.⁵ A carefully developed mechanism, on the other hand, could not only prevent non-compliance but also encourage the highest possible participation and ensure the effective implementation of an agreement's provisions.

The Paris Agreement to the UN Framework Convention on Climate Change (UNFCCC) has reached a defining moment as it prepares to enter into force and strengthen the multilateral rules-based regime to address climate change. But its effectiveness will depend on the extent to which parties meet their obligations. Participation and ambition are of little value if parties fail to deliver what they agreed to do or refrain from complying with their obligations.⁶ So facilitating implementation and promoting compliance with obligations set out in the agreement are important determinants of effectiveness.⁷

This paper explores and defines options for parties elaborating the elements of modalities and procedures that will ensure the effective operation of the mechanism to facilitate the implementation of, and promote compliance with, its provisions. Each section also highlights the associated advantages and challenges of the options discussed.

Provisions of the Paris Agreement and Decision 1/CP.21

1

Article 15 of the Paris Agreement establishes a mechanism to facilitate the implementation of – and promote compliance with – the provisions of the agreement (hereafter referred to as the mechanism).⁸ It specifies that the mechanism will consist of an expert-based committee that is facilitative in nature and function; transparent, non-adversarial and non-punitive; and pays particular attention to parties' national capabilities and circumstances (hereafter referred to as the committee).⁹

The committee will operate under the modalities and procedures developed by the Ad Hoc Working Group on the Paris Agreement (APA)¹⁰ and adopted at the first session of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA).¹¹

Although the Paris Agreement and the decision adopting it (hereafter referred to as the decision) give some initial guidance around the mechanism and the committee (Table 1 lists obligations arising from the

provisions of the agreement), parties have yet to agree on and further clarify a number of key elements that will ensure the full and effective operation of the committee. These include: the modalities and procedures of the mechanism's functions; its scope regarding the issues it will address; its guiding principles; institutional arrangements, including membership and flexibility; decision-making options and triggers; outcomes; and its relationship with the CMA. This paper discusses these elements and the main options we believe parties should consider when negotiating the modalities and procedures of the compliance mechanism at COP22 in November 2016 and beyond. The paper also draws lessons from the compliance mechanism established under Article 18 of the Kyoto Protocol, which addressed questions of implementation by the parties, provided advice and recommendations, facilitated assistance for complying with commitments under the Protocol, and applied sanctions in cases of non-compliance.

The mechanism functions



2.1 Modalities and procedures

The Paris Agreement emphasises two distinct yet complementary functions for the mechanism and the committee: facilitating implementation and promoting compliance.¹² To ensure that any modalities and guidelines developed effectively fulfil both functions, it is important that parties understand their distinct natures:

- Facilitating implementation might provide a consultative and facilitative forum for parties to discuss opportunities, challenges and lessons learnt relating to the implementation of the agreement's provisions.
- Promoting compliance might deal more directly with issues regarding individual commitments under the Paris Agreement.

We must note that the mechanism established under Article 15 of the Paris Agreement will be distinctively different from the Kyoto Protocol's compliance mechanism. While the latter had a clear third enforcement function, the former will only focus on facilitating implementation and promoting compliance.

2.2 Scope

According to Article 15.1, the mechanism is established to facilitate the implementation of, and promote compliance with, the provisions of the Paris Agreement. But it makes only general reference to the provisions and does not clarify which provisions the mechanism covers. This leaves the scope of its mandate open for interpretation. So, when developing the committee's modalities and procedures, parties will need to specify which provisions it would facilitate implementation of and which provisions it would promote compliance with.

We could argue that the mechanism's implementation-focused function is most appropriate for provisions that relate to domestic actions or those that guide the design and operation of the regime's organisational structure.¹³ But due to the nationally determined nature of commitments under the agreement, any discussion

on domestic action must respect parties' national sovereignty.

We could also argue that the compliance aspect of any agreement only applies to the provisions that set out legally binding obligations requiring parties to take or refrain from taking specific actions.¹⁴ For example, the committee could ensure that parties meet their obligations in relation to preparing, communicating, maintaining, and updating nationally determined contributions (NDCs).¹⁵ It could also be involved in promoting compliance with reporting and accounting obligations.¹⁶ But it would not be appropriate for the committee to promote compliance in relation to the content of NDCs, as parties are not legally bound to achieve the content of their NDCs. As such, it may be more appropriate for the committee to consider the content of NDCs under its facilitating implementation mandate.

Table 1 highlights various obligations arising from the provisions of the Paris Agreement that could be considered to be within the scope of promoting compliance.

2.3 Limitations

But extending the committee's compliance function to some of the substantive areas would be a challenge. This includes adaptation, where the obligations are to plan and implement adaptation actions. Such obligations lack specificity and stringency, making them more appropriate targets for the committee's implementation function. And because most countries consider adaptation measures as priorities and actions that they have to take anyway to face climate change impacts, promoting compliance around adaptation actions might not be necessary.

It would also be a challenge to extend the committee's compliance function to collective obligations, such as developed country parties providing financial resources to assist developing country parties.

Table 1: Obligations arising from the provisions of the Paris Agreement

ARTICLE	OBLIGATION	RESPONSIBILITY OF
4.2	Prepare, communicate and maintain successive NDCs that it intends to communicate.	All parties
4.2	Pursue domestic mitigation measures, with the aim of achieving the objectives of such NDCs.	All parties
4.3	Use successive NDCs to progress beyond current NDC and reflect the party's highest possible ambition and common but differentiated responsibilities and respective capabilities, in light of its national circumstances.	All parties
4.8	Provide the information necessary for clarity, transparency and understanding, when communicating its NDC.	All parties
4.9	Communicate an NDC every five years.	All parties
4.13	Account for its NDC, thus promoting environmental integrity, transparency, accuracy, completeness, comparability and consistency and avoiding double counting.	All parties
9.1	Provide financial resources to help developing country parties with mitigation and adaptation.	Developed country parties only
9.5	Biennially communicate indicative quantitative and qualitative information related to Article 9.1 and 9.3.	Developed country parties only
9.7	Provide transparent and consistent information on support for developing country parties provided and mobilised through public interventions biennially.	Developed country parties only
13.7	Regularly provide a national inventory report and the necessary information to track progress in implementing and achieving its NDC.	All parties
13.9	Provide information on financial, technological transfer and capacity building support provided to developing countries.	Developed country parties only

Guiding principles

3

Article 15.2 of the Paris Agreement requires the committee to be facilitative, transparent, non-adversarial and non-punitive – principles that reflect the spirit of respect and cooperation that underlie it. The committee's proposed branches (see Section 4) or any other structure the parties adopt for the committee's functioning need to reflect these same principles.

The Paris Agreement explicitly requires the committee to pay particular attention to parties' national capabilities and circumstances. In practice, this will probably mean the committee needs to avoid placing undue burdens on parties (see Section 4.2).

The principles of equity and common but differentiated responsibilities and capabilities are central to the United Nations Framework Convention on Climate Change (UNFCCC) regime and need to be reflected in all dimensions of the implementation of the Paris Agreement. This naturally relates to the institutions and structures created under the agreement, including how the mechanism operates.

The committee



4.1 Institutional arrangements

In Section 2 we discussed the two distinct functions for the mechanism stipulated in the Paris Agreement. There are two options to ensure the effective operationalisation of both functions. The committee could operate as a single body fulfilling each of the two functions under clearly defined modalities and procedures, or it could operate through two branches – an implementation and a compliance branch – while taking decisions in plenary (see Figure 1).

To help parties implement the agreement, the committee as a whole (or its implementation branch) could *inter alia*:

- Clarify the provisions of the agreement and resolve questions related to its operation, and
- Provide appropriate guidance, advice and assistance to parties to overcome any difficulties they encounter when implementing the agreement.

To promote compliance with the agreement's provisions, the committee (or its compliance branch) could, *inter alia*:

- Determine whether a party or group of parties are failing to comply with their obligations under the agreement
- Take actions to anticipate and identify potential cases of non-compliance
- Take actions to prevent or minimise instances of non-compliance, and
- Work with a party or group of parties to remedy instances of non-compliance.

Any measures taken by the committee must be non-punitive and non-adversarial.

If the committee operates on a branch basis, it would need to have the following internal functions:

- A plenary: to take decisions to operationalise the mechanism and make recommendations to the CMA
- A bureau: to provide executive and administrative functions to the committee in general and the committee as a whole or the two branches constituting it
- An implementation branch: to undertake the substantive work to ensure parties implement the agreement, and
- A compliance branch: to undertake the substantive work to ensure parties comply with the mechanism.

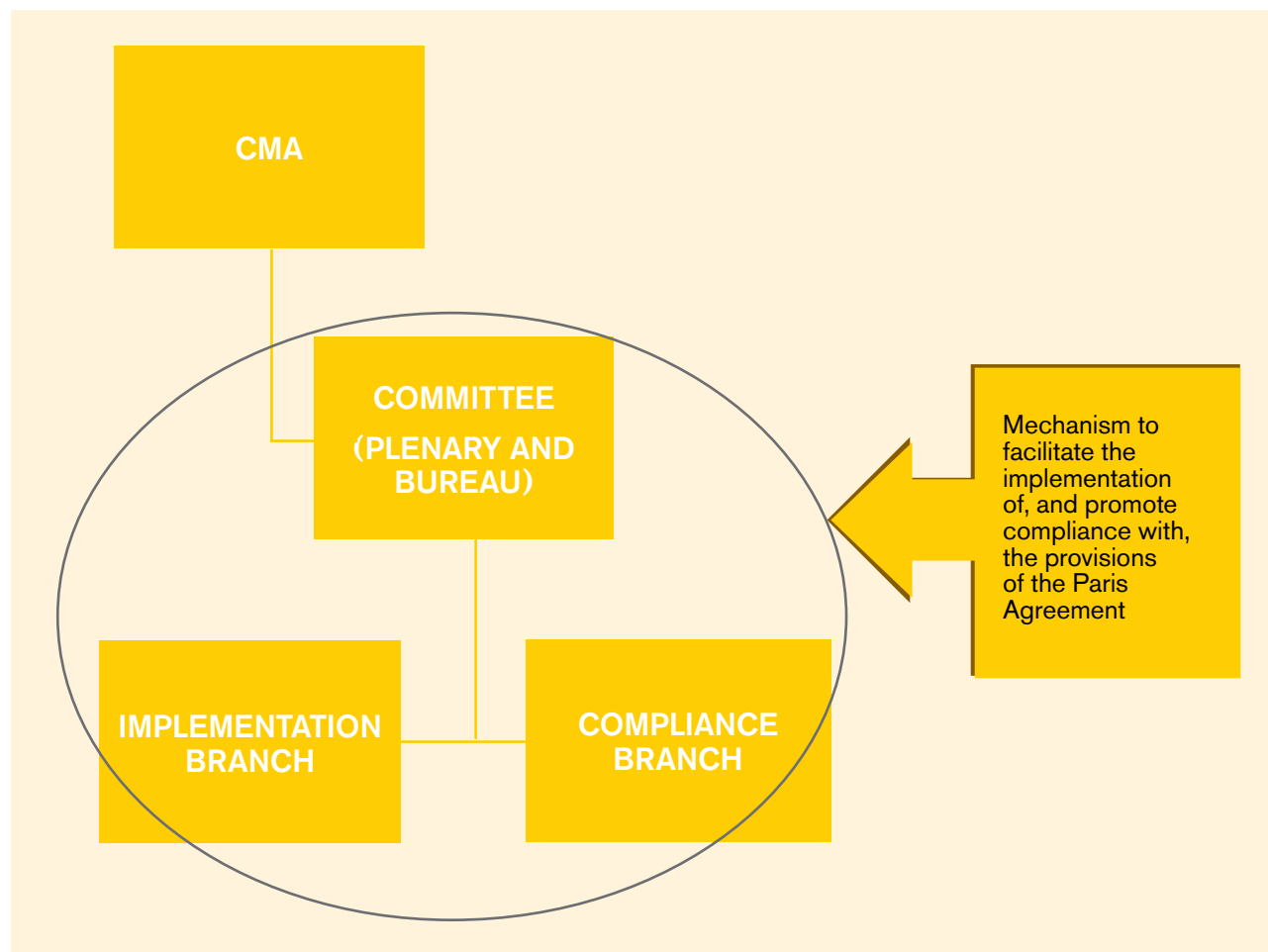
The Kyoto Protocol's Compliance Committee is formed of two branches: enforcement and facilitation. Each is composed of ten members, a chair and a vice-chair. The committee meets in a plenary of members of both branches, and is supported by a bureau, consisting of the chair and vice-chair of each branch.

4.2 Relationship with the CMA

The CMA will have authority over and provide guidance to the committee on an ongoing basis (see Figure 1). It will adopt rules of procedure for the committee at its first session, based on APA recommendations, and provide ongoing guidance for the functioning of the mechanism as appropriate.

The committee must report annually to the CMA¹⁷ and could provide recommendations for CMA decisions related to facilitating implementation or promoting compliance.

Figure 1: Proposed option for the mechanism’s institutional structure under Article 15 of the Paris Agreement



4.3 Flexibility

Article 15 calls for the committee to pay particular attention to parties’ national capabilities and circumstances. Some might argue that the committee’s functions apply equally to all parties, particularly because many Paris Agreement provisions apply in the context of common but differentiated responsibilities and capabilities, in the light of national circumstances. So in theory, this implicit application of appropriate differentiation in the functioning of the mechanism should render the application of further formal differentiation in the committee’s modalities and procedures unnecessary. This is likely to be a controversial point in the upcoming negotiations to elaborate these modalities and procedures.

But we believe there is a need to apply some flexibility, whether implicit or explicit. This could be around the timeframes a party has to satisfy queries related to implementation and compliance or around the level and intensity of support particular parties get to facilitate implementation and compliance.

In any case, the committee needs to adequately consider the special circumstances of Least Developed Countries (LDCs) and Small Island Developing States (SIDS), and the additional support and flexibility they might need to implement the agreement and comply with their obligations under it.

4.4 Membership

The agreement sets out clearly that the committee must be expert based. Decision 21 specifies that the committee will consist of 12 members with recognised competence in relevant scientific, technical, socioeconomic or legal fields. They will be elected 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 SIDS and the LDCs, and should take gender balance into account.

Similar to the modalities of the Kyoto Protocol's compliance committee, the CMA could consider electing an alternate member for each committee member, respecting the guidance in Decision 21 and any representation requirements. Committee members and their alternates should serve in their individual capacities and act independently and impartially, avoiding real or apparent conflicts of interest around matters under the committee's consideration.

Going forward, if it is to operate through two branches, the committee in plenary and the bureau should decide on the membership of each branch from the members of the committee, with equal representation of the five regional groups in each branch. The SIDS and LDCs would consequently be represented on only

one branch each, but they could alternate membership in the branches every election or appointment cycle to minimise any impact of this arrangement. For this reason, it might be most appropriate for the committee to take all decisions sitting in plenary, for both functions of mechanism.

The implementation and compliance branches could interact and cooperate in their functioning. As necessary, the bureau could designate one or more members of each branch on a case-by-case, non-voting basis to contribute to the work of the other branch.

If the committee were to operate as a single body, it would avoid this representation issue.

Decision making

5

It is important that parties adopt the committee's recommendations by consensus. This reflects the UNFCCC's long-standing working practice and the cooperative nature of the Paris Agreement regime. If parties fail to reach consensus after exhausting all efforts, recommendations could be adopted by a three-fourths majority vote of the members present and voting as a last resort. It might also be appropriate to require a quorum of three-fourths for decisions to be taken.

It is important to learn from the experiences of existing mechanisms. For example, the Kyoto Protocol's compliance mechanism has struggled to achieve quorum at its meetings, even though it has alternates for every member.¹⁸ With this in mind, a two-thirds quorum might be more appropriate for the mechanism's effective operation, although this might introduce legitimacy issues. A three-fourths majority of a two-thirds quorum means that in general only six affirmative votes from a 12-member committee or three affirmative votes from a six-member branch of the committee would be enough to carry a decision.

The other option is for the committee to require quorum only for certain kinds of decisions, such as measures taken to remedy instances of non-compliance.

5.1 Triggers

The Paris Agreement does not specify the triggers that would bring a matter before the committee. In developing the committee's modalities and procedures, parties should consider appropriate triggers, depending on whether a particular instance relates to implementation or compliance functions. Where the committee operates as a single body, it would need to be clear when it is considering instances related to either of its functions.

For matters related to facilitating implementation, triggers for bringing a matter before the committee (or its implementation branch) could include:

- Self-referral by a party or group of parties, or
- Referral by the relevant competent body on the basis of the technical expert review under Article 13, which establishes the transparency framework of the Paris Agreement.¹⁶

For matters related to promoting compliance, triggers for bringing a matter before the committee (or its compliance branch) could include:

- Self-referral by a party or group of parties
- Referral by a party or group of parties around the compliance of another party or group of parties
- A request from the CMA
- A decision by the committee itself,¹⁹ or
- Referral by the relevant competent body on the basis of the technical expert review under Article 13.¹⁷

Although the transparency framework and the work of the committee will be closely linked, transparency provisions cannot be a substitute for provisions that facilitate implementation and promote compliance. But a robust transparency system can assist compliance.

Outcomes



Article 15.2 of the Paris Agreement requires the committee to be non-adversarial and non-punitive. Apart from this, the outcome of the mechanism on any matter it considers is unclear. But we could argue that the committee should produce different outcomes in exercising its two distinct functions.

When it exercises its implementation function, the committee's outcomes (or those of its implementation branch) could include conclusions and measures that the committee deems suitable to be taken by the party or group of parties concerned for the effective implementation of relevant provisions of the agreement. These could include:

- Clarifying and resolving questions on implementation
- Providing advice and assistance to resolve particular difficulties encountered in the course of implementing the agreement
- Referring parties to other bodies or sources of support, including capacity building, finance or technology, or
- Introducing a process for tracking progress on implementation.

We could argue that, where progress on implementation is lacking, the provision of financial assistance could provide a negative incentive to effectively implement domestic measures. But we also note that the committee itself has no financial resources to provide to parties and that it can only direct the party in question to other bodies that may be able to provide financial or other assistance.

When it exercises its compliance function, the committee's outcomes (or those of the compliance branch) could include:

- Asking the party concerned to provide information about its performance regarding the obligation in question and to provide an explanation or reasons for non-compliance

- Producing regular reports that identify and verify cases of non-compliance and options to overcome barriers to compliance
- Issuing recommendations to the party concerned
- Asking the party to develop a compliance action plan that includes: an analysis of the causes of non-compliance; a description of the measures it has taken to become compliant; and a timetable for implementing the measures within a given time period, or
- Issuing a cautionary note and/or declaration of non-compliance in case of continued non-compliance.²⁰

Due to the mechanism's non-punitive nature, the committee should always seek clarification and understanding of the cause of non-compliance and the challenges parties face, and work with the parties concerned to address these issues.

Most multilateral environmental agreements (MEAs) use compliance systems to prevent non-compliance, facilitate implementation and ensure enforcement. In general, MEA enforcement provisions seek to facilitate compliance and only penalise as a last resort.²¹ But the Kyoto Protocol's enforcement branch has a quasi-judicial function, imposing penalties on non-compliant parties that include increasing the party's target level and suspending treaty rights. This mechanism addresses compliance issues in developed countries only; its facilitative branch supports implementation by developing countries. Overall, the Kyoto Protocol's track record has given us the opportunity of learning by doing,²¹ so we would be wise to use and built on this knowledge.

Looking forward



The Paris Agreement's compliance mechanism is a crucial element that can ensure the highest legal rigour on binding provisions. Parties should design it in a manner that strengthens trust among them and helps them meet their commitments to implement the agreement effectively.

Moving forward, it is important that parties take lessons learnt from the compliance mechanisms of other MEAs, particularly the experience with Kyoto, which demonstrated that early prevention of non-compliance could be an effective measure to promote compliance.²¹

The mechanism's overall goal is to facilitate the implementation of – and promote compliance with – the provisions of the Paris Agreement. With this in mind, parties will enter into a process of developing the modalities and procedures to operationalise the mechanism. Their next clear opportunity to engage in discussions for modalities and procedures is at COP22 in Marrakesh in November 2016.

To facilitate the committee's deliberations on modalities and procedures at COP22, the co-chairs of the APA have presented the following guiding questions:

1. How could the scope of the mechanism for facilitating implementation and promoting compliance address the mandatory elements included in the Paris Agreement?
2. How should the respective national capabilities and circumstances of parties be reflected in the design of the mechanism for facilitating implementation and promoting compliance?
3. What will trigger the work of the committee and how will the proposed triggers and actions be consistent with the facilitative, non-adversarial and non-punitive nature of the mechanism?
4. What will be the relationship with existing arrangements and bodies under the UNFCCC, if any?
5. How should the committee enable the participation of a party in the process to facilitate implementation and promote compliance?

We have yet to see how parties will capture their deliberations under these questions and take them forward.

We will produce an updated version of this based on the COP 22 discussions to facilitate the negotiations on compliance in 2017.

Acronyms

APA	Ad Hoc Working Group on the Paris Agreement
CMA	Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement
LDCs	Least Developed Countries
MEA	multilateral environmental agreements
NDC	nationally determined contributions
SIDS	Small Island Developing States

Related reading

Unless otherwise specified, these are all available at <http://pubs.iied.org>

Abeyasinghe, A (21 September 2016) Steps to enforcing the Paris Agreement. See www.iied.org/steps-enforcing-paris-agreement

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Endnotes

- 1 Mitchell, R (2007) Compliance theory. In: Bodansky, D *et al.* (eds). (2007) *The Oxford Handbook of International Environmental Law*. Oxford University Press.
- 2 Brunnee, J (2012) Promoting compliance with multilateral environmental agreements. In: Brunnee, J *et al.* (eds). 2012) *Promoting compliance in an evolving climate regime*. Cambridge University Press.
- 3 See Manguiat, M and Bondi, O (2013) The compliance committee of the Kyoto Protocol: towards a robust assessment of compliance with targets for the first commitment period. See www.inece.org
- 4 Bodansky, D (2010) *The art and craft of international environmental law*. Harvard University Press.
- 5 Voigt, C (2016) The compliance and implementation mechanism of the Paris Agreement. *RECIEL* 25 (2).
- 6 Mitchell, R (2007) Compliance theory. In: Bodansky, D *et al.* (eds). (2007) *The Oxford Handbook of International Environmental Law*. Oxford University Press.
- 7 Brunnee, J (2012) Promoting compliance with multilateral environmental agreements. In: Brunnee, J *et al.* (eds). 2012) *Promoting compliance in an evolving climate regime*. Cambridge University Press.
- 8 Article 15 of the Paris Agreement. FCCC/CP/2015/10/Add.1.
- 9 Similar language appears in the Article 13 of UNFCCC and Article 15 of the Minamata Convention on Mercury. See <http://tinyurl.com/od8tdn6> and www.mercuryconvention.org
- 10 Decision 1/CP.21, paragraph 103.
- 11 Article 15.3 of the Paris Agreement.
- 12 Article 15 of the Paris Agreement. Contrast these with the two functions of the Compliance Committee under the Kyoto Protocol, which focused on compliance and enforcement.
- 13 As note 2. According to Bodansky, implementation is reserved for situations “in which the relationship between an international rule and the behaviour it aims to change is more attenuated” than straightforward compliance. According to Bodansky, implementation depends on factors such as depth, stringency or type of commitment, the capacity of the state and the degree to which implementation converges with domestic policy objectives.
- 14 According to Article 18 of the Kyoto Protocol, the compliance mechanism determines and addresses cases of non-compliance with the protocol’s provisions. Procedures and mechanisms adopted by the parties clarifies that they facilitate, promote and enforce compliance with their commitments under the protocol. See FCCC/KP/CMP/2005/8/Add.3.
- 15 Article 4.2 of the Paris Agreement.
- 16 Note that obligations under the Paris Agreement are procedural. The Kyoto Protocol contained legally binding commitments to limit and reduce quantified emissions as well as methodological and reporting requirements for its annex I parties.
- 17 Article 15.3 of the Paris Agreement
- 18 As note 1. The Kyoto Protocol’s enforcement branch has resorted to collecting additional votes by electronic means at several meetings. “The Committee has repeatedly requested the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to authorize all members and alternate members to receive funding for participating in meetings of the Committee, arguing that such funding is ‘essential’ for their full independence.”
- 19 The compliance committee could become active on its own initiative to consider parties’ compliance with their respective obligations. This is particularly relevant in the context of the public registry (Article 4.12) with regards to: successive communication of an NDC; biennial communications, including national inventory report and information on progress in implementation in accordance with Article 13, paragraphs 7, 8, 9, and 10; biennial communications of developed country parties according to article 9.5 and 9.7; or any other reporting instrument or channel which are to be decided by the CMA. Based on the information available through those information channels, the committee could assess whether a party has complied with its obligations.
- 20 The Basel Convention has a compliance mechanism that exhausts all facilitative measures. It will only report to the COP for a cautionary statement or further measures once it has exhausted these. See Article 20 of the ‘Terms of reference of the mechanism for promoting implementation and compliance. See <http://tinyurl.com/hebszr8>
- 21 See Abeyasinghe *et al.* (2015) *Compliance in the 2015 Climate Agreement*.

With a record number of parties to the UNFCCC ratifying it in the 11 months since its adoption, the Paris Agreement will enter into force before the end of 2016. Its parties will then be legally bound to comply with their commitment to implement it. The agreement establishes a mechanism to facilitate its implementation and promote compliance with its provisions. This paper explores options for the parties, who must now develop modalities and guidelines for the mechanism to ensure the agreement's full and effective implementation.

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