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A QUESTION OF COMPLIANCE
THE PARIS AGREEMENT IMPLEMENTATION AND
COMPLIANCE COMMITTEE

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ABSTRACT

International compliance mechanisms are crucial to the effectiveness of international environmental treaties: instances of non-compliance not only undermine directly the goals of such agreements but, equally important, also erode the trust necessary to promote participation and ambition. This dissertation examines and assesses the Paris Agreement Compliance Committee (PAICC), a mechanism established in Article 15 of the Paris Agreement to ‘facilitate implementation of and promote compliance with [its] provisions’. The PAICC builds on the experience of previous compliance mechanisms – in particular, the Kyoto Protocol Compliance Committee –, and responds to the bottom-up nature of the Agreement. This analysis observes, however, that, in its current design, the Committee faces significant limitations in addressing cases of non-compliance with legally binding procedural obligations in the Agreement – including lack of enforcement powers and narrow grounds for action. Nonetheless, this assessment also suggests that facilitative action could become the central strength of the Committee.

Keywords: climate change, compliance, enforcement, multilateral environmental treaties, Kyoto Protocol, Paris Agreement, Paris Agreement Compliance Committee, Paris Rulebook.

CONTENTS

- USE OF TERMS 5**
- 1. Introduction 6**
- 2. Background: the Paris Agreement under the United Nations Framework Convention on Climate Change 2015 8**
- 3. The Implementation and Compliance Committee: creation, purpose and composition 10**
 - 3.1. Purpose: ‘a mechanism to facilitate implementation and promote compliance’ 11
 - 3.2. Composition: an ‘expert-based’ Committee 13
- 4. Functions, modalities and procedures, and meetings 15**
 - 4.1. Decision 20/CMA.1: Modalities and Procedures 16
 - 4.2. Initiation of consideration of issues by the Committee 20
 - 4.3. Decision 24/CMA.3 and Decision 24/CMA.4: Rules of Procedure 23
 - 4.4. Meetings of the Committee since 2020 24
- 5. The Kyoto Protocol Compliance Mechanism 25**
 - 5.1. Background 25
 - 5.2. The Compliance Committee 26
 - 5.3. Powers of the Compliance Committee 29
 - 5.4. Comparative with the Article 15 Implementation and Compliance Committee 30
 - 5.5. Assessment of the Kyoto Protocol and its compliance mechanism. The Paris Agreement, an opportunity for new approaches? 32
- 6. Affairs overview: compliance, enforcement and facilitation 34**
 - 6.1. Compliance in multilateral environmental agreements 34
 - 6.2. The Paris Agreement Implementation and Compliance Committee: a compliance mechanism without enforcement functions? 36
 - 6.3. A limited facilitative mechanism 37
 - 6.4. Further thoughts 39
- 7. Conclusions 40**
- 8. References 42**

USE OF TERMS

CMA: Conference of the Parties serving as the meeting of the Parties to the Agreement

CMP: Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol

COP: Conference of the Parties

ETF: Enhanced Transparency Framework

GHG: greenhouse gas

GRULAC: Latin American and Caribbean States

LDCs: Least Developed Countries

MEA: Multilateral Environmental Agreement

NDCs: Nationally Determined Contributions

PAICC: Paris Agreement Implementation and Compliance Committee

SIDS: Small Island Developing States

TER: Technical Expert Review

UNFCCC: United Nations Framework Convention on Climate Change

WEOG: Western European and Other States

1. Introduction

The Paris Agreement Implementation and Compliance Committee (PAICC) is defined in the text of the Agreement as an expert-based committee, designed to function in a manner ‘transparent, non-adversarial and non-punitive’. Reflecting the complex compromise reached by the parties during the Paris negotiations, its composition and functions have been further developed in later decisions adopted by the Conference of the Parties serving as the meeting of the Parties to the Agreement.

The establishment of the Implementation and Compliance Committee in Article 15 shows a consensus among the parties to the Agreement ‘on the necessity and desirability of promoting compliance’.¹ As a paradigmatic example of a multilateral environmental treaty, one of the central issues (if not the most relevant) in assessing the Paris Agreement is its effectiveness. Christina Voigt, current Co-Chair of the Committee, argues that the effectiveness of an environmental treaty is determined by three elements: participation, ambition and compliance.² In this respect, she claims that the Paris Agreement struck a balance between ‘broad participation and a level of commitment that mattered in the fight against climate change’ by establishing procedural obligations of a legally binding nature, awarding the parties a considerable degree of discretion in ascertaining the subjective content of their commitments. Assessing compliance with these obligations is thus an indispensable requirement to ensure the effectiveness of the Agreement³ and to establish the trust and confidence among parties needed to increase participation and ambition.⁴ This is the core task, together with facilitating the performance of the parties in their implementation efforts, of the Committee.

The goal of this analysis is to examine and critically assess the implementation and compliance mechanism set up in Article 15 of the Agreement. I will provide a detailed description and assessment on the role and purpose PAICC, its constitution procedure, functions and grounds for action, as well as a review of the first decisions it has adopted, eight years after the signature of Agreement and after the first global stocktake in COP28 in Dubai (Sections 3 – 4). As the design of the Committee builds on the experience of previous

¹ C. Voigt, ‘The Compliance and Implementation Mechanism of the Paris Agreement’, *Review of European Community and International Environmental Law*, 2016, 25 (2), p. 161.

² S. Barret, *Environment and Statecraft: The Strategy of Environmental Treaty-Making*, Oxford University Press, 2003; D. Bodansky, ‘Legally Binding Versus non-legally Binding Instruments’, in S. Barret, c. Carraro and J. de Melo (eds.), *Towards a Workable and Effective Climate Regime*, CEPR Press and Ferdi, 2015, p. 155 (through C. Voigt, *Ibid.*).

³ J. Brunnée, ‘Promoting Compliance with Multilateral Environmental Agreements’, in J. Brunnée, M. Doelle and L. Rajamani (eds.), *Promoting Compliance in an Evolving Climate Regime*, Cambridge University Press, 2012, p. 38 (through C. Voigt, *Ibid.*).

⁴ C. Voigt, *Op. Cit.*, 2016, p. 162.

multilateral environmental agreements, this analysis will be furthered with comparative examination assessing the fundamental elements of the implementation mechanism in the Kyoto Protocol, the Compliance Committee, a committee with different internal organisation, functions and legal powers (Section 5). Finally, I will provide an overview of key issues regarding compliance and of the main challenges faced by the Committee (Section 6).

For these purposes, I have mainly examined primary legal sources – the Kyoto Protocol, the Paris Agreement, and later decisions of the Conference of the Parties – and reports – the Kyoto Protocol Compliance Committee reports, and the first reports issued by the PAICC (2020 – 2024)–; and commentaries in academic literature in relation to both mechanisms, as well as more general analysis regarding compliance in environmental agreements.

I argue that the constitution of the PAICC under the Paris Agreement represents the culmination of a process of transition from traditional compliance mechanisms, with a focus enforcement, to contemporary compliance mechanisms, based in facilitating implementation and promoting compliance. This new approach embraces the characteristics and limitations of multilateral environmental agreements and the realities of non-compliance. I also try to show that, although the ‘non-punitive’ nature of the mechanism is coherent with an Agreement which only provides for legally binding procedural obligations, the Committee should be left with stronger powers in addressing cases of non-compliance with these obligations, as they determine the effectiveness of a successive scaling-up of efforts and, in consequence, ultimately of the goals in Article 2 of the Agreement. Furthermore, I contend that the Committee should embrace a more proactive role in facilitating implementation by the parties by actively initiating facilitative procedures, and by being more severe in ascertaining cases of ‘significant and persistent’ inconsistencies that can lead to initiation of consideration of issues. Finally, I observe that, in its current design and regulation, it is through facilitative engagement with the parties that the Committee can play a most effective role.

Considering that the Committee is a mechanism of recent constitution and implementation, carrying its functions actively only since 2020, and which has been subject to little academic review, the analysis proposed, together with the comparative examination with the Kyoto Compliance Committee, is innovative and of relevance. However, this has also posed significant challenges in carrying this research: as the PAICC’s work is still limited, it is difficult to assess properly its success. This project could therefore have continuity in further study of the work of the Committee, and more extensive assessment as a reference model for the development and improvement of future compliance mechanisms for multilateral environmental treaties.

2. Background: the Paris Agreement under the United Nations Framework Convention on Climate Change 2015

The Paris Agreement is an international legally binding treaty on climate change.⁵ It was adopted at the UN Climate Change Conference (COP21) by 196 parties in Paris, France, on 12 December 2015. On 4 November 2016 it came to force, after ratification by the European Union, thus exceeding the required threshold of 55 ratifying countries producing at least 55% of global emissions.⁶ It is widely regarded as landmark in the multilateral climate change process as the first ‘binding agreement [that brought] all nations together to combat climate change and adapt to its effects’.⁷ It has been signed by all UN recognized states, including North Korea. However, it has not been ratified by Iran, Libya and Syria.

The Agreement established a new international framework oriented towards an acceleration of efforts to cut greenhouse gas emissions and adaptation to the impacts of climate change. The climate transformation required for these purposes is articulated through three core goals (as displayed in Article 2 of the Agreement):

1. ‘To keep global temperature rise well below 2 degrees C above pre-industrial levels and to pursue efforts to limit temperature rise to 1.5 degrees C);
2. to increase the ability of countries to deal with the impacts of climate change; and
3. to make finance flows consistent with a low-emissions and climate-resilient development pathway.’

While the Paris Agreement established the framework for international action, the tools and processes ‘to enable its full, fair and effective implementation’ were laid out in the Paris Rulebook. The Rulebook was largely adopted in the Katowice climate package (COP24/CMA.1).⁸

The implementation of the Agreement requires profound transformation in all fields, based (as extensively referenced in the text of the Agreement) on the best available science. It works on a basis of five-year cycles of ‘increasingly ambitious climate action’ – or ratcheting up – carried out by the parties.⁹ The Agreement differentiates from the Kyoto Protocol (its

⁵ UNFCCC Website, ‘The Paris Agreement’ <<https://unfccc.int/process-and-meetings/the-paris-agreement>> accessed October 1, 2023.

⁶ S. Yeo, ‘Explainer: The adoption, signing and ratification of the UN climate deal’ (Carbon Brief, 19 April 2016). <<https://www.carbonbrief.org/explainer-the-adoption-signing-and-ratification-of-the-un-climate-deal>> accessed 1 June 2024.

⁷ *Ibid.* 1

⁸ Explaining the Paris Rulebook: What You Need for COP24, World Resources Institute

⁹ *Ibid.* 2

predecessor) in a number of ways, however, its main feature is an innovative bottom-up approach which is characteristic of multilateral environmental agreements (in which it is left to the discretion of the Parties to determine which actions they are to adopt to achieve the goal of climate change mitigation) and a more relevant role for developing countries.

Perhaps the main provision reflecting this bottom-up approach is Article 4 of the Agreement, the central provision of the Agreement (together with Article 2), which sets up the mechanism of Nationally Determined Contributions (NDCs), through which Parties determine themselves the contributions they will make – i.e. their national climate action plans or the actions undertaken with the aim of reducing GHG emissions – in order to achieve the goals of the Agreement. Although Article 3 requires that these Contributions ought to be ambitious (reflecting the ‘highest possible ambition’¹⁰) and reflect a progression over time, Parties are awarded a significant degree of discretion in determining the specific goals to be achieved nationally and the nature of the actions directed towards achieving these (greenhouse-gas mitigation plans can involve a diversity of provisions in the fields of mitigation, adaptation, finance, technology transfer and transparency¹¹). In determining contributions to address climate change ‘nationally’ (as opposed to globally), a Party can and should take into account its ‘national circumstances and priorities’ – it is worth noting how this terminology emphasises the ‘bottom-up’ approach of the contributions to be adopted by Parties.¹²

The table in the following page summarizes the essential differences¹³ between the Paris Agreement and the Kyoto Protocol.

¹⁰ It should be highlighted that the concept of ‘highest possible ambition’ is of a highly indeterminate and ambiguous nature, with the implications this indeterminacy has in terms of accountability.

¹¹ F. Taibi; S. Konrad; O. Bois von Kursk. A. Sharma (ed.). *Pocket Guide to NDCs: 2020 Edition*, European Capacity Building Initiative, 2020. p. 1

¹² *Ibid.*

¹³ As outlined in UNDP Documents, Training on Article 6.2 of the Paris Agreement: Capacity Building Program for Article 6.2 Implementation and operationalization. Support Guide for UNDP Article 6.2 Training Course. Available at: https://www.learningfornature.org/wp-content/uploads/2020/07/Support_Guide_UNDP_UNFCCC_23.01.2023-compressed.pdf

Figure 1: the Paris Agreement and the Kyoto Protocol, main differences

Paris Agreement	Kyoto Protocol
<ul style="list-style-type: none"> • Bottom-up approach • Large role of developing countries • Developing countries commit through NDCs • Developed countries commit through NDCs and provide support to developing countries • Weak compliance regime. Transparent reporting and facilitation as the main means for assessing progress 	<ul style="list-style-type: none"> • Top-down approach • Limited role of developing countries • Developing countries do not have targets • Compliance regime for Annex 1 countries only

The contrasting approaches in Kyoto Protocol and the Paris Agreement result in significant differences in their implementation and compliance mechanisms. While the Kyoto Protocol establishes a mechanism with wide enforcement competences, the Paris compliance mechanism, often regarded as weaker, relies on the transparent reporting by the parties and in a facilitative approach through engagement and dialogue with the concerned Parties.

This recently constituted and implemented mechanism, the Paris Agreement Implementation and Compliance Committee, has been functioning only since 2020, and it has been the subject to little academic review. It is the purpose of this research to analyse and assess the composition, functions and work of the Committee to this date.

3. The Implementation and Compliance Committee: creation, purpose and composition

The Paris Agreement Implementation and Compliance Committee (PAICC) is established under Article 15, paragraphs 1 and 2 of the Paris Agreement, which state the following:

‘1. A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.

2. The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties.’

Paragraph 3 provides that the operation of the PAICC will be governed by the modalities and procedures to be adopted by the Conference of the Parties serving as the meeting of the Parties to the Agreement at its first session. It also establishes a mandate to the Committee to report annually to the Conference of the Parties serving as the meeting of the Parties to the Agreement (CMA).

‘3. The committee shall operate under the modalities and procedures adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement at its first session and report annually to the Conference of the Parties serving as the meeting of the Parties to this Agreement.’

3.1. *Purpose: ‘a mechanism to facilitate implementation and promote compliance’*

Implementation and compliance are central to the effectiveness of multilateral environmental agreements.¹⁴ However, experience shows that the international community cannot entirely rely on states to implement international environmental commitments, even when involving simple procedural commitments, which are often left unfulfilled by states.¹⁵ Violations of environmental agreements not only constitute direct harm to the environment but also ‘erode the capacity for international cooperation more generally by undermining trust’.¹⁶ As environmental agreements build on reciprocity¹⁷ – each state acting in exchange for action by the others –, lack of confidence in other parties’ action will often result in the parties having less incentives to take action themselves. It is because of this, that international compliance measures are imperative to make international law effective.¹⁸

The central purpose of the PAICC is, as expressly formulated in Article 15 para 1 of the Agreement, to facilitate the implementation of and to promote compliance with the provisions of the Paris Agreement. According to the UN Climate Change News portal, the task of the Committee should promote further ambition towards the goals of the Agreement in addressing climate change over time ‘by providing facilitation to implementation and helping governments

¹⁴ C. Voigt, *Op. Cit.*, 2016, p. 161.

¹⁵ D. Bodansky, *The Art and Craft of International Environmental Law*, Harvard University Press, 2010, p. 226. Daniel Bodansky highlights a set of examples involving State violations of international conventions, among them: the Taliban dynamiting of the giant Buddhas at Bamiyan, protected under the World Heritage Convention; Canada’s lack of compliance with the Kyoto Protocol; and the failure by a considerable proportion of the Parties to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) to implement its commitments.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ D. Bodansky, *Op. Cit.*

understand the compliance aspects of the regime, [...] [what] enables countries to deliver on their national climate action plans under the Paris Agreement [...]’.¹⁹

As it is the case with the whole of the Paris Agreement – its character and normative strength were subject to intense political, legal and academic debate both during negotiations and after its entering into force²⁰, with some Parties demanding a legally binding treaty with matching legally binding obligations and others campaigning for a less binding or even no-binding agreement creating no legally binding obligations –, Article 15 reflects a compromise²¹: although the mandate of the Committee in the wording of the Agreement is ‘to facilitate implementation of and promote compliance with the provisions of [the] Agreement’, Article 15 does not specify how this will crystallize in relation to the different provisions of the Agreement. The issue was left to be negotiated by the Parties at a later stage, during the negotiations of decision 20/CMA.1 (‘Modalities and Procedures’, also known as the Paris Rulebook). In the course of such discussions two positions became defined: whereas some Parties contended that the Committee should be aimed at performing two distinct functions, ‘facilitating implementation’ and ‘promoting compliance’ – the first function intended to provide a facilitative forum for the Parties to discuss and address issues’ of implementation in a wide sense²² and the latter being only applicable to the binding provisions in the Agreement²³ –, other delegations claimed that these terms did not establish per se two different functions that ought to be associated separately to binding or non-binding commitments but rather an expression that the Committee was to be left with broad discretion in addressing the different provisions in the Agreement with a range of different outcomes.

As an example of the first position, in one of the first reviews of the Article 15 mechanism, Christina Voigt proposed the creation of two branches within the Committee: a ‘Compliance Branch’, which would deal with ‘compliance issues with regard to legally binding obligations of the Parties’ in order to achieve an ‘effective functioning of the Agreement’ and a ‘successive

¹⁹ UN Climate Change News, ‘Paris Agreement Implementation and Compliance Committee (PAICC) Adopts Work Plan for 2020-21’ (UN Climate Change News, 6 November 2020). <<https://unfccc.int/news/paris-agreement-implementation-and-compliance-committee-paicc-adopts-work-plan-for-2020-21>> accessed 24 September 2023

²⁰ D. Bodansky, ‘The Legal Character of the Paris Agreement’, *Review of European Community and International Environmental Law*, 2016, 25(2) p. 142.

²¹ Gu Z., C. Voigt, J. Werksman, ‘Facilitating Implementation and Promoting Compliance With the Paris Agreement Under Article 15: Conceptual Challenges and Pragmatic Choices’, *Climate Law*, 2019, 9, p. 71.

²² C. Voigt, ‘The Compliance and Implementation Mechanism of the Paris Agreement’, *Review of European Community and International Environmental Law*, 2016, 25 (2), p. 166.

²³ Gu Z., C. Voigt, J. Werksman refer to the Submission by Norway on APA agenda item 7 Modalities and procedures for the effective operation of the committee under the mechanism to facilitate implementation of and promote compliance with the provisions of the Paris Agreement (Article 15, paragraph 2) (3 November 2016), and Submission by Norway on APA agenda item 7 (4 April 2017).

scaling up of efforts towards the level of ambition necessary for reaching the long-term temperature goal’; and an ‘Implementation Branch’ to discuss implementation issues with and between the Parties, dealing mostly with ‘elements of the Agreement that do not establish legally binding obligations for any Party’, providing assistance in terms of ‘clarifying and resolving implementation questions, and offering recommendations [...] to the Party concerned’, and connecting to the Enhanced Transparency Framework (ETF).²⁴

A point that remained however undisputed was the fact that, independently of the issues and provisions being addressed by the Committee, it was required to ‘remain facilitative and non-punitive’ in the performance of its functions.²⁵

In the end, as Daniel Bodansky highlights in his note on the Paris Agreement, concerning the purpose of the Committee, the rules regarding to the functions and work of the Committee as developed in the Rulebook attempted ‘to strike a balance between those countries that wanted the Committee to play a ‘help desk’ function, involving the provision of assistance to countries having compliance difficulties, and those that wanted the Committee to play a more independent role in policing compliance by Parties.²⁶ Nevertheless, conceptual debates surrounding the PAICC have still not been solved altogether and some authors argue that ‘few unresolved inconsistencies remain’.²⁷ Thus, a significant part of the Committee’s work during its first years in operation has been focused in designing in more detail its rules of procedure, being left in this respect with considerable discretion within the limits of the Agreement and the Rulebook.²⁸

3.2. *Composition: an ‘expert-based’ Committee*

As outlined above, the functions, composition, modalities and procedures of the Committee were further developed in decisions 1/CP.21 paras 102 and 103, decision 20/CMA.1 (the Paris Rulebook), decision 24/CMA.3 and decision 24/CMA.4.

The composition of the Committee was established in Decision 1/CPA.21 of January 29 2016, paragraph 102 (and later developed in decision 20/CMA.1). The PAICC is formed by 12

²⁴ C. Voigt, *Op. Cit.*, 2016, p. 166.

²⁵ Gu Z., C. Voigt, J. Werksman, *Op. Cit.*, p. 71.

²⁶ Bodansky, Daniel. *Introductory Note to the Paris Agreement*, United Nations Audiovisual Library of International Law, 2021, in <https://legal.un.org/avl/pdf/ha/pa/pa_e.pdf> accessed 23 September 2023

²⁷ See Gu Z., C. Voigt, J. Werksman, *Op. Cit.*, p. 72.

²⁸ Gu, Voigt and Werksman note that ‘the Rulebook has put in place important institutional and procedural safeguards to ensure that the Committee preserves the essentially facilitative nature of the process, address differences in parties’ respective national capabilities and circumstances, and respects the sovereignty of the parties concerned [...]’. *Op. Cit.* p. 69.

members of recognized competence in relevant scientific, technical, socioeconomic or legal fields, to be elected by the Conference of the Parties serving as the meeting of the Parties to the Agreement (CMA), on the basis of equitable geographical representation, with 2 members each from the five regional UN groups and 1 member each from small island developing States and the least developed countries, taking into account to goal gender balance. The composition of the Committee reflects therefore the determination of certain Parties to avoid referencing the ‘developed’ and ‘developing countries’ categories as listed in the UNFCCC’s Annexes – in fact, as Gu, Voigt and Werksman highlight, the use of the UN regional groups results in ‘fewer representatives of countries categorised as ‘developed’ under the UNFCCC than are included in UNFCCC institutions of similar size’.²⁹ This geographical groupings also aim to strike a political balance which is relevant in a context where the functions of the Committee require the exercise of discretionary powers in reviewing reports by the Parties, as some provisions apply only to developed-country Parties (e.g. the commitment in Article 13.9 to ‘provide information on financial, technology transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11’) and where reporting requirements or time-lines allow a degree of flexibility in light of the principle of different capabilities.³⁰

Currently, the Committee is chaired by Mr. Haseeb Gohar and Ms. Christina Voigt. Its other members are – not including alternates – Ms. Selam Kidane-Abebe (Ethiopia) and Mr. Happy Khambule (South Africa), from African States; Ms. Chenxia Yi (China) Mr. Haseeb Gohar (Pakistan and co-chair), from Asia-Pacific States; Ms. Eva Šalplachtová (Czechia) and Mr. Grigory Yulkin (Russian Federation), from Eastern Europe States; Mr. José Félix Pinto-Bazurco Barandiarán (Peru) and Ms. Jimena Nieto (Colombia), from Latin American and Caribbean States (GRULAC); Mr. Jacob Werksman (United Kingdom of Great Britain and Northern Ireland) and Ms. Christina Voigt (Norway and co-chair), from Western European and Other States (WEOG); Mr. Ziaul Haque (Bangladesh), from Least Developed Countries (LDCs); and Ms. Diane Tan (Singapore), from Small Island Developing States (SIDS).

It is worth noting that the Committee is not an ad hoc body: its members serve for a period of 3 years – for a maximum of two consecutive terms³¹ – and the Committee remains standing for the consideration of issues coming before it (contrastingly, Technical Expert Review Teams are set up by the UNFCCC Secretariat on an ad hoc basis to consider specific issues, after

²⁹ *Ibid.*, p. 73.

³⁰ *Ibid.* p. 73 – 74.

³¹ Decision 20/CMA.1, Annex, 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, para. 7. FCCC/PA/CMA/2018/3/Add.2.

information to be reviewed – Biennial Transparency Reports under Article 13, paragraphs 7 and 9 – is submitted).³² This design, as observed by Gu, Voigt and Werksman, offers ‘procedural continuity and predictability’, while allowing its members to gain expertise with respect to the procedures and functions of the Committee as well as to the performance of and issues faced by the Parties. Furthermore, coupled with the safeguards established in the modalities and procedures (provisions of confidentiality, protection of information, and on the quorum and majority requirements for adoption of decisions³³), the continuity element should be deemed as protecting the legitimacy of the Committee’s proceedings and its role in assisting the Parties (in opposition to ad hoc bodies, which could be perceived as established to be punitive of a certain Party facing compliance issues).

Paragraph 103 requested to Ad Hoc Working Group on the Paris Agreement to develop the rules (Modalities and Procedures) for the effective operation of the Committee, that were to be considered and adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement during its first session. These are examined in the next section (4. *Functions, modalities and procedures*).

4. Functions, modalities and procedures, and meetings

Following the mandate in Paragraph 103 1/CPA.21, the Conference of the Parties adopted during its first session, held at Katowice from 2 to 25 December 2018, Decision 20/CMA.1 – the Paris Rulebook. The Rulebook provisions regarding the Committee focus on organizational aspects and contain the modalities and procedures for its effective operation (in the Annex to the decision). Besides, a first thorough examination of the abovementioned modalities and procedures was set up to be undertaken in 2024, during the seventh period of sessions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (COP28, taking place in Dubai), on the basis of the acquired experience and taking into account the recommendations of the Committee itself. It should be noted that the adoption of the modalities and procedures as adopted by CMA.1 played a crucial function in resolving a considerable number of the ambiguities in the text of the Agreement – which had resulted until that moment in conflicting academic opinions on how and on what grounds the Article 15 Committee ought

³² Decision 18/CMA.1, Annex, Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement, paras. 172 – 188. FCCC/PA/CMA/2018/3/Add.2.

³³ Decision 20/CMA.1, Annex, paras. 13 – 16. FCCC/PA/CMA/2018/3/Add.2.

to operate³⁴ – and divergences in Parties’ views in the setting up of the Committee.³⁵ Nevertheless, a significant degree of discretion was still left to the Committee – once constituted and in its expert capacity – in designing its rules of procedure (the rules developed by the Committee and recommended to the Conference of the Parties would be adopted in Decision 24/CMA.3 in 2021 and 24/CMA.4 in 2022).³⁶

4.1. *Decision 20/CMA.1: Modalities and Procedures*

The thirty-seven paragraphs of the Annex to the Decision (Modalities and Procedures) establish general provisions oriented towards guiding the Committee in its work, and design the core aspects of the process by which the Committee will initiate and address issues and come to decisions. The provisions are structured in seven sections: ‘Purpose, principles, nature, functions and scope’, ‘Institutional arrangements’, ‘Initiation and process’, ‘Measures and outputs’, ‘Consideration of systemic issues’, ‘Information’, ‘Relationship with the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement’ and ‘Secretariat’.

The first section (**‘Purpose, principles, nature, functions and scope’**) highlights the expert-based and facilitative nature of the Committee and the transparent, non-adversarial and non-punitive character of its work, as well as its duties to pay attention to the respective national capabilities and circumstances of Parties (para. 2) and to respect national sovereignty (para. 4). It finally stipulates that the Committee should work in a way as to avoid duplication of efforts – the perception of the mechanism in Article 15 as one susceptible of being duplicative of other mechanisms, in particular of the transparency framework under Article 13, had drawn criticism from some commentators before the adoption of the modalities and procedures³⁷ –, and sets up provisions to prevent it from functioning as an ‘enforcement or dispute settlement mechanism’ and from imposing penalties or sanctions.

The second section (**‘Institutional arrangements’**) provides a detailed description of the composition of the Committee, expert-based and emphasizing on equitable geographical representation and gender balance, as already outlined previously in Decision 1/CPA.21 (reference above). Its 12 members (and alternates) are elected by the CMA to serve for a period

³⁴ See, for example, Zahar’s skeptical review on the operationality of the Committee in A. Zahar, ‘A Bottom-Up Compliance Mechanism for the Paris Agreement’, *Chinese Journal of Environmental Law* 1, 2017, 69 – 98. Contrastingly, see C. Voigt, *Op. Cit.*, 2016, pp. 161 – 173.

³⁵ Gu Z., C. Voigt, J. Werksman, *Op. Cit.*, p. 99.

³⁶ See Section 4.3. of this dissertation.

³⁷ See A. Zahar, *Op. Cit.* pp. 73 ‘I argue that if Article 15 were to be endowed with [...] a facilitative function, which is what most commentators are betting on or urging, it risks becoming duplicative, wasteful or impotent’.

of 3 years (maximum of 2 consecutive terms), and shall thereafter elect among them two co-chairs to serve for the same period. The functions to be performed by the co-chairs were later further developed in Decision 24/CMA.3 and include the coordination of the work of the Committee during and between meetings, the chairing of the meetings ('opening, conducting, suspending, adjourning and closing' the meetings and dealing with procedural matters), external representation of the Committee and 'any other functions assigned to them through these rules of procedure or a decision of the Committee'.³⁸

Regarding to meetings, the Committee is bound to meet at least twice a year, starting in 2020 and taking into account 'the desirability of holding its meetings in conjunction with sessions of the subsidiary bodies serving the Paris Agreement' (para. 12). This second specification seems to elucidate – read together with other provisions in the modalities and procedures – the role of the Committee as a body designed to work in a coordinated manner with other transparency and evaluation mechanisms in the Agreement, and a concern to avoid a duplication of efforts (as noted above).

The adoption of decisions requires a quorum of 10 members. Although the rules call for the Committee to make 'every effort to reach agreement on any decision by *consensus*' (a recurrent rule in multilateral negotiations and bodies), as a last resort decisions may 'be adopted by at least three quarters of the members present and voting' (para.16). During elaboration of decisions, only members, alternates and secretariat officials can be present. The section concludes with a mandate to the Committee to develop rules of procedure for recommendation and adoption at CMA 3, addressing 'any matters necessary for the proper and effective functioning of the Committee' (paras. 17 and 18). These were later developed and adopted in decisions 24/CMA.3 and 24/CMA.4.

The third section regulates the **initiation of action** by the Committee as well as the exercise of its functions once a process comes before it. Although Decision 20/CMA.1 (paras. 17 and 18, as outlined above) provides that the rules of procedure are to be developed in ensuing decisions (decisions 24/CMA.3 and 24/CMA.4), the principles that govern these are pinpointed in para. 19: subjection to the legal character of the provisions of the Paris Agreement, duty to 'constructively engage with and consult' with the Parties concerned (in 'considering how to facilitate implementation and promote compliance'), duty to have regard to the 'respective national capabilities and circumstances of Parties' and to the 'special circumstances of the least

³⁸ Decision 24/CMA.3, Annex. Rules of procedure of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, FCCC/PA/CMA/2021/10/Add.3, Rule 4.

developed countries and small island developing states’ at all stages of the process; and duty to consider the work of other bodies and under other arrangements and forums serving or established under the Paris Agreement (to avoid a ‘duplication of efforts’).

The basis for action of the Committee (when and on the basis of what information the work of the Committee will be triggered) are outlined and elaborated in paragraphs 20 and 22 (both in Section III. Initiation and process) and in paragraphs 32 and 34 of the Annex. These involve: i) self-referral by a given Party (Mode 1, in accordance with para. 20); ii) automatic initiation of action by the Committee in cases of failure to report according to legally binding procedural obligations in the Agreement (Mode 2, in accordance with para. 22(a)); iii) initiation of action in cases of significant and persistent inconsistencies in the information provided by a Party, with the consent of that Party (Mode 3, in accordance with para. 22(b)); and iv) consideration of systemic issues, at the initiative of the Committee or of the CMA (Mode 4, in accordance with paras. 32 – 34). These modes will be further developed and analysed in depth in the following section (*‘Initiation of consideration of issues by the Committee’*).

Where considering issues under para. 22 (Mode 2 and Mode 3), the Committee is required to notify the Party concerned and ‘request it to provide the necessary information on the matter’ (para. 24). It is of interest to observe how these provisions are clear manifestations of the duty to constructively engage with the concerned Party (as established in para. 19 (b) and noted above), a duty that, to a certain extent, articulates the participation requisite to attain effectiveness of multilateral environmental agreements, as proposed by Barret.³⁹ This duty further displays in para. 25, which sets up four additional provisions for the participation of a Party concerned with respect to the consideration of matters initiated in accordance with the modes of initiation in paras. 20 and 22.

According to para. 25, the concerned Party is allowed participate in the discussions of the Committee (except for the Committee’s elaboration and adoption of a decision), as well as to request in writing to the Committee that a consultation is held during the meeting at which the matter with respect to that Party is considered. In addition, the Committee is enabled to obtain additional information or to invite (in consultation with the Party concerned) representatives of relevant bodies and arrangements under or serving the Paris Agreement to participate in its meetings, and required to send a copy ‘of its draft findings, draft measures and any draft recommendations’ to the Party concerned, taking into account any comments by the Party.

³⁹ S. Barret, *Op. Cit.* (above, p. 3 of this dissertation). Barret proposes three requisites for the effectiveness of multilateral environmental treaties: participation, ambition and compliance.

Finally, in accordance with the facilitative nature of the work of the Committee, and with attention to the ‘respective national capabilities and circumstances’ of the Parties, paragraphs 26 and 27 of the Rulebook offer provisions for flexibility to be accorded by the Committee with regard to timelines of procedures and for assistance to be provided to enable developing countries concerned the necessary participation in relevant meetings of the Committee.

The fourth section of the Annex to the Modalities and Procedures (**Measures ad outputs**) outlines the issues that should be taken into account by the Committee in identifying measures, findings or adopting recommendations. Among these, the Committee is required to consider comments received from the Party concerned and to pay attention to the national capabilities and circumstances of the Party (para. 28), allowing the Party concerned to provide information on capacity constraints, needs or challenges faced (para. 29).

Paragraph 30 highlights the measures that can be adopted by the Committee with the goal of facilitating implementation and promoting compliance by the Parties. These – all of a facilitative nature and with the goal of promoting the Party’s return to compliance – involve engaging in dialogue with the Party concerned (in order to identify challenges, make of recommendations and share information), assisting the Party in engaging with appropriate finance, technology and capacity-building bodies or arrangements with the goal of identifying challenges and solutions, issuing recommendations towards the development of an action plan and assistance in developing such plan and assisting the Party through the issuing of findings of fact in relation to implementation and compliance considerations. The list in para. 30 is not *numerus clausus*, consequently, the Committee should be able to develop other strategies, building on its experience and information-sharing with the Parties.

The last three sections of the Modalities and Procedures (VI. **Information**; VII. **Relationship with the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement**; and VIII. **Secretariat**) provide the basis for the Committee’s relationship with other bodies under the Paris Agreement. Like this, the Committee is allowed to seek expert advice and information from processes, bodies, arrangements, and forums under or serving the Agreement (para. 35); and will be assisted by the Secretariat in Article 17 of the agreement, that will also serve as secretariat of the Committee (para. 37). Para. 36 stipulates that the Committee is required to report annually to the CMA. These paragraphs should be read together with the other provisions in the Rulebook.

4.2. *Initiation of consideration of issues by the Committee*

The four modes that allow the Committee to initiate consideration of issues – **basis for action** of the Committee – are found in paragraphs 20, 22(a) and (b), and 32 to 34 of the Annex to Decision 20/CMA.1. It is fundamental to understand the different modes of initiation as they ‘apply differently to identified provisions of the Agreement and the Rulebook’, depending on the legal character of the provision they relate to.⁴⁰

The first mode (Mode 1) of initiation addresses cases of self-referral by the Parties. Under paragraph 20 a given Party can make written submissions to the Committee ‘with respect to its own implementation of and/or compliance with any provision of the Paris Agreement’.⁴¹ This mode of initiation is, as highlighted by Gu, Voigt and Werksman, ‘common to many multilateral environmental agreement (MEA) compliance mechanisms’, and reflects an approach avoiding adversarial, punitive mechanisms, instead emphasizing ‘non-confrontational facilitation that promotes implementation and prevents non-compliance’.⁴² Embracing that, frequently, non-compliance with multilateral environmental agreements can take place ‘due to a lack of capacity instead of a lack of will, particularly among developing countries’⁴³, this mechanism allows Parties the opportunity to seek assistance and to ‘bring challenges they face to the attention of the Committee’.⁴⁴ Self-referral, as such, can cover matters regarding to any provision of the Agreement in relation to implementation and compliance – both binding and non-binding. In these circumstances, the basis for consideration of issues will be the written submissions from the concerned Party and the Committee will enjoy wide discretion in deciding on how to address issues. Para. 19 therefore precises that the Committee ‘will undertake a preliminary examination of the submission’ in order to verify ‘that the submission contains sufficient information, including on whether the matter relates to the Party’s own implementation of or compliance with a provision of the Paris Agreement’.

Para. 22(a) provides a set of circumstances that will automatically lead the Committee itself to initiate consideration of issues (Mode 2 of initiation). This closed list refers to circumstances

⁴⁰ Gu Z., C. Voigt, J. Werksman, *Op. Cit.*, p. 72. Following the method of these authors, I will refer to the different modes of initiation of action as ‘**Mode 1**’ (initiation in accordance with paragraph 20 of the Rulebook), ‘**Mode 2**’ (initiation in accordance with paragraph 22(a)), and ‘**Mode 3**’ (initiation in accordance with paragraph 22(b)).

⁴¹ Decision 20/CMA.1, Annex, para. 20. FCCC/PA/CMA/2018/3/Add.2..

⁴² Gu Z., C. Voigt, J. Werksman, *Op. Cit.*, p 84, citing N. Goeteyn and F. Maes, ‘Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?’, *Chinese Journal of International Law*, 2011, 10(4), p. 800.

⁴³ *Ibid.*, citing N. Goeteyn and F. Maes, p. 799. Also, D. Bodansky, in *The Art and Craft of International Environmental Law*, *Op. Cit.*, p. 229, enumerates several causes of non-compliance, among them: lack of capacity, bad faith, changed circumstances, poor planning or domestic politics.

⁴⁴ Gu Z., C. Voigt, J. Werksman, *Op. Cit.* p. 84.

in which a given Party fails to comply with legally binding procedural commitments in the Agreement to submit information regarding the efforts pursued.⁴⁵ This way, the Committee will initiate consideration of issues in the following cases: (i) where a Party ‘has not communicated or maintained a nationally determined contribution (NDC) under Article 4 of the Paris Agreement, based on the most up-to-date status of communication in the public registry referred to in Article 4, paragraph 12, of the Paris Agreement’; (ii) where a Party ‘has not submitted a mandatory report or communication of information’ under Article 13, paragraphs 7 and 9, or Article 9, paragraph 7 of the Paris Agreement’⁴⁶ – the Enhanced Transparency Framework (ETF) –; (iii) where a Party ‘has not participated in the facilitative, multilateral consideration of progress’; (iv) where a Party ‘has not submitted a mandatory communication of information under Article 9, paragraph 5, of the Paris Agreement’. There are two things that must be observed in relation to Mode 2 of initiation: first, the list in para. 22(a) is a closed list, implicitly excluding other information obligations that will be left unaddressed by the Committee⁴⁷; secondly, Mode 2 only concerns compliance with procedural obligations to provide information, and not to questions of ‘ambition, implementation, or achievement’ nor to the ‘content or quality’ of the information provided.⁴⁸ Although it is already clear that the Committee is exclusively concerned with procedural obligations, this second observation inevitably raises questions about the substantive effectiveness of the work of the Committee.

The third mode of initiation is provided for in para. 22(b) of the Rulebook (Mode 3). This Mode allows the Committee to engage in ‘facilitative consideration of issues in cases of significant and persistent inconsistencies of the information submitted by a Party’ pursuant the ETF provisions⁴⁹, with ‘modalities, procedures and guidelines referred to in Article 13, paragraph 13’. This assessment of issues will be based on the recommendations made by Technical Expert Review Teams⁵⁰, and in light of the differentiated capacities and of the

⁴⁵ *Ibid.* Gu, Voigt and Werksman note the relevance of public information sources provided for in the Agreement in determining issues of compliance, especially of those addressed by Mode 2 of initiation – as they relate to transparency.

⁴⁶ Reports or communications of information under Article 13 of the Paris Agreement refer to 7(a): ‘A national inventory report of anthropogenic emissions by sources and removals by sinks of GHG’, (b): ‘Information necessary to track progress made [in relation to NDCs]’, and 9: ‘Information on financial, technology transfer and capacity building support’ provided by developed country Parties to developing country Parties; reports or communications of information under Article 9 refer to ‘transparent and consistent information on support for developing country Parties’ provided by developed country Parties).

⁴⁷ E.g., see the information requirements under Article 7, para. 10; Article 11, para. 4; or ‘the more contentious collective financial obligations in Article 9.1 and 9.3’ (as noted by Gu, Voigt and Werksman) of the Agreement.

⁴⁸ As highlighted by Gu, Voigt and Werksman, *Op. Cit.*, p. 87 and 88.

⁴⁹ As set up in Article 13, paragraphs 7 and 9 of the Paris Agreement.

⁵⁰ Prepared under Article 13, paragraphs 11 and 12,

flexibilities this principle provides for. Mode 3 of initiation requires the concerned Party to consent to consideration of issues.

It is worth noting how this mode of initiation responds to a fear expressed by several commentators on the Committee that its work would result in a duplication of efforts and functions of existing mechanisms, especially those of Technical Expert Review Teams (TER Teams).⁵¹ TER Teams, set up under Article 13 of the Agreement⁵², conduct biennial reviews of the information provided by the Parties under the ETF, tracking their progress in achieving their NDCs.⁵³ Through thorough overview of the consistency of the information provided, TER Teams identify areas of improvement by making recommendations. Moreover, in conducting reviews, TER Teams are instructed to include assistance in identifying capacity-building needs and improving the performance of the Parties.⁵⁴

Where a TER Team has included a ‘recommendation’ regarding to an ‘area of improvement’ under the ETF, and the Committee finds ‘significant and persistent’ inconsistencies relating to it and to the information submitted by the concerned Party, it will be allowed, with the consent of the Party, to take action. In other words, the Committee will initiate consideration of issues in those cases where issues raised by TER Teams have been left unaddressed.⁵⁵ However, it must be observed that the role of the Committee is not neutral nor apolitical: Mode 3 involves a judgment by the Committee regarding what should be considered ‘significant and persistent’ inconsistencies. In exercising this discretion, the Committee ought to be proactive and carry assessments inspired by the principles of differentiated responsibilities and different national circumstances, as well as strive to properly identify shortcomings in the Parties’ capacities in order to facilitate suitable corresponding assistance.

Para. 22(b) therefore succeeds to achieve a balanced system in which the technical role of TER Teams is coupled with the oversight and accountability functions performed by the Committee. Moreover, in addressing ‘significant and persistent inconsistencies’, the Committee should have the opportunity of identifying cases in which inconsistencies and implementation problems are due to shortcomings in a given Party’s capacity, in order to subsequently engage in facilitative assistance and capacity-building support.

⁵¹ See A. Zahar above.

⁵² Technical Expert Review Teams are set up under Article 13 of the Agreement. Their functions and institutional arrangements are elaborated in Decision 18/CMA.1, Annex, paras. 172 – 188.

⁵³ In case of developed countries, this requirement also involves submitting information on support provided to developing countries under Article 13, para. 9.

⁵⁴ Paris Agreement, Article 13, para. 3 and 11.

⁵⁵ Gu Z., C. Voigt, J. Werksman, *Op. Cit.*, p. 90.

The last mode of initiation (Mode 4) of action by the Committee is featured in paragraphs 32 to 34 of the Modalities and Procedures. These provide that the Committee is allowed to identify and bring to the CMA ‘issues of a systemic nature with respect to the implementation of and compliance with the provisions of the Paris Agreement faced by a number of Parties’. Reciprocally, the CMA may request the Committee to examine issues and to report back to the CMA. When reporting to the CMA, the Committee will make recommendations for its consideration.

This mode of initiation must be regarded central in the functions of the Committee: in carrying out the comprehensive examination involved in addressing systematic issues faced by a multitude of the Parties – it should be borne in mind that, under Mode 4, the Committee is not permitted to examine matters relating to implementation and compliance by an individual Party⁵⁶ –, the Committee will be able to identify the fundamental challenges to implementation of the Agreement and, consequently, the critical obstacles compromising the effectiveness of the Agreement as a whole. As, in accordance with paras. 32 and 33, such issues – together with the attached recommendations – will be reported to the CMA, this could subsequently allow for a responsive and progressive addressing of the weaknesses undermining the effectiveness of the Agreement in the CMA.

Finally, we should note that none of these modes contemplates Party-to-Party initiation. The mechanism does not allow State-Parties to bring other Parties’ performance in front of the Committee. Although this was an option considered during the Rulebook negotiations, it was argued to be ‘overly adversarial’.⁵⁷ Other options on the table were initiation by the Secretariat and by other bodies of the Agreement (in particular, initiation by TER Teams). These were dismissed with a fear that they would threaten the neutrality (in the case of the Secretariat) and technical nature (in the case of the TER Teams) of these bodies.⁵⁸

4.3. *Decision 24/CMA.3 and Decision 24/CMA.4: Rules of Procedure*

In accordance with the provisions in decision 20/CMA.1,⁵⁹ The rules of procedure of the Committee were established in Decision 24/CMA.3, adopted in the Conference of the Parties held in Glasgow from 31 October to 13 November 2021. This set of detailed rules was brought to the CMA following the work of the Committee to that date and on the basis of its the annual

⁵⁶ Decision 20/CMA.1, Annex, para. 34. FCCC/PA/CMA/2018/3/Add.2.

⁵⁷ Gu Z., C. Voigt, J. Werksman, *Op. Cit.* p. 85.

⁵⁸ Gu Z., C. Voigt, J. Werksman, *Op. Cit.* p. 85.

⁵⁹ See Section 4.1. above.

reports, and should be read ‘together with and in furtherance of the modalities and procedures’ in Decision 20/CMA.1 (Rule 1.2).

The fourteen rules of procedure were confirmed and completed with nine additional rules in Decision 24/CMA.4, approved in the Conference of the Parties held in Sharm el-Sheikh from 6 to 20 November 2022.

These provisions cover basic rules for the running of the meetings: confidentiality, duties and conduct, conflict of interest, election, roles and functions of Co-Chairs, meeting documentation and adoption of meeting agendas, languages, as well as other procedural rules. Rules 17 to 23 cover relevant procedural aspects regarding to the initiation of consideration of issues (rules 17 to 20), to the consideration of issues itself (participation of and consultation with the Party concerned, obtaining of information (rule 21)), to the process identification of measures and recommendations (rule 22.1), and to the adoption of decisions on measures and outputs (rule 22.2).

Further examination of these rules should be conducted in a more exhaustive review of the functions and work of the Committee.

4.4. Meetings of the Committee since 2020

Since its constitution in 2020, the Committee has held eleven meetings: two in 2020, three in 2021, three in 2022 two in 2023 and one in 2024. Following the mandate in Article 15, the outcomes of the work and of the meetings of the Committee have been reported to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, through a summary of the activities and performance of the Committee during the reporting period, and following progress in the development of internal rules.

As an example, the 2022 report gives account of the work undertaken during the reporting period (Section II of the report), including organizational matters, information on the meetings held, communications and outreach, budget considerations, and recommendations for the Conference of the Parties (among them, the need to adopt the draft rules of procedure of the Committee, ‘as developed by the Committee in accordance with paras 17 and 18 of its modalities and procedures’ (2022 PAICC Report)).

To this date, the work of the Committee has mainly covered organizational matters. The Committee has thus drafted its rules of procedure – ‘to address any matters necessary for the proper and effective functioning of the Committee’ as outlined by UN Climate Change News following the second meeting of the Committee in November 2020) – focusing on aspects of

organisation and the guiding principles for the work of the Committee. These draft rules were adopted in Decision 24/CMA.4 and Decision 24/CMA.4, as outlined in the previous section.

For illustrative purposes, a summary of the issues in the agenda of the first meeting of the Committee (2 – 5 June 2020) is outlined below:

- Opening, attendance and quorum
- Adoption of the agenda
- Co-Chairs election and introduction of members and alternates
- Presentations by the secretariat on the mandate of the Committee and the elements to be covered in the draft rules of procedure according to paras 17 and 18 of the annex to decision 20/CMA.1 (modalities and procedures)
- Committee discussion in regard to the development of the draft rules of procedure and other substantive arrangements
- Arrangements for the next meetings of the Committee (among these, development by Co-Chairs of a programme of work to progress work until the following meeting)
- Preparation of the report and closure of the meeting

5. The Kyoto Protocol Compliance Mechanism

To fully understand and evaluate the Paris Agreement Implementation and Compliance Committee, it is pertinent to examine thoroughly its predecessor in the Kyoto Protocol, the Compliance Mechanism. This will be done in this section, followed by a comparative between the two mechanisms.

5.1. Background

The Kyoto Protocol establishes the operative framework for the United Nations Framework Convention on Climate Change (from now on, UNFCCC).

The Convention (UNFCCC) requested the Party countries to adopt policies and measures on mitigation (in accordance with agreed individual targets) and established periodic reporting duties, with the aim of stabilizing greenhouse gas concentrations ‘at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system’, within a time-frame ‘sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable

manner' (Article 2 of the UNFCCC). The Convention established common but differentiated responsibilities, recognizing the fact that industrialized countries (countries in the Annex I to the Convention) are largely responsible for climate change, as they have been and are the source of most greenhouse gas emissions, and the fact that they are expected to take the lead in the process of reducing emissions.

On the basis of these principles, the Kyoto Protocol develops the provisions of the Convention, placing a heavier burden on developed countries under the principle of 'common but differentiated responsibility and respective capabilities' (Article 3, Principles). Its Annex B set binding targets for emission reduction for 37 industrialised countries ('and economies in transition') and the European Community. These countries were to be subject to the commitment of reducing greenhouse gas emissions up to an average 5% against 1990 levels. The Protocol was amended in Doha in 2012, for its adoption for a second period (2013-2020), in which the same countries listed in Annex B committed to reduce greenhouse gas emissions by (at least) 18% below 1990 levels.

Similarly to the Paris Agreement, the Kyoto Protocol sets up several mechanisms for the achievement of the goals of the Convention, mainly three market-based mechanisms (based on emissions permits trading: the International Emissions Trading mechanism (art 17), the Clean Development Mechanism (art 12) and the Joint Implementation mechanism (art 6)).

5.2. *The Compliance Committee*

However, one of the major 'milestones'⁶⁰ of the Kyoto Protocol is its 'rigorous monitoring, review and verification system', together with 'a compliance system to ensure transparency and hold Parties to account'.⁶¹ From the very beginning of the negotiations, it was acknowledged that compliance with the commitments in the Protocol was indispensable to secure the achievement of the ultimate goal of reducing and limiting GHG emissions. To that end, the design of a system to ensure effective compliance with the Commitments in the Protocol was a priority of the Parties.⁶²

The monitoring system of the Protocol called for monitoring and reporting of the Party countries' emissions and of the recording of trades carried out under the market-based mechanisms. The Compliance Mechanism, on the other hand, wa 'designed to strengthen the

⁶⁰ According to the UNFCCC website, *Op. Cit.*

⁶¹ *Ibid.*

⁶² M. Campins, 'El mecanismo de cumplimiento del Protocolo de Kioto: un nuevo paso en aras a control de cumplimiento de los acuerdos internacionales ambientales', *Revista Electrónica de Estudios Internacionales*, 2007, p. 1.

Protocol's environmental integrity, support de carbon market's credibility and ensure transparency of accounting by Parties'. Its aim was to 'facilitate, promote and enforce compliance with the commitments under the Protocol'.⁶³

The procedures and mechanisms regarding to the Compliance Mechanism under the Kyoto Protocol were adopted in decision 24/CP.7 of the Marrakesh Accords (confirmed through decision 27/CMP.1), following the mandate of article 18 of the Protocol, which provided that the CMP (Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol) must approve, at its first session, 'appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences'. The same decision (24/CP.7) also set up the criteria for designation of members and alternates.

The first report of the Committee was presented in November 2006, at the second session of the CMP. This report additionally recommended the approval of rules of procedure for the Committee, which were approved at the CMP's second session (in decision 4/CMP.2). The Committee reported annually on its activities to the CMP.

Campins observes that the Compliance Committee was innovative in its nature, comprising elements relating to 'preventive diplomacy, facilitation and advice'⁶⁴ to the Parties to the Protocol, together with aspects linked to enforcement in cases of non-compliance'.⁶⁵ The Compliance Committee was structured therefore in two branches: a facilitative branch, with the goal of providing 'advice and assistance to the Parties' in order to encourage and facilitate compliance; and an enforcement branch, responsible for determining the consequences 'for Parties not meeting their commitments'. This double perspective also meant an interaction between enforcement and facilitation: attending to the circumstances of each case, it may be needed to address non-compliance issues as cases requiring support measures, while applying punitive measures in other cases.⁶⁶

Each branch was composed of 10 members, which, in a logic similar to that in the PAICC, were representing each of the five official UN regions (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, and Western Europe and Others), the small island developing States, and two representatives from Annex I and non-Annex I Parties. The Committee was moreover allowed to meet in a plenary composed of members of both branches.

⁶³ UNFCCC, *Op. Cit.*

⁶⁴ 'Asesoramiento' could be translated also as 'assistance', 'guidance' or 'consulting'.

⁶⁵ M. Campins, *Op. Cit.*, p. 2.

⁶⁶ *Ibid.*

Decisions of the plenary and facilitative branch were adopted by consensus and, alternatively, by a three-quarters majority. On the other hand, decisions adopted by the enforcement branch demanded a larger majority (a double majority of both Annex I and non-Annex I Parties). A bureau, composed by the chair and vice-chair of each branch, supported Committee' work.

The Committee was aimed at considering issues regarding to the implementation of the Protocol, brought to the Committee in the form of 'Questions of Implementation'. Questions could be raised either by a) Expert Review Teams under Article 8 of the Protocol;⁶⁷ b) any Party *with respect to itself*; c) a Party *with respect to another Party*. Once the questions were submitted, the bureau of the Committee would allocate the questions to the appropriate branch. Besides, the enforcement branch d) 'may refer a question of implementation to the facilitative branch' at 'any time during its consideration of a question of implementation'.

The *facilitative branch* was 'made up of experts [...] with competence related to climate change and in relevant fields' (Kazakhstan note⁶⁸) and was responsible for providing advice and facilitation to Parties in the process of implementation of the Protocol, as well as to promote compliance with commitments adopted by Parties to the Protocol. It addressed questions of implementation by Parties in relation to mitigation measures ('measures aimed at mitigating climate change in a way that minimizes their adverse impacts on developing countries') and 'supplemental' mechanisms. It also had the power to provide 'early warning' of risk of non-compliance with 'emissions targets, methodological and reporting commitments relating to GHG inventories, and commitments on reporting supplementary information [...]'.⁶⁹

In considering matters, the Committee was called to 'take into account any degree of flexibility allowed by the CMP for Annex I Parties undergoing the process of transition to a market economy'. The facilitative branch must take into consideration the principle of common but differentiated responsibilities of the Parties and the individual circumstances regarding to the relevant issue.

The *enforcement branch*, 'made up of legal experts' (Kazakhstan note⁷⁰), had been allocated most questions of implementation. It had the duty to determine situations of non-compliance with emissions targets by Annex I Parties and was responsible for determining 'the methodological and reporting requirements for GHG inventories, as well as the eligibility requirements under the mechanisms'. It was also responsible for determining whether to apply

⁶⁷ Article 8 (1): 'The information submitted under Article 7 by each Party included in Annex I shall be reviewed by expert review teams pursuant to the relevant decisions of the Conference of the Parties [...]'.
⁶⁸ Compliance Committee of the Kyoto Protocol, *Kazakhstan informal information (note)* 10 August 2023

⁶⁹ Kazakhstan information note, *Op. Cit.*

⁷⁰ *Ibid.*

adjustments to GHG inventories and to the accounting database for the accounting of assigned amounts in the cases of disagreement between the Expert Review Team and a Party.

5.3. Powers of the Compliance Committee

When a Declaration of Non-Compliance was issued by the enforcement branch, the course of action to be taken depended on the type of non-compliance. For example, in the case of Declaration of Non-Compliance with the assigned amount of emissions by a Party, the Committee would require the Party ‘to make up the difference between its emissions and its assigned amount during the second commitment period, plus an additional deduction of 30%’. In addition, it would require the Party ‘to submit a compliance action plan’ and suspend the eligibility of the Party ‘to make transfers under emissions trading until the Party is reinstated’⁷¹. The stark difference with the powers awarded to the Paris Agreement Compliance Committee should be stressed. Whereas the later only has facilitative and informative functions, the Declaration of Non-Compliance by the Kyoto Protocol Committee opened the door to material consequences (punitive measures) upon the non-complying Party.

While in the enforcement branch each type of non-compliance required a previously determined course of action, the facilitative branch was awarded more discretion in deciding whether and how to provide advice and facilitation of assistance to individual Parties in relation to implementation, facilitate technical and financial assistance, or (and) formulate recommendations. Moreover, as the enforcement branch had fixed deadlines for the resolution of questions of implementation, the facilitative branch had no such deadlines (except for the three-week deadline for the preliminary examination).

The process of Declaration of Non-Compliance with emission targets would involve the following stages: all Annex I Parties would be required to submit to expert review their final annual emissions inventory. After expert review had finished, Parties would have 100 days to make up for any shortfall in compliance.⁷² It would be at the end of this period of 100 days that, if that Party’s emissions still exceed its assigned amount, the enforcement branch would issue a Declaration of Non-Compliance in regard to that Party and apply the consequences attached to such declaration.

The Parties facing the Compliance Committee in the enforcement branch would be allowed to make formal written submissions ‘and request a hearing where [they] [could] present [their]

⁷¹ UNFCCC Website, *Op. Cit.*

⁷² By acquiring emissions units (assigned amount units, AAUs), removal units (RMUs), emission reduction units (ERUs) or certified emission reductions (CER) through emissions trading.

views and call on expert testimony'.⁷³ Parties not complying with reporting requirements would be required to develop a comprehensive compliance action plan, and Parties not meeting the criteria 'for participating in the mechanisms [would] have their eligibility withdrawn'.⁷⁴ When a Party which had had its eligibility withdrawn or suspended believed it had addressed the problem, it could request ('either through an expert review team or directly to the enforcement branch') to have its eligibility restored.

Decisions by the Committee (by each of the two branches) could not, as a general rule, be appealed (with the exception of decisions by the enforcement branch regarding to emissions reduction targets, and only on the grounds of alleged denial of due process).

As a final remark, although Declarations of Non-Compliance carried consequences for the non-complying Party, it should be borne in mind that financial penalties were not allowed under the provisions of the Kyoto Protocol, nor any consequences involving the loss of credits (however, consequences could imply loss of access to the carbon market).⁷⁵

5.4. *Comparative with the Article 15 Implementation and Compliance Committee*

Having summarized the essential elements and functions of the PAICC in Section 3 of this dissertation and those of the Compliance Mechanism of the Kyoto Protocol (above), it is of great interest to contrast the two mechanisms and their functions, examining the common elements and differences between them.

The key difference to have in mind in comparing these two mechanisms, aside from the organic differences and procedures, is the fact that the Kyoto compliance mechanism had both facilitative and enforcement functions, whereas the Paris Compliance Committee is designed to strictly perform a facilitative role, functioning in a non-punitive manner. Thus, even if its facilitative functions are, to a considerable degree, similar to those of the facilitative branch of the Kyoto Committee, the Paris Compliance Committee lacks the relatively strong enforcement powers that were awarded to the Kyoto Compliance Committee.

The table below (Figure 2) outlines the key characteristics and elements of the Compliance Mechanism of the Kyoto Protocol and the Paris Agreement Implementation and Compliance Committee, offering an overview of the main similarities and differences between the two mechanisms.

⁷³ UNFCCC Website, *Op. Cit.*

⁷⁴ *Ibid.*

⁷⁵ Kazakhstan information note, *Op. Cit.*

Figure 2: Comparative table – the compliance mechanisms of the Kyoto Protocol and the Paris Agreement

	KYOTO COMPLIANCE MECHANISM	ARTICLE 15 IMPLEMENTATION AND COMPLIANCE COMMITTEE
Composition	2 branches (facilitative – climate change experts – and enforcement branch) of 10 members each. Expert-based. Each branch: one representative from each of the five official UN regions, one from the small island developing States, and two each from Annex I and non-Annex I Parties. The Committee also meets in a plenary composed of members of both branches, and a bureau.	1 Committee of 12 members. Expert-based.
Role	Facilitative and enforcement role. Facilitative branch: providing advice and assistance to the Parties in order to encourage and facilitate compliance, questions of implementation, early warning of risk of non-compliance. Enforcement branch: determination and declaration of situations of non-compliance with emissions targets. Power to establish consequences.	Facilitative: advice and facilitation, early warning of risk of non-compliance. ‘Help desk’ function.
Basis for action	Committee consider issues in the form of <i>questions of implementation</i> , which can be raised by: <ul style="list-style-type: none"> a) Expert Review Teams; b) any Party with respect to itself; c) any Party with respect to another Party; d) the enforcement branch can refer questions of implementation to the facilitative branch 	Committee will initiate action when: <ul style="list-style-type: none"> - A Party ‘has not communicated or maintained a nationally determined contribution - Where a party ‘has not submitted a mandatory report or communication of information - Where a Party ‘has not participated in the facilitative, multilateral consideration of progress’; - Committee also allowed to consider issues, <i>with the consent of the Party</i>, in cases of ‘significant and persistent inconsistencies of the transparency information provided by a Party with the modalities, procedures and guidelines for reporting’. - Consideration of issues of a systematic nature No Party-to-Party initiation.
Basis for considerations	Rigorous monitoring, review and reporting system.	Submission by the Parties in relation to their own actions.

	Mandate to take into account common but differentiated responsibilities and individual circumstances. Provisions for participation of/dialogue with the Parties.	Mandate to take into account common but differentiated responsibilities and individual circumstances. Provisions for participation of/dialogue with the Parties.
Measures and power to impose consequences	Can impose penalties and sanctions. Each type of non-compliance requires a specific course of action. Example of consequences: requirement to reduce emissions (making up for the excess of emissions), requirement to submit a compliance action plan and power to suspend the eligibility of the Party to make transfers under emissions trading. No financial penalties under the Protocol, except for the limitation of access to the carbon market.	Expressly prevented from imposing penalties or sanctions (para 4 Annex 20/CMA1). Measures that can be adopted (open list in para. 30 of the Rulebook): <ul style="list-style-type: none"> - Engage in dialogue with the Party to identify challenges faced, share information and make recommendations. - Engagement with finance, technology and capacity-building bodies or arrangements under or serving the Paris Agreement, and assistance to the Party in its engagement with these supporting institutions. - Recommendation to develop an action plan and support with the development of such plan. - Issuing of ‘findings of fact’ in relation to matters referred in para. 22(a).
Voting rule	Consensus. If consensus is not reached, majority of ¾ of the members present and voting. Decisions in the enforcement branch require, moreover, a majority involving the majority of Parties representing the countries in Annex I and the majority of the Parties representing the countries not included in Annex I.	Consensus. If consensus is not reached, ¾ of the members present and voting.

5.5. Assessment of the Kyoto Protocol and its compliance mechanism. The Paris Agreement, an opportunity for new approaches?

As overviewed in previous sections ‘strong and effective compliance mechanism[s]’ are key to the success of the implementation of international environmental agreements. This was stressed in relation to the Kyoto Protocol,⁷⁶ but, the extent to which this statement is true or,

⁷⁶ UNFCCC Website, *Op. Cit.*

more accurately, applicable to the Protocol, should be assessed in light of its relative and even highly questioned success. Although almost ten years after its entering into force the sum of emissions from nations with Kyoto targets had fallen significantly, emissions in the rest of the world had increased significantly, leading to poor overall progress.⁷⁷ The following excerpt from The Guardian summarizes the outcomes of the Protocol:

‘Overall, there are more successes than failures and the sum of emissions from nations with Kyoto targets have fallen significantly. In the meantime, however, emissions in the rest of the world have increased sharply – especially in China and other emerging economies [...]. This blurs the success of the nations with Kyoto targets because much of the growth in China and other emerging economies has been driven by the production of goods and services exported to developed nations. According to one study I reported on last year, when you look at total carbon footprint of each nation (including imports and excluding exports), the progress made under Kyoto looks extremely poor, with Europe's savings reduced to just 1% from 1990 to 2008 and the developed world as a whole seeing its emissions rise by 7% in the same period.

Overall, the result is that global emissions have showed no sign of slowing down, [...]. In that sense, the Kyoto protocol has been a failure. But it was unquestionably an important first step in global climate diplomacy. The question is whether a more ambitious second step will follow in time to avoid unacceptable risks of devastating climate change.’⁷⁸

Gupta described the commitments of the first round of the Kyoto Protocol as ‘modest’, and held them as constraining the treaty's effectiveness. She called for the need to achieve higher reductions and, more relevantly for the purpose of this analysis, for ‘implementation of policy instruments covering a higher share of global emissions’.⁷⁹ Although some countries reduced their emissions pursuing the goals of the Protocol, the countries with a cap in 2008 only made up one third of the annual global emissions, meaning that accountability mechanisms were only effective (at most) in regard to part of the Parties to the Protocol.⁸⁰ The overall consequence was that the effect of Protocol on curbing the growth of global emissions was only slight.⁸¹ On the other hand, the effectivity of the treaty in providing financial support to developing

⁷⁷ D. Clark, ‘Has the Kyoto protocol made any difference to carbon emissions?’ *The Guardian* (London, 26 November 2012) <<https://www.theguardian.com/environment/blog/2012/nov/26/kyoto-protocol-carbon-emissions>> accessed 24 September 2023.

⁷⁸ D. Clark, *Op. Cit.*

⁷⁹ S. Gupta *et al.*, ‘Chapter 13: Policies, instruments, and co-operative arrangements’. In B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds), *Climate Change 2007: Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, 2007.

⁸⁰ International Energy Agency (IEA). *CO₂ Emissions from Fuel Combustion - 2011 Highlights*, IEA. Paris, France, 2011, p. 12.

⁸¹ World Bank. *Integrating development into a global climate regime*, World Bank, 2010, p. 233

countries to assist in the emissions reduction and adaptation has been regarded limited.⁸² More criticism of the Protocol has been on the basis of the idea of climate justice, particularly regarding to the balance between low emissions of developing countries and their high vulnerability to climate change, in contrast to the high emissions (both present and in the past) of the developed world.⁸³

It is following these ideas that the Paris Agreement took new approaches, among others, in the provisions regarding to ‘respective national capacities and circumstances’ and ‘common but differentiated responsibilities’ principles, striving to address the highlighted concerns about climate justice; through establishing binding obligations for all Parties, in particular the commitment to set ambitious Nationally Determined Contributions, a provision that seeks to strike a balance between the need for more ambitious commitments and the demand to account for national sovereignty and different national circumstances; or the facilitative and non-punitive nature of the Compliance Committee, embracing a new type of response to the problematic issue of compliance.⁸⁴

Now, eight years after the signature of the Paris Agreement and four years after the first meeting of the Committee, it comes the time for a thorough overview of the work of the PAICC and of the strength and success of the new strategies in the Agreement to determine whether they have been more successful than those in the Kyoto Protocol. This will be explored in the following section. There is no doubt, however, that the Committee should play a central role in conducting this examination and adopt a self-critical position in assessing its effectivity.

6. Affairs overview: compliance, enforcement and facilitation

6.1. Compliance in multilateral environmental agreements

Compliance is a central requisite to the effectiveness of multilateral environmental agreements, whether it is regarding legally binding obligations or non-binding obligations. Furthermore, it is an indispensable element in establishing the trust and confidence necessary to promote engagement by the Parties and to promote increasing participation and ambition.⁸⁵

⁸² *Ibid.*

⁸³ D. M. Liverman, ‘Conventions of climate change: constructions of danger and the dispossession of the atmosphere’ *Journal of Historical Geography*, 2009, 35, pp. 279–296

⁸⁴ It is nonetheless surprising to note that the Parties in the Paris negotiations opted for a facilitative approach, when the facilitative branch in the Kyoto mechanism had often been regarded as a failure, being assigned few cases and even abandoning some of them (see A. Zahar, *Op. Cit.* p. 84).

⁸⁵ R. B. Mitchell notes that, for states, ‘the ability to reliably predict the reductions by other states may provide enough reassurance to take action that might otherwise seem too risky. And over time, initially reluctant states

It is recognising this that international environmental regimes have progressively developed a variety of institutions and mechanisms to tackle the issue of compliance, ranging from enforcement strategies – limited by the diffuse nature of environmental harm and by the reluctance of states to relinquish their sovereignty –, to transparency and facilitation mechanisms.⁸⁶ This evolution nonetheless has not come without hurdles: the history of meetings of the COP shows how compliance and the issue of the consequences of non-compliance have always posed severe difficulties in negotiations.⁸⁷

The Paris Agreement Implementation and Compliance Committee constitutes the culmination of a process of transition from traditional compliance mechanisms, of a coercive and adversarial character and focusing on enforcement, to an understanding of compliance regimes as aimed at encouraging compliance through facilitative action. This evolution embraces the nature of contemporary multilateral environmental agreements, which obey to a bottom-up logic through mostly procedural legally binding commitments, and acknowledges the realities of non-compliance, especially the fact that non-compliance, in environmental agreements, can often result from capacity limitations rather than from the lack of political will.

Through the establishment of two branches, the Kyoto Protocol Compliance Committee combined both approaches: an enforcement branch – vested with classic enforcement powers and addressing cases of non-compliance with legally binding commitments –, and a facilitative branch – aimed at providing advice and assistance to the Parties in order to encourage and facilitate compliance.

The PAICC draws on the experience of the Kyoto Compliance Committee, in particular on the institutionalisation of preventive diplomacy, facilitation and advice.⁸⁸ Already at COP20 in Lima in December 2014, during negotiations for what would later be the content of the Paris Agreement, there seemed to be an ‘emerging understanding’ that the Paris compliance mechanism should be aimed at assisting the Parties in implementing their commitments and

may gain information and confidence based on the changed behaviors of others and alter their behaviors accordingly’. R. B. Mitchell, ‘Compliance Theory’, in D. Bodansky, J. Brunée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2007, p. 893; see also D. Bodansky, *The Art and Craft of International Environmental Law*, p. 228 – 230.

⁸⁶ D. Bodansky, *Ibid.*, p. 226.

⁸⁷ ‘At COP 6 in The Hague, however, Parties were unable to reach agreement on the package of decisions under the Buenos Aires Plan of Action. In the case of compliance, **key outstanding issues included what the consequences of non-compliance should be** and the membership of the Compliance Committee. As with other issues, the negotiating texts on compliance were forwarded to a resumed session of COP 6 for further consideration.’ (UNFCCC website, *Op. Cit.*)

⁸⁸ M. Campins, *Op. Cit.* p. 2.

should function in a manner ‘expert-based, non-confrontational and non-judicial’.⁸⁹ The architecture of such mechanism was still the subject of stark differences in views, however. This is key in understanding the broad and, to some extent, vague wording of Article 15 in the final text of the Agreement, reflecting the essential points the Parties were finally able to agree on.⁹⁰

Further details regarding the internal structure, institutional arrangements, functions, triggers modalities, proceedings and consequences were left to be developed later by the Ad Hoc Working Group on the Paris Agreement – in what would be the Modalities and Procedures Decision (decision 20/CMA.1, also known as the Paris Rulebook) – and by the Committee itself. The fact that the Committee was left with broad powers to develop its functions should also be explained in terms of its expert-based and specialised nature: its members, individually – serving in their expert capacities – and collectively – based on the experience of the Committee as it carries its work – are deemed to be best placed to determine how it should function and to identify areas for improvement. Like this, the largest part of the work undertaken by the Committee to this date has been focused on organisational matters. One thing however should be observed: it is vital that the Committee does not miss the aim of its functions. Even if organisational matters are essential to the proper functioning of its work, they should be directed to supporting the central duty of the Committee: engaging with the Parties in promoting implementation and facilitating compliance.

6.2. The Paris Agreement Implementation and Compliance Committee: a compliance mechanism without enforcement functions?

The core element distinguishing the PAICC from the Kyoto Compliance Committee is its lack of enforcement powers. This is somehow surprising as the Enforcement Branch of the Kyoto Committee was regarded by many as the most successful element (if not the only) in the mechanism,⁹¹ but has been justified on the basis of the bottom-up model of the Paris Agreement: as the Agreement does not establish any substantive legally binding obligations, an enforcement function would make little sense.⁹²

I do not agree with such a statement. It is true that the Paris Agreement does not introduce legally binding substantive commitments, nevertheless it establishes procedural obligations

⁸⁹ UNFCCC, Decision 1/CP.20, Lima Call for Climate Action (UN Doc. FCCC/CP/2014/10/Add.1, 2 February 2015), para. 5 in the Annex), in C. Voigt, *Op. Cit.*, 2016, p. 163.

⁹⁰ *Ibid.* p. 164.

⁹¹ See A. Zahar, *Op. Cit.*, p. 81

⁹² *Ibid.*, p. 73.

which are, still, legally binding. In fact, the provisions in the Modalities and Procedures seem to acknowledge this, while avoiding referring to enforcement. Mode 2 of initiation (para. 22(a) of Decision 20/CMA.1) provides that the Committee will initiate consideration of issues where a Party has failed to comply with its legally binding commitments to submit information under Articles 4, 9 or 13. Mode 3 (in para. 22(b)) provides for initiation of action through facilitative consideration of issues in cases of ‘significant and persistent’ inconsistencies of the information provided by a Party pursuant the EFT provisions. These cases constitute indeed, even if not clearly worded as so, breaches of procedural obligations under the Agreement. The fact that the Committee is only allowed to engage in facilitative action in relation to such breaches represents one of its main limitations.

While some commentators have argued that the initiation of consideration of issues by the Committee actually represents a form of sanction, and that peer pressure from other states, together with the advice provided by the Committee, should be sufficient to incentivize a Party’s return to compliance,⁹³ other types of possible responses should be developed. Facilitation and peer pressure are pragmatic, but not necessarily fit the specificities of all instances of non-compliance. Once the factors leading to non-compliance and the circumstances of a Party have been thoroughly examined, in light of the different national circumstances, the Committee should be provided with stronger compliance or enforcement powers. These could take a variety of forms, and probably the Committee is the body best placed to propose them to the CMA. An option could be the issuing of a declaration of non-compliance in those cases where a Party which has failed to comply with its procedural commitments has also not engaged in facilitative dialogue with the Committee. This would be useful in distinguishing the cases in which non-compliance has been due to lack of capacity from those in which the Party has engaged in mere negligence or even bad faith.

6.3. *A limited facilitative mechanism*

As highlighted throughout this dissertation, the work of the Committee is facilitative in nature, designed to promote compliance and facilitate implementation with the commitments adopted by the Parties to the Agreement. Nevertheless, a comprehensive analysis shows that the facilitative task of the Committee also faces significant limitations. In this respect, further criticism must cover the provisions establishing the circumstances that trigger the work of the Committee.

⁹³ Gu Z., C. Voigt, J. Werksman, *Op. Cit.*

Whereas Mode 1 seems the ideal mode of initiation of action for facilitative procedures – under this mode, a Party facing difficulties of implementation in relation to any provision of the Agreement may seek assistance of the Committee –, because it relies in self-referral, it must be complemented with the modes of initiation at the Committee’s initiative – Mode 2 and Mode 3, which present important limitations. In this respect, as outlined in Section 4.2., Mode 2 involves initiation of consideration by the Committee where a Party has failed to communicate information in the circumstances provided in the list in para. 22(a). This list is not exhaustive, but it is however a *numerus clausus* list. Inevitably, this leaves other transparency requirements in the Agreement at risk of being left unaddressed – despite being considered relevant enough to be included in the text of the Agreement. Moreover, the issues considered will be merely procedural, the Committee being prevented from assessing more substantive issues such as ambition, achievement or even the quality of the information provided – matters nonetheless equally significant to the effectiveness of a successive scaling-up of efforts and therefore to the achievement of the goals in Article 2 of the Agreement.

The main issue to be highlighted in relation to Mode 3 – initiation of consideration in cases of ‘significant and persistent’ inconsistencies in the information provided – is the discretion awarded to the Committee in determining what are ‘significant and persistent’ inconsistencies, which could be a double-edged sword: on one hand, the Committee may feel reluctant to label a Party as incurring in significant and persistent inconsistencies, as it strives to stay non-confrontational and non-punitive; on the other, this discretion could become crucial in identifying gaps in the Parties’ capacities to subsequently engage in effective and timely facilitative assistance, thus maximizing the potential of the facilitative role of the Committee.

Summarizing, current trigger mechanisms that allow the PAICC to initiate action are limited and probably insufficient. This is an issue that should be further assessed in light of the work carried by the Committee, once it starts engaging with countries in a recurrent way. In this respect, Mode 4, aimed at identifying and addressing issues of systemic nature, could provide the Committee with a powerful tool to enlarge the scope of its work, by proactively ascertaining recurring challenges of implementation and compliance and determining how these should be tackled by the Committee, perhaps through suggesting to the CMA new modes of initiation, including automatic consideration of information contained in the many UNFCCC channels.

Finally, although the non-adversarial nature of the Committee is likely to prevent Party-to-Party initiation (conversely, the Kyoto Compliance Committee was allowed to consider Question of Implementation brought by a Party regarding to another Party), the possibility of allowing a given State Party to bring potential non-compliance of another Party in front of the

Committee in order to consider issues seems appealing and should be assessed. Even if it did not bind the Committee to initiate action – only requiring it to conduct a preliminary examination –, this would probably foster a sense of responsibility, participation and belonging amongst the Parties and would strengthen the perception of effective public accountability.

6.4. *Further thoughts*

As observed throughout this dissertation, the Paris Agreement and further decisions of the CMA articulate a bottom-up approach that constitutes a differential element in relation to previous international environmental agreements.

Although such an approach is attractive from a national point of view, as it is highly considerate of national sovereignty and of the fact that national authorities are usually best placed to assess national particularities and circumstances,⁹⁴ and of how to allocate burdens and resources according to these, it carries the usual risks of discretion: it does not set straightforward standards, undermining the need for globally coordinated and – although paying attention to the respective national capabilities and circumstances of Parties – uniform action; and it opens the door to more arbitrary decision-making, which may give considerable weight to interests other than global climate change mitigation.

This bottom-up approach also permeates the structure, functions and work of the Committee. As the goals in Article 2 are not legally binding for individual Parties and as the content of NDCs as set up in Article 4 is not binding itself, the object of accountability and review by the PAICC are the procedural and transparency obligations corollary⁹⁵ to these goals. Besides the issues addressed in this dissertation, this poses a more general question, but nonetheless equally significant: whether and to what extent can the work of the Committee effectively contribute to a timely achievement of the goals of the Agreement as set in Article 2, in reviewing only procedural issues and not the substantive elements set in NDCs. Are procedural commitments and transparent reporting enough to address an issue so defined by urgency and by the need of globally coordinated action as climate change? Is the work of the Committee in fact relevant in achieving Article 2 goals?, or is it merely an instrument to promote ambition among those Parties that are already committed to action? Or even more broadly, as accurately put by Harro van Asselt, ‘what role international law still has to play in

⁹⁴ E. Fisher; B. Lange; and E. Scotford, *Environmental Law: Text, Cases and Materials*, Oxford University Press, 2019, chapter 18.

⁹⁵ B. Mayer, *International Law Obligations on Climate Change Mitigation*, Oxford, Oxford University Press, 2022.

a world where *commitments* have been replaced with *contributions*, and where compliance no longer needs to be *enforced* but *facilitated*. In other words, what is the role of international climate change law in a bottom-up world?'⁹⁶

In this sense, it would be better aimed to conceive the Paris Agreement Implementation and Compliance Committee as a facilitative instrument: designed as it is and facing notable limitations in terms of finding and addressing violations, its real strength and potential lie in promoting the implementation of the Agreement commitments through assistance to the Parties, provision and exchange of information, and facilitating engagement with other bodies serving under the Agreement,⁹⁷ something which, in turn, can foster further ambition in the goals of the Parties.

7. Conclusions

This research has sought to overview and analyse the role of the Paris Agreement Implementation and Compliance Committee as a compliance mechanism drawing from the experience of previous compliance mechanisms and instruments in international environmental law.

Having reviewed the purpose, composition, functions and procedures of the Committee, as well as having conducted a comparative review with the Compliance Committee in the Kyoto Protocol, three conclusions should be highlighted.

First, the PAICC is a mechanism that responds to the bottom-up nature of the Paris Agreement, something which differentiates it from traditional compliance mechanisms in international environmental treaties – which had a focus on enforcement of legally binding substantive obligations. As the Paris Agreement does not impose legally binding substantive commitments but only procedural obligations – leaving to the Parties the determination of their contributions to the common goal in Article 2 –, the focus of the Committee is in assessing compliance with such obligations, as well as promoting and facilitating implementation of the mitigation and adaptation goals of the Parties in order to ultimately allow further ambitious action. The design of the PAICC's functions and action thus embraces the characteristics of multilateral environmental action and the realities of implementation and compliance (and of non-compliance).

⁹⁶ H. van Asselt, 'International climate change law in a bottom-up world', *Questions of International Law, Zoom In* 26, 2016, p. 5.

⁹⁷ Assistance which can come in the form of identifying effective adaptation practices, financial resources, technology and knowledge transfers or capacity-building support, among other.

Secondly, although the nature of the PAICC is consistent with the approach and provisions in the Agreement, the limitations of the rules setting the basis for initiation of consideration of issues by the Committee (in paras. 20, 22 and 32 – 34 of the Modalities and Procedures), as well as of the measures the Committee is allowed to adopt in addressing issues of implementation and compliance (in particular the constraints in terms of enforcement action) significantly restrict its effectiveness in addressing situations of non-compliance. In this sense, the Committee should be awarded a more expansive scope of action and should be allowed to adopt stronger enforcement measures. Within the current framework, in particular in relation to Mode 3 of initiation, the Committee should adopt a rigorous approach in ascertaining cases of ‘significant and persistent’ inconsistencies in order to broaden its sphere of intervention.

As it is, the present mechanism will be probably most effective in relation to Parties that strive to comply with their obligations, but not necessarily in regard to those which are not willing to engage in ambitious commitments. In this respect, the identification of issues of a systemic nature should be the most useful tool for the Committee to assess the issues faced by a number of Parties in terms of implementation and compliance, as well as to evaluate its work and powers so as to make recommendations to the CMA to enlarge the scope of its work and to improve the effectiveness of the mechanism.

Finally, it is through facilitative action in relation to those Parties that strive to comply with the obligations in the Agreement and aim to undertake more ambitious commitments, that the Committee – in its current design – can be most effective. In embracing a proactive role, delivering assistance and facilitating information, finance and technology-transfer arrangements, the Committee could become crucial in fostering capacity-building and cooperation amongst the Parties.

Notwithstanding all the observations made, the role, functions and effectiveness of the PAICC as a compliance mechanism will need to be further evaluated in light of future reports and decisions following its work during the next years.

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