



The Role of the Compliance Mechanism of the
Paris Agreement in Achieving Equity and
Climate Justice

PhD Thesis

School of Law

Selam Kidane Abebe

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Abstract

In a departure from the largely top-down approach United Nations Framework Convention on Climate Change (UNFCCC), and the Kyoto Protocol, the new climate treaty the Paris Agreement (PA) created a bottom-up approach where the obligations and commitments emanating from the international agreement were created through a self-assessed contribution in the form of Nationally Determined Contributions (NDCs). The Agreement also envisaged that its burden sharing efforts to address climate change and implementation will be guided by equity, and the principle of common but differentiated responsibilities, in the light of different national circumstances (CBDRRC). It also recognised the intrinsic relationship between raising ambition, climate justice and equitable access to sustainable development.

Despite the explicit inclusion of equity, CBDRRC, and fairness considerations under the climate regimes, the application of these guiding principles has remained politically controversial and central to the North-South divide under the UNFCCC. The PA only requires countries to reflect equity and fairness in their self-defined contribution. The question remains how to ensure equity in such an agreement which is centred around self-assessed obligations. Although the enforceability of self-determined obligations is a broad problem, equity and fairness issues are further complicated in part by the fluidity of the concepts, varying parameters of assessment utilised by countries in their NDCs, and the structural and institutional limitations of the Agreement. A possible way might be to utilise the interpretative and quasi-adjudicatory role of inbuilt mechanisms of the Agreement to evaluate the fairness and equity of countries' contributions based on their NDCs and their own equity parameters.

The PA aims to achieve the collective targets notably the temperature goal to hold average temperature increases to 1.5 degrees Celsius above preindustrial levels, and the adaptation and finance goals – that need to be implemented to curb climate change through the accumulation of efforts contained in the NDCs of countries. The progress made towards the achievement of these collective targets is assessed by the inbuilt instrument of the Global Stocktake (GST), which promises to take account of the collective contributions made vis-a-vis the PA's long-term goals and in light of equity.

The GST, however, is not built as an individual accountability mechanism to look at what each Party has contributed to the global effort. The Compliance Mechanism, on the other hand, is designed to consider individual Party compliance issues. The Mechanism can be employed to weigh the equity and fairness of individual contributions made by countries. The question, however, is how the Compliance Mechanisms of the Paris Agreement, currently under development, can assess whether the self-determined obligations fulfil the equity principle either in terms of general expectations or the self-determined parameters countries identify in their NDCs. What role does the Compliance Mechanism – and by extension, the Compliance Committee – play in determining (non-)compliance with the PA's equity requirements?

The Thesis examines to what extent the newly established Compliance Mechanism (CM) as an inbuilt framework of the Paris Agreement could facilitate the operationalisation of equity and climate justice. As the idea of operationalising equity and climate justice within the framework of the compliance mechanism is a new topic, this study will contribute a strong analytical and conceptual framework to the field. The Thesis proposes three possible analytical models to operationalise the consideration of equity and climate justice by the PA's Compliance Mechanism. The procedural model sees the role of the Mechanism limited to the assessment of the fulfilment of procedural obligations related to equity, including communication of the reflection of countries on the equity and fairness of their contributions. The model may also extend to the assessment of other procedural obligations that ensure equity, such as the inclusiveness of the national processes followed in designing the NDCs. The substantive model anticipates the involvement of the CM in the assessment of the equity and fairness of a Party's contributions in their NDCs based on substantive criteria. Considering the design of the CM that does not involve an adversarial contestation of the obligation of countries, a strong mechanism must be in place to ensure minimum standards are maintained to achieve the overall goal of the Agreement. The substantive model, therefore, proposes a minimum objective standard of equity that the CM can use to determine compliance with equity obligations under the Agreement while respecting the facilitative nature of the PA Compliance Mechanism. The third model is the integrated model, which incorporates elements from the two previous models in response to the equity parameters and definitions adopted by different countries in their

NDCs. This model will be more compatible with the bottom-up ethos of the Agreement and the nature of the NDCs.

By incorporating a study of the architecture of the PA's CM, the substantive provisions of the Agreement and lessons from other treaties, including the Kyoto Protocol compliance mechanism, the Thesis will contribute to the understanding of how to measure and assess equity in international climate change law. While some current works on equity and justice in climate change agreements have looked at theoretical and methodological issues with assessing equity of climate action this Thesis will provide options that deal with institutional, procedural, and legal considerations within the PA. The success of the PA and its goals will depend on the Parties' compliance. The overall narrative of facilitating compliance is critical to the thesis. In any agreement with inbuilt equity considerations, and more significantly in a self-defined obligation centred agreement with inherent differentiated expectations, compliance can help ensure equity. In the Paris Agreement, the achievement of equity and climate justice is further promoted when the Compliance Mechanism is able and empowered to assess the equity and fairness of climate action.

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Declaration

I confirm that this thesis is my own work and the use of all material from other sources has been properly and fully acknowledged.

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Acronyms

ADP	Ad Hoc Working Group on the Durban Platform for Enhanced Action
BASIC	The BASIC Group (Brazil, South Africa, India, and China)
CBDR	Common but Differentiated Responsibilities
CBDRRC	Common but Differentiated Responsibilities and Respective Capabilities
CBDRRCNC	Common but Differentiated Responsibilities and Respective Capabilities, in the light of different national circumstances
CMA	Conference of the Parties [to the UNFCCC] serving as the meeting of the Parties to the Paris Agreement
CMP	Conference of the Parties [to the UNFCCC] serving as the meeting of the Parties to the Kyoto Protocol
COP	Conference of the Parties to the UNFCCC
INC	Intergovernmental Negotiating Committee
INDC	Intended nationally determined contribution (became NDC after COP21 and ratification of the Paris Agreement)
KP	Kyoto Protocol
MEAs	Multilateral Environmental Agreements (MEAs)
NDCs	Nationally determined contributions
PA	Paris Agreement
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technical Advice
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change

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Chapter 1 Introduction

The principles of equity and common but differentiated responsibility (CBDR) have guided the adoption of and obligations of countries under the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol (KP) and the Paris Agreement that are the foundations of the climate change regime. However, these principles remained political and contributed to the North-South divide in the UNFCCC negotiations, resulting in the principles being more nuanced in the 2015 Paris Agreement.

The Thesis discusses the importance of the principles of equity and CBDR as the guiding principles for burden-sharing of the collective efforts to address climate change. Importantly, in an agreement that is built around self-defined contributions such as the Paris Agreement, the principle of equity is essential in ensuring all Parties take their fair shares of the burdens. In addition, these principles also guide the progression of efforts required from countries to meet the urgent demands of addressing climate change. In the Paris Agreement, countries define their contribution to climate action and provide information on how their commitments reflect equity. However, as presented in the Thesis there is no clear inbuilt Paris Agreement mechanisms to consider and assess if a country has considered equity and CBDR, and if these principles have informed its progression.

The Paris Agreement has a commendable transparency mechanism and a collective assessment system through the Global Stocktake. However, these tools fail to address individual accountability issues in relation to overall compliance with the obligations emanating from the agreement and specific equity related obligations. Without the operationalisation of the principle of equity, individual accountability for taking a fair share of the burdens in this self-defined contributions architecture remains problematic. Although there are some proposals on assessing the implementation of equity and CBDR, these proposals are outside the UNFCCC process and are limited in their capacity to induce compliance in the formal climate change regime.

The Thesis proposes the Compliance Mechanism of the Paris Agreement, as an inbuilt mechanism, could be the tool to assess whether Parties are fulfilling their obligations

in line with equity and thereby contributing to the achievement of equity and climate justice. I will argue that the Compliance Mechanism can be of use in two ways. The first way is by ensuring overall compliance with the obligations of the agreement and individualised commitments in their NDCs. The second is by assessing the compliance of Parties with specific equity related obligations in the Paris Agreement. To help achieve this goal, I present my three potential comprehensive models for the role of the Compliance Mechanism in achieving equity and climate justice. The three models present alternative typologies of the Compliance Mechanism in performing both general compliance assessment as well as assessment of specific equity compliance

1.1. Research Background and Motivation

Studies reveal that global warming is human-induced, and the stabilisation of the temperature increase to well below 2°C is a matter of the highest importance, with urgent action required to limit the increasing rise to 1.5°C, which is a scenario that could minimise the potentially high costs of adaptation and loss and damage. The Intergovernmental Panel on Climate Change (IPCC)'s special report on global warming of 1.5°C concluded that the world requires deep and sustained decarbonisation, including reducing CO₂ emissions by 45% from 2010 levels by 2030 and achieving net-zero around mid-century.¹

Countries have designed international treaties to stabilise the concentration of greenhouse gas in the atmosphere by curbing emissions. The most recent treaty and successor of the Kyoto Protocol, the Paris Agreement, is a global response to climate change and calls for ambitious action by all countries. In 2015, 197 countries adopted the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC) to undertake ambitious action against climate change. In its latest report, AR6, the IPCC provides stark warnings on climate change's current and future impacts and the massive adaptation needed. It points to climate change contributing to droughts, extreme heat, floods, extinction of species, food and water insecurity, and the

¹ Intergovernmental Panel on Climate Change (IPCC), Global Warming of 1.5°C.: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty (IPCC 1.5 Report) (Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, et.al. (eds.) 2018).

escalation of exposure to some diseases.² The report warns that the risks will be higher with increasing temperature. With current emission reduction trajectories not sufficient to limit the temperature rise, the success of the Paris Agreement is crucial.

The Paris Agreement sets obligations on all Parties to significantly reduce greenhouse gas emissions, adapt to the adverse impacts of climate change, and enhance support to assist developing countries in effectively implementing the Agreement. The Agreement also recognises the link between raising ambition, equity, and climate justice. However, it fails to properly operationalise the concepts of equity and climate justice and how their progress and implementation can be assessed under the Agreement.

In the following section I will provide a note on terminology and address why I chose to research and write this Thesis on equity and climate justice and why the issue needs to be addressed now (in other words, why the research is significant). Definitional comments and contents are also incorporated in the main chapters of the thesis, and the aim of this note is to provide context on the general orientation of these concepts and terms.

1.2. Why Equity and climate justice, and why now?

We are in a critical period – dubbed the critical decade – for dealing with climate change and reducing emissions before the world will no longer be able to avert climate catastrophe in a meaningful way. The Paris Agreement is the instrument by which countries can pool together their efforts to respond to the climate emergency. The Agreement's success will depend on the adequate functioning of the domestic processes to ensure the highest level of commitment is submitted, and the international system to facilitate all Parties take the necessary action. Based on the scientific evidence, aggregated mainly by the IPCC in its Assessment Reports, we know what kind of emissions reduction is needed to succeed in preventing the worst impacts of climate change, and countries have submitted their first, and in some cases second, NDCs to take their share of the required climate action. In 2023, the Parties to the Paris

² IPCC, 2022: Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, et.al. (eds.)]. In: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (H.-O. Pörtner, D.C. Roberts, M. Tignor, et al. (eds.) Cambridge University Press Press| 2022).

Agreement will assess, through the Global Stocktake (GST), how their NDCs have collectively lived up to the Agreement's objectives. The findings of the GST will inform further NDCs and help countries improve their subsequent commitments.

However, because of the reliance of the Paris Agreement on self-defined obligations, the adequacy and fairness of the contributions made by countries need to be scrutinised. The Agreement requires an accountability mechanism to ensure all Parties can contribute as much as possible. The accountability mechanism will ensure that countries contribute their adequate and fair share to the efforts against climate change. I argue that such an accountability system is already present in the form of the Compliance Mechanism in the architecture of the Paris Agreement. The Mechanism, as I will present by using three potential models, is well-positioned to contribute to the achievement of equity and climate justice in the climate regime by facilitating overall compliance as well as assessing the equity and fairness of climate actions to be taken by Parties.

I will provide a choice of alternative frameworks for the work of the Compliance Mechanism that can serve as a starting point for further study into the potential roles and functions of the Mechanism. These approaches can also be applied to other bottom-up mechanisms that rely on self-defined 'commit and report' type obligations. As an elected member of the Paris Agreement Compliance Committee, I see a significant space for the Committee to explore its role as an accountability mechanism that can contribute to the achievement of equity and climate justice, and frameworks like these will assist the Committee in developing further modalities that can aid this endeavour.

1.3. [A note on Terminology](#)

In this thesis, the notions of equity, climate justice and fairness are going to be utilised broadly and to an extent, interchangeably. The term equity is used in reference to the principles of equity and CBRDRC as described in the UNFCCC and its subsequent agreements. The meaning of the term is left undefined in the agreements and the purpose of this thesis is to contribute to the attempts to operationalise it through the Compliance Mechanism of the Paris Agreement. What complicates matters more is the fact that the question as to what equity means is partly a legal one compounded with

broader concepts requiring interpretation. Equity is, for example, used to refer to the general justice concerns associated with the treaty. These concerns might be related to distributional considerations of economic development in climate action and temporal aspects of climate justice in the form of intergenerational equity. While the intergenerational dimensions are clearer, other aspects are less clear, with multifaceted differences necessitating considerations of equity among countries that are differentiated geographically, economically, climate vulnerability and responsibility for historical and current emission levels, to name a few factors. These questions are presented in detail in Chapter 7.

Climate justice is the other term that is usually employed as an umbrella term to denote distributional aspects of the benefits and burdens of measures taken in response to climate change, including human rights, international development and concerns related to climate change vulnerability and inequitable consequences of climate related policies. In this thesis, the scope of these terms is limited to the meaning they have in the context of the relationship between and among countries as part of their international law obligations emanating from the treaties in which they are Parties. Although these terms might have usages that relate to individuals and other non-state actors in international law, the analysis in this study is limited to inter-state obligations and relationships created by international law in line with, for instance, the usage in the preamble of the Paris Agreement.

In some places, the choice of terminology follows the wording of the specific provisions of the Agreement. For example, in the analysis of NDCs, the requirement on Parties to include how they consider their contributions to be fair and their reflection on equity dictate the terminology being used. Parties might choose to include clear references to fairness or provide narratives in support of their consideration of equity. In such scenarios, equity, fairness, and climate justice might be used to refer to something similar.

A final point on terminology relates to what is meant by measures taken in response to climate change. I have also used the term climate action in the thesis that covers the broader actions that need to be taken to mitigate the causes of climate change, and the measures necessitated by the impacts of climate change either in terms of adaptation

needs or loss and damage. The meaning of climate action should, therefore, include mitigation, adaptation, and the provision of means of implementation for both of these in the form of finance and technology. Furthermore, the unavoidable impacts of climate change (i.e. those harms that cannot be avoided via mitigation or adaptation) that necessitate actions related to loss and damage have to be considered. The association of climate action to only mitigation efforts that work towards reducing emissions is problematic. By mainly focusing on mitigation action, climate discussions alienate poorer countries with limited mitigation potential and require mostly adaptive measures in their fight against climate change and loss and damage assistance.

1.4. Research Questions

To help guide the research and analysis presented, I start with the main research question: what role can the Compliance Mechanism of the Paris Agreement play in achieving Equity and Climate Justice? Other general questions used to guide the research include:

1. How are the concepts of equity and climate justice understood in the international climate change regime in general and the Paris Agreement in particular?
2. How does the compliance mechanism of the Paris Agreement work, and how can it be used to operationalise equity and climate justice effectively?

1.5. Key Contributions of the Thesis

As the idea of operationalising equity and climate justice within the framework under the UNFCCC, the Paris Agreement and the Compliance Mechanism is a relatively new topic, this research will contribute a robust analytical and conceptual framework to the field. Furthermore, the research will form a basis for further study into operational questions related to how general principles such as equity can be assessed in international environmental law. The Thesis will also contribute to understanding the Compliance Mechanism of the Paris Agreement and the range of possible roles it can play in achieving equity and climate justice. As I will present in this Thesis, the existing literature on equity in the climate change regime has overlooked the opportunity created by the Compliance Mechanism as an individual accountability tool to assess whether country Parties are fulfilling their equity obligations under the Paris Agreement. Therefore, the contribution of this Thesis is to create an analytical framework for the

utilisation of the compliance mechanism to ensure equity and climate justice obligations are met.

1.6. Context and Rationale

The IPCC, the international body for assessing the science of climate change, has confirmed its certainty that humans are the main cause of global warming.³ It also highlights that stabilising the temperature increase to below 1.5°C relative to pre-industrial levels requires urgent action by all countries. In 1994, countries adopted the first international agreement on climate change, the United Nations Framework Convention on Climate Change (UNFCCC), to stabilise the concentration of greenhouse gas (GHG) in the atmosphere and curbing emissions.⁴ In 1997, countries adopted another agreement on climate change, the Kyoto Protocol (KP)⁵, by elaborating the UNFCCC and committing certain countries listed in Annex I of the Protocol to binding emission reduction targets.

The Agreements recognised that the largest share of historical and current GHGs originated in developed countries, and thus the Kyoto Protocol placed binding emission targets on developed countries. Based on the historical contributions of GHGs, the UNFCCC and its Kyoto protocol provided key principles for guiding countries' actions to achieve the ultimate objective of the convention and subsequent agreements and to implement their commitments. The principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC)⁶ have served as the foundation for burden-sharing of efforts to address climate change. These principles have been highlighted in a range of different UNFCCC decisions, including the Bali Action Plan

³IPCC: Summary for Policymakers. In: IPCC 1.5 Report (n1).

⁴ United Nations General Assembly, United Nations Framework Convention on Climate Change (resolution adopted by the General Assembly 20 January 1994, entered into force 21 March 1994) 1771 UNTS 107 (The Convention).

⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted at the COP3 in Kyoto, Japan, on 11 December 1997 entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).

⁶ The Convention (n4) Article 3.

2007,⁷ the Copenhagen Accord 2009,⁸ the Cancun Agreement 2010⁹, the Durban Outcome 2011¹⁰ and Lima Call to Climate Action 2014.¹¹

The principles of equity and CDRRC were also among the key areas of contention during the negotiation of the new international agreement, the Paris Agreement.¹² The Paris Agreement is a global response to the increasingly alarming impacts of climate change that calls for ambitious action. It sets an ambitious legal target of holding the increase in the global average temperature to well below 2 °C relative to pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C and, for the first time, requires all countries to aim to reach global peaking of GHGs as soon as possible to achieve it.¹³ The principles of equity and CDRRC are more important than ever to provide clarity in countries' progressive burden-sharing of efforts. In addition to these principles, the Paris Agreement recognised that the progressive efforts by countries to the urgent threats of climate change should be on the basis of science and the intrinsic relationship of climate action to equitable access to sustainable development.¹⁴ It also, for the first time, recognised the importance of the concept of “climate justice” for taking action to address climate change.¹⁵

These principles have been reflected in the different legal instruments and decisions of the UNFCCC. However, countries have divergent stands on their interpretation and application.¹⁶ Countries have differing views on the application of these principles and the nature of any obligations they entail. Furthermore, compared with Kyoto, the Paris Agreement has comparatively fewer provisions that provide clear differentiation of

7 Decision 1/CP.13, The Bali Action Plan (14 March 2008) FCCC/CP/2007/6/Add.1 para 2.

8 Decision 2/CP.15, Copenhagen Accord (30 March 2010) FCCC/CP/2009/11/Add.1 para 1.

9 Decision 1/CP.16, The Cancun Agreement (15 March 2011) FCCC/CP/2010/7/Add.1 para 3.

10 Decision 2/CP.17, The Durban Outcome: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (15 March 2012) FCCC/CP/2011/9/Add.1 para 15.

11 Decision 1/CP.20, Lima Call for Climate Action, (2 February 2015) FCCC/CP/2014/10/Add.1 para 3.

12 Paris Agreement to the United Nations Framework Convention on Climate Change (adopted at COP 21 in Paris, France, on 12 December 2015, entered into force 4 November 2016) 3156 UNTR (Paris Agreement).

13 Paris Agreement (n12) Articles 2 and 3.

14 Paris Agreement (n12) Preamble of the agreement, paras 8 and 10.

15 Paris Agreement (n12) Preamble of the agreement, para 13.

16 See Lavanya Rajamani, 'The Reach and Limits of the Principle of Common but Differentiated Responsibilities and Respective Capabilities in the Climate Change Regime' in Navroz K. Dubash (ed) *Handbook of Climate Change and India: Development, Politics and Governance* (Oxford University Press, 2011) 118.

countries and their obligations, making the need for clarity on the principles and their applicability essential.

In addition, other multilateral environmental agreements (MEAs) such as the Rio Declaration on Environment and Development 1992,¹⁷ the United Nations Convention on Sustainable Development (Rio+ 20) 2012, the Montreal Protocol on Substances that Deplete the Ozone Layer 1987,¹⁸ the Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2000,¹⁹ and the Minamata Convention on Mercury 2017²⁰ have recognised the guiding principles of equity, CDRRC, the precautionary principle and the right to development to guide the implementation of their provisions. But, how far these principles were reflected in the final assessment of the obligations agreed to and their performance is not clear.

MEAs generally have compliance regimes that have more or less delivered on their objectives. Countries have also a collective interest in the effectiveness of MEAs as problem solvers, and their compliance mechanisms have been used as a tool to evaluate their progress.²¹ Article 15 of the Paris Agreement (PA) established a compliance mechanism to facilitate implementation and promote compliance with the provisions of the Agreement. At the time of writing in 2022, countries are still negotiating the modalities and procedures of the PA Compliance Mechanism. This negotiation could afford an opportunity to provide a practical and operational understanding of equity and climate justice principles and contribute to the possible assessment of the implementation of obligations on the basis of these principles. This study will contribute to creating a better understanding of the principles and how the Compliance Mechanism can help achieve them. Furthermore, building on the lessons learned from other MEAs will provide a conceptual and analytical framework for further discussions of how the Compliance Mechanism of the Paris Agreement can help achieve equity and justice.

17 Rio Declaration on Environment and Development (1992) 31 ILM 874.

18 Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTR 3.

19 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (adopted on 29 January 2000 in Montreal, entered into force 11 September 2003) 2226 UNTR 208.

20 The Minamata Convention on Mercury (adopted on 10 October 2013, Kumamoto, Japan, entered into force 16 August 2017)

21 See Asher Alkoby, 'Theories of Compliance with International Law and the Challenge of Cultural Difference' (2008) 4 *Journal of International Law and International Relations* 151.

1.7. Key Literature and Limitations

The equity principle in the major climate agreements is the primary method of ensuring developing countries can get the protection they need in terms of economic growth and eradication of poverty. However, the operationalisation and the implementation of this principle is lacking. Because of the absence of operational applications of the principle has remained a political discussion rather than guiding the burden sharing of efforts and obligations.²²

The principle of equity should be observed in the sharing of contributions to the global effort to address climate change. Here, countries claim different capabilities and national circumstances that provide for a differentiated and fair contribution to the global effort. The question remains what constitutes a fair share of responsibility. In addition, the questions regarding sustainable development, and the different types of climate action (i.e., mitigation and adaptation), the role of the means of implementation (i.e., finance and technology) as part of the global effort, and climate-related loss and damage raise similar questions of equity.²³ In the unfortunate event that climate change cannot be averted, the impact on the livelihoods of the poorest communities with limited adaptive capacity is likely to be significant and far-reaching. Therefore, the importance of addressing equity in climate change and its impacts cannot be over-emphasised. It provides an important entry point for successful outcomes in international climate negotiations.²⁴

In addition, although low carbon development pathways and adaptation are part of a global agenda for addressing the cause and impacts of climate change, there are deep concerns, especially among the highly vulnerable countries, in the way these principles are framed. Adaptation concerns and development pathways followed by countries are often described as domestic matters and therefore, outside the scope of the global climate action discussions. This attitude towards adaptation and development is in sharp contrast to the way mitigation everywhere is given the highest attention with even more

22 Duncan French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' (2000) 49 *International and Comparative Law Quarterly* 35.

23 Xolisa Ngwadla, 'An operational framework for equity in the 2015 Agreement' (2014) 14 *Climate Policy* 8. available at <<http://dx.doi.org/10.1080/14693062.2014.857199>> (accessed 2 May 2022)

24 Jay Schulkin and Paul Kleindorfer, 'Equity Decisions: Economic Development and Environmental Prudence' (1995) 17 *Human Rights Quarterly* 382.

scrutiny on high emitting countries. The same level of attention is not paid to the most vulnerable countries to climate impacts and their adaptation needs. Because of the framing of adaptation action as a domestic matter left to the country itself, the limited financing made available for climate action is disproportionately allocated to mitigation related activities.

Most commitments taken by countries and those expected of them by other countries are based on two understandings of justice, one being corrective based on past responsibilities while the other is distributive, which looks at the capacity of the states. The capacity in the distributional sense here goes beyond mitigation action by developed countries. It concerns their ability to pay for climate action outside their own territories in terms of providing means of implementation for mitigation, adaptation, and loss and damage in countries that could take the actions but do not have the financial and technological capability. The corrective aspect is also important as the vulnerability to, harms and impacts of climate change are unevenly distributed, mainly victimising those that have contributed the least to the creation of the problem. According to Lamont et al, distributive justice provides for the possibility of apportioning benefits and burdens in accordance with principles agreed upon based on a common responsibility.²⁵ Corrective justice has an element of understanding that past actions of the subject – in this case, Parties to the Paris Agreement that have contributed to causing climate change – are inconsistent with a certain accepted moral standard, which needs to be redressed at present.²⁶ The question of how one can address past injustices and the way forward to fulfil the common global challenge needs further conceptual and theoretical scrutiny. The problem of disconnect between the theoretical foundations of policies and their practicality is captured by Stern as follows:

All too often equity criteria are invoked in an arbitrary way, with little or no attempt to anchor them in ethical principles or link them to the basics of public economics. Further, deep political difficulties have strong ethical and economic

25 Julian Lamont, and Christi Favor, 'Distributive Justice', in the *Stanford Encyclopaedia of Philosophy* (Edward N. Zalta (ed.) 2017) < <https://plato.stanford.edu/entries/justice-distributive/> > Accessed 2 May 2022.

26 Jules Coleman, Scott Herschovitz and Gabriel Mendlow, 'Theories of the Common Law of Torts' in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (2022). < <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=tort-theories> > accessed 7 May 2022.

dimensions: various attempts to create “formulae for equity” tend to point to “allocations of emissions rights or permits”, which would give large resource transfers to poor countries relative to current conditions. Whilst the ethical case for large transfers does seem strong, rich countries are most unlikely to accept the arguments for so doing.²⁷

Besides the academic and theoretical importance of the debate on what is meant by equity within the context of climate change and the responsibility of states to address it, practical applications of the principle require further study.

For example, in the framing of the 2010 Cancun decision on Equitable Access to Sustainable Development, although there is a clear inclusion of equity considerations, there is a lack of operational meaning to what is meant by equity.²⁸ In the Cancun Climate agreement, BASIC (Brazil, South Africa, India and China) countries introduced the concept of Equitable Access to Sustainable Development (EASD), departed from the traditional position of China and India that focused on equitable access to atmospheric space and per capita entitlements to such space.²⁹ This signalled a subtle shift from rights-based entitlements to the atmospheric space to a need-based claim of sustainable development.³⁰ The structure, legitimacy, efficiency and conceptual foundations of such a system or any other attempt at streamlining equity standards must be examined.

The BASIC expert group identifies three essential elements of the EASD rather than just using per capita entitlements to the carbon space. To this element, they further add sustainability and time for development.³¹ The notion of access to carbon space, as opposed to a right to pollute, considers the atmosphere as a shared resource which should be distributed based on principles that are accommodative to the sustainable development needs of countries.³² As a general framework for operationalising the

27 Nicholas Stern, ‘Ethics, Equity and the Economics of Climate Change, Paper 1: Science and Philosophy’ (2014) 30 *Economics and Philosophy* 397.

28 Decision 1/CP.20, The Cancun Agreement, (15 March 2011) FCCC/CP/2010/7/ Add.1.

29 Lavanya Rajamani, ‘From Berlin to Bali and beyond: Killing Kyoto Softly?’ (2008) 57 *International and Comparative Law Quarterly* 909.

30 Lavanya Rajamani, ‘The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves’ (2011) 60 *International and Comparative Law Quarterly* 499.

31 BASIC experts, *Equitable Access to Sustainable Development: Contribution to the Body of Scientific Knowledge* (2011). Available at < <http://gdrights.org/wp-content/uploads/2011/12/EASD-final.pdf> > accessed 7 May 2022.

32 *ibid.*

concept of differentiated responsibility in the global climate change regime, two approaches are suggested by the IPCC.³³ The first one introduces a resource/budget sharing approach that tries to allocate the remaining carbon space. The other concerns an effort/burden sharing approach that relies on apportioning the obligation to reduce emissions and take other climate actions.³⁴

The question of equity in both these regards has to be answered in a way that is operational and applicable in the process of negotiation and implementation of climate change agreements. The proposals regarding objective criteria in applying equity principles put forward by the BASIC expert group include per capita emissions, historical responsibility, and capability and indicators of sustainable development.³⁵

Negotiation groups such as BASIC have become very important in creating operational concepts.³⁶ However, given that the Paris Agreement is considered to be both progressive and ambitious, countries need advanced proposals for operationalizing equity and climate justice. The Parties to the Agreement are expected to take ambitious actions to match the magnitude and urgency of the response required. The Agreement is also designed to motivate Parties to take progressive action and ramp up their commitments cyclically, ensuring that no regression happens. The challenge, however, comes when addressing what the specific shares of individual countries are. Guiding principles such as equity are important in this consideration. The argument posed by the different countries and authors on equity and how it should be operationalised has not been very successful due to its inherently political nature. Such views on historical emissions, carbon budget and per capita emissions are now being considered but are not helping in addressing the urgent ambitious action needed against climate change. Some suggestions have also been put forward to create what is known as an Equity

³³ Marc Fleurbaey, Sivan Kartha et. al., '2014: Sustainable Development and Equity' in Edenhofer et al. (eds) *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) p 319.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ Kathryn Hochstetler and Manjana Milkoreit, 'Emerging Powers in the Climate Negotiations: Shifting Identity Conceptions' (2014) 67 *Political Research Quarterly* 224.

Reference Framework (ERF), discussed in Chapter Ten, to further elaborate on and operationalise equity issues.³⁷

The need for equity considerations is generally reflected in the Paris Agreement and most other MEAs. Yet, the principles have not been formulated in a way that will provide legal enforceability and tracking of progress. The Compliance Mechanism of the Paris Agreement, and its newly established Committee, presented in Chapter Six, could be instrumental in achieving the clarity of the equity principle and its implementation. The decision that adopted its purpose, principles, nature, functions provides that the work of the Committee will be guided by the provisions of the PA, including the principles of equity and CDRRC. This study will explore the opportunity presented by the development of the modalities and procedures of the Compliance Mechanism as an in-built framework for assessing the implementation and achievement of the equity principle and climate justice.

By presenting three models of how the compliance mechanism can assess and operationalise the principles of equity and climate justice, this Thesis will provide an analytical and conceptual framework within which the PA can be implemented in a manner that is reflective of equity and fairness. The procedural model will explore the PA as a ‘commit and report’ system that is centred around certain procedural duties the fulfilment of which will be essential for equity and climate justice. The second model looks at potential substantive parameters that will inform the considerations of the Compliance Mechanism to assess the equity and fairness of climate commitments made by countries. A third model will respond to the assessment of equity in terms of the self-defined criteria set by the countries by utilising a mix of procedural as well as substantive assessments.

1.8. Research Methodology

In this section I will present the main objective of the research, the guiding questions and the methodology employed. First, I will introduce the general objective of the Thesis. I will then deal with the methodological approaches I have followed to address

37 Xolisa Ngwadla, ‘Equitable Access to Sustainable Development: relevance to negotiations and actions on climate change’ (2012) 10 Mitigation Action Plan and Scenarios Research Paper. available at < http://www.mapsprogramme.org/wp-content/uploads/EASD-Relevance-to-negotiations_Paper.pdf > accessed 7 May 2022.

the research questions. The thesis utilises doctrinal, normative, and empirical approaches to answer these research questions.

The study aims to investigate to what extent the newly established Compliance Mechanism of the Paris Agreement (Article 15) could facilitate the consideration of equity and climate justice. In addition, the research will explore what needs to be in place for the Compliance Mechanism to promote the implementation of climate action by Parties and thereby operationalise the concepts of equity and climate justice. The Compliance Mechanism is currently being developed, and the legal, institutional, and operational issues are yet to be agreed upon by the Parties to the Paris Agreement. However, there is some foundational guidance given by the Agreement and subsequent Conference of Parties (COP) decisions as to the nature, authority, scope of considerations and the composition of the expert Committee.

As indicated already, equity is one of the fundamental principles of the climate change regime in its application as a guiding principle for climate action, including Parties' differentiated responsibilities. However, this principle remains problematic at the operational level. This study will argue that the operationalisation of the principle and, consequently the achievement of climate justice can be done through the work of the Compliance Mechanism.

The Thesis argues that the Compliance Mechanism of the Paris Agreement can play two roles in the achievement of equity and climate justice. The first one relates to promoting overall compliance with the Agreement. As an Agreement built on differentiated self-determined obligations, equity and climate justice would be inbuilt and overall *general* compliance with the PA would contribute to their achievement. Secondly, by promoting Parties' compliance with their *specific* equity-related obligations, the Compliance Mechanism can help achieve equity and climate justice. The goal of the Thesis is to produce a typology of models for the Compliance Mechanism in its role of promoting overall compliance as specific compliance with equity-related obligations.

1.8.1. Doctrinal Approach

The research question is framed around the existing international climate change laws. Therefore, the research will investigate these international laws, cases, and decisions by international law bodies. The relevant international climate change laws include the United Nations Framework Convention on Climate Change, the Kyoto Protocol to the Framework Convention on Climate Change, and the Paris Agreement to the Framework Convention as the main legal data sources. Furthermore, decisions of the Conference of Parties that provide guidance and clarity on the provisions of the Agreements considered will form part of the data sources for analysis of the legal obligations.

Therefore, the doctrinal approach will involve research and legal analysis of these existing regimes in relation to equity, climate justice and the compliance mechanism. The doctrinal method will also be used to conceptualise and contextualise the notions of equity and climate justice, including the associated principle of CBDRRC. Qualitative analysis of documents that have come out of the negotiation process and submissions and communications by the countries will also be part of the methodology.

1.8.2. Normative Approach

The aim and objective of the research is to investigate to what extent the compliance mechanism of the Paris Agreement facilitates equity and climate justice and what needs to be in place for the compliance mechanism to promote compliance and operationalise equity. A normative approach helps in understanding the application of equity and climate justice principles in the rule-making process of the international climate change regime. The normative approach will benefit from the empirical approach presented below to understand the different negotiating countries and groups (i.e., African Group, European Union Commission, G-77 and China and the Umbrella Group) interpretations of equity and climate justice in the rule making process. On the basis of this approach, the research develops possible models and recommendations on what needs to be in place for the compliance mechanism to achieve equity and climate justice.

In this thesis, I propose three models for the Compliance Mechanism of the Paris Agreement. These models are informed by the research analysis presented in the thesis. They are based on the lessons learned from the architecture of the Agreement and

Convention they will serve, theoretical inputs as to countries' compliance with international agreements, experiences of other MEAs and their compliance mechanisms, and my analysis of the political and negotiation stance of Parties, and the overall purpose of achieving equity and climate justice. The goal of the models is to propose a framework within which the Compliance Mechanism can operate to achieve its goal of promoting compliance, thereby helping in the achievement of equity and climate justice.

1.8.3. Empirical Approach

Following the development of possible models for the Compliance Mechanism and to examine their applicability, particularly in the Integrated Model presented in Chapter Ten, I use an empirical approach in relation to the models by presenting the specific content of the submissions made by Parties as part of their NDCs. These inclusions aid the Thesis in presenting practical and applicable options supported by the Parties' own framing. Additional empirical elements will also include a deeper analysis of the United Nations Framework Convention negotiations and in particular, the Paris Agreement negotiations on the development of the Compliance Mechanism.

1.9. Research Structure

In this section, I will describe the structure of the thesis. The Thesis is divided into eleven chapters. In the first two chapters, I present the introduction to the Thesis and a review of the key literature. From Chapters Three to Six, analysis of the Paris Agreement, theories of compliance in international law and international relations, and analyses of the compliance mechanism in MEAs and the Paris Agreement are covered. The purpose of these chapters is to understand the mechanisms well in order to draw lessons for my proposed models for the Paris Agreement. Chapter Seven then deals with the issues of equity and climate justice in the Paris Agreement, leading into Chapters Eight to Ten, where I address my three proposed models. The final chapter concludes and offers some recommendations. The section that follows the Thesis structure will be presented in more detail beyond this initial sketch.

Chapter One introduces climate change as a global challenge and the need to take urgent climate action according to international treaties. It introduces the different

international climate change treaties as a background and the role these treaties have played to date. It also introduces the principles that guide the climate treaties framework in defining obligations under the treaties and highlights their key limitations from the literature. The chapter discusses the role of the Compliance Mechanism in promoting the implementation of the treaty and the Article 15 mechanism of the Paris Agreement that was established to facilitate implementation and promote compliance with the provisions of the Agreement. In addition, it outlines the methodology applied for the research. By introducing the background and key limitations, this chapter will argue for the need to explore the role of the PA Compliance Mechanism as an inbuilt treaty mechanism to achieve equity and climate justice.

In Chapter Two, a literature review on the climate change regimes, particularly the UNFCCC and the Kyoto Protocol, will be analysed to provide a background on their negotiation and why that is an important consideration. It introduces the key principles of the climate change regimes, including CDRRC and equity. The literature review further provides a background for assessing the implementation of these principles and the obligations enshrined in climate treaties. The chapter will then identify the implementation gaps created by the lack of operationalisation of the principles and obligations under these regimes from the literature review. It will reflect on chapter one to highlight the role and impact of the climate treaties to date and introduce the next chapter that will deal with a recently adopted climate treaty, i.e., the Paris Agreement, and answer the question of why it needed to be adopted as a third implementing framework under the climate regime.

The Paris Agreement is the main focus of Chapter Three. This chapter introduces the Paris Agreement, including the history of the negotiations, principles, and obligations by referring both to literature and the treaty itself. It will provide an analysis of ‘why’ it was characterised as a ‘landmark’ by some and ‘soft law’ by others by building on the conclusions of the previous chapter. It also introduces the new mechanisms established by the Agreement, including the transparency framework, the compliance mechanism and the global stocktake, to explore if these new mechanisms will contribute to addressing challenges identified in Chapter One and to introduce the possible role of the compliance mechanism in facilitating the implementation of equity and climate justice. The chapter argues that the compliance mechanism and the current

elaboration of its rules and procedures offer an opportune moment for recommending additional models for facilitating the implementation of equity and climate justice.

In the next chapter, aims to discuss the question of compliance to explore the major international law (IL) and international relations (IR) literature. The chapter presents a brief look at the major theories on why states comply with international agreements to understand the different factors that authors have argued are the basis for the decision of a state to comply. This chapter aims not to choose and agree on one school of thought. The aim here is to inform the analysis in the following chapters to present different options on how the compliance mechanism of the Paris Agreement could facilitate implementation. The chapter will also explore the motivation of states to comply with obligations and recommend its findings to answer the question in Chapter Three as to what additional procedures or models are needed and as bases for the recommendation on the proposed models of compliance in chapters Eight to Ten of this thesis. The theories identified in this chapter will outline the assumptions behind what a good compliance mechanism should achieve. Also, the different perspectives from IL & IR and their comparative analysis will contribute to designing a mechanism that should, hypothetically, be acceptable by most states. Therefore, the specific lessons are drawn from the theories - individually and collectively - will be used to enrich the recommendations.

Building on the theories of compliance, the next chapter will first investigate if other compliance mechanisms under (non-climate) multilateral environmental agreements (MEAs) successfully promoted the principles and obligations of their respective agreements. Chapter Five, focusing on the specific question of compliance, will explore the compliance mechanisms of selected international environmental agreements to present the different approaches in terms of the purpose they serve, the processes they utilise, and their core features such as their institutional arrangement, and the procedures for initiating their work. The examples presented in this chapter are some of the most developed and tested mechanisms. Therefore, lessons will be presented and analysed on how to design such a mechanism, what has worked and what has not, and what issues were raised in implementing such mechanisms. While some of the work in this chapter will be to describe these mechanisms, comparative analysis and drawing lessons for the Paris Agreement Compliance mechanism is its objective.

Continuing with the theme of compliance mechanisms, Chapter Six deals with the Compliance Mechanism of the Paris Agreement. The chapter discusses the Mechanism's scope of application, rules and procedures, and its measures. It will provide an in-depth analysis of the mechanism by reviewing literature and analysing why Parties established the mechanism itself and exploring its objectives for what it can do. It also aims to answer what countries are considering for the Compliance Mechanism and what possible role it could play in achieving equity and climate justice. To answer these questions, the chapter will look back to chapter 2 and 3, and also look ahead to the next chapter that will particularly focus on equity and climate justice under the Paris Agreement.

Chapter Seven will discuss the formulation of the principles of equity and climate justice under the Paris Agreement as compared to the previous climate regimes. It will explore the role of these principles in a 'self-defined' bottom-up structured agreement. It will also examine the Agreement's provisions that contain references to equity and climate justice. In particular, in keeping with the self-defined nature of the obligations of the Paris Agreement, the chapter will explore how Parties considered equity and fairness by empirically examining the NDCs submitted to the UNFCCC. The role of equity as a legal principle and a tool for interpreting other obligations is also discussed in the chapter. The findings of this chapter will inform the possible models of compliance mechanisms in the next chapters.

In the three chapters that follow, Chapters Eight, Nine and Ten, I present my proposed models for the Compliance Mechanism of the Paris Agreement. These models will present the key obligations and how the Mechanism can facilitate compliance in the particular scenarios associated with each model. The models will address the two aspects of how the Compliance Mechanism can help in achieving equity and climate justice, namely through promotion of overall general compliance and specific equity compliance achieved by facilitating the compliance of Parties with equity related obligations.

In Chapter Eight I put forward my proposed Procedural Model for the Compliance Mechanism of the Paris Agreement. This model focuses on the fulfilment of the procedural requirements of the Paris Agreement and subsequent decisions. The

procedural model works on the assumption that a Party's submission of what they considered to reflect equity and climate justice (specific equity compliance), and the procedural communication on all their obligation under the Paris Agreement (overall compliance) will contribute to the achievement of equity and climate justice. If Parties have not submitted communications on either of the above, the role of the compliance mechanism will be initiated and, through the use of the common element/checklist, it will follow up on Parties' obligations. An alternative to this model will be to go beyond the procedural elements of the obligations and consider their substantive content which is the proposal in the next chapter.

The proposed Substantive Model is discussed in Chapter Nine. While recognizing the role of the Procedural Model and its importance to follow up on non-compliance with communication obligations of the Parties, the substantive model goes beyond checking whether communications were submitted or not to assessing the substantive content of the submissions made by Parties. The chapter analyses the legal, operational, and political viability of such a role for the compliance mechanism under the architecture of the Paris Agreement. Although there might be reservations as to the acceptability of a mechanism that would infringe from the self-defined soft approach envisaged by the Paris Agreement, there are merits to scrutinizing contributions of Parties and their equity and fairness claims. The Model also proposes objective assessment parameters for the considerations of equity and climate justice submitted by Parties in their NDCs through the compliance mechanism. The model comprises three levels of assessment with the first one dedicated to shallow consideration of whether the substantive obligations of the Agreement have been met, while the level II assessment goes deeper to further scrutinise the contributions made for progress and fulfilment of the differentiated obligations. In level III, specific equity compliance questions are presented, and an objective parameter-based assessment of equity compliance is proposed. The last of the models, the Integrated Model, will be discussed in Chapter Ten.

This chapter (Ten) proposes a model for the Paris Agreement Compliance Mechanism that incorporates elements from both the procedural and substantive models discussed in the preceding chapters. Taking advantage of the potentially muted objections to the Procedural Model and the thoroughness of the general compliance assessment offered by the Substantive Model, the Integrated Model presents the possibility of an adaptive

mechanism for the role of the Compliance Mechanism of the Paris Agreement. It presents a bottom-up specific equity compliance assessment that is in line with the nature of Paris Agreement and based on the choices made in the NDCs, and the consideration of differentiated obligations emanating from the Convention, the Paris Agreement, and subsequent decisions. The Thesis will then offer some conclusions.

In the conclusion, I will recap the main findings of the Thesis and reflect on the viability of the models I have presented. This is informed by the theoretical, and practical lessons presented in the thesis. Finally, I present the most likely model to be politically acceptable to Parties, and the possible ways forward for a stronger consideration of equity and climate justice in the compliance mechanism.

CHAPTER 2 Review of Literature on Climate Change Regimes

This chapter focuses on literature review of the climate change regimes. It aims to provide context and discuss the evolution of the climate regimes to provide an understanding of their principles and obligations. It also examines the role of the legal principles of the climate change regime and how these principles have informed the obligations of Parties and guided implementation of the regimes. This literature review comprises of three sections and sub-sections. In section 2.1 the literature focuses on the emergence and development of the international climate change law, the Convention and Kyoto Protocol; in particular, section 2.2 reviews the Compliance Mechanism of the Convention and the last section of the Chapter, section 2.3, focuses on the Kyoto Protocol Compliance System. The Paris Agreement and its Compliance Mechanism are presented in Chapter Three.

The climate regime has benefited from its close affiliation with the previously developed international environmental law regime and to some extent. Concepts and reasoning in the environmental law space have contributed to the way the climate regime has evolved.³⁸ However, its development has involved numerous experiments and negotiations to reach where it has. The tracing of this journey is helpful in understanding the motivation behind the way the agreements work.

In 2021, Working Group I to the Intergovernmental Panel on Climate Change Sixth Assessment Report found that human activities have caused global warming and that impacts of extreme events will have adverse impacts on people and nature.³⁹ However, the United Nations has long recognised climate change as the “defining human development challenge of the 21st century.” Climate change has a number of consequences including rising sea levels, extreme droughts, desertification, floods and tropical cyclones, and a decrease in crop yields and associated food security.

³⁸ Chris Hilson, ‘It’s All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law’ (2013) 25 *Journal of Environmental Law* 359

³⁹ IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. (Valérie Masson-Delmotte, Punamo Zhai, Anna Pirani, et al (eds) (Cambridge University Press 2021). See <https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf >

In 1992 the first international agreement on climate change, the United Nations Framework Convention on Climate Change (UNFCCC) was adopted with the ultimate objective of stabilizing the concentration of greenhouse gas (GHG) in the atmosphere and curbing emissions. In 1997, countries adopted another agreement on climate change, the Kyoto Protocol (KP), by elaborating the UNFCCC and committing Parties to binding emission reduction targets. These climate change regimes are a result of two pillars, the scientific and the political. The following section provides a historical context to the scientific developments that led to the creation of a political momentum of reaching an international agreement on climate change. It also aims to explore the negotiation history of the climate change regimes.

2.1. Emergence and Development of the Climate Change Regime

It was in the 1980s that the awareness of climate change and a general theory of greenhouse gas warming became a concern⁴⁰ that led to an international regime to address it.⁴¹ As outlined by Bodansky in his commentary, the concern was a result of the following several scientific developments. In the 1960s and 1970s atmospheric chemists conclusively proved the increase in the concentration of carbon dioxide (CO₂) in the atmosphere. Dupuy and Viñuales discuss the series of reports and scientific conferences that drew attention to the possibility of human influence on the climate system.⁴²

Schroeder also recalls the call by scientists to consider precautionary action concerning possible anthropogenic interference with the global climate at the first World Climate Conference in Geneva in 1979.⁴³ He considered the conference to be the first to recognise climate change as a serious problem. Bodansky also outlined the advancement of climatic models that provide credible global warming predictions. In the 1980s, scientific reports by the International Council of Scientific Unions

⁴⁰ Daniel Bodansky, 'The United Nation Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale Journal of International Law* 451.

⁴¹ Daniel Bodansky, Jutta Bruneée; Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017) 35.

⁴² Pierre-Marie Dupuy and Jorge Viñuales, *International Environmental Law* (Cambridge University Press, 2015) 237.

⁴³ Heike Schroeder, 'The History of International Climate Change Politics: Three Decades of Progress, Process and Procrastination' in Maxwell Boykoff (ed), *Politics of Climate Change: A Survey* (Routledge, 2010) 27.

(‘ICSU⁴⁴’) were able to identify traces of other types of gases: methane, nitrous oxide, and chlorofluorocarbons (CFCs) that trap heat and contribute to the greenhouse warming.

The first World Climate Conference⁴⁵, which was held in Villach, Austria, in 1985, resulted in a recommendation to scientists and policy-makers to begin an active collaboration to explore the effectiveness of alternative policies and adjustments.⁴⁶ In 1987, at the 10th World Meteorological Congress (WMO), government representatives reflected on the Villach recommendation and recognised the need for periodic assessment of scientific knowledge to inform countries.⁴⁷ It was also noted that such assessment should be under the guidance of governments rather than the scientists serving in their personal capacity. This led to the WMO and the United Nations Environment Programme (UNEP) establishing the Intergovernmental Panel on Climate Change (IPCC) in 1988. Mayer argues that IPCC was set up to take stock of the growing number of scientific studies and provide the best available climate science.⁴⁸ Schroeder elaborates the objective of IPCC as the assessment of ‘the scientific, technical and socio-economic information relevant for understanding the risk of human-induced climate change and assess peer-reviewed publications and scientific reports.’⁴⁹ On another hand, Bodansky argues, as per the Villach recommendation, the establishment of IPCC was to reassert government control and supervision on an increasingly prominent political issue.⁵⁰ As one of the main bodies of IPCC, i.e. the Working Group on Science and Government Representatives, negotiates ‘political acceptance of the knowledge produced by the scientists, it sometimes leads to a watering down of the science to politically acceptable levels.’⁵¹

⁴⁴ International Council of Scientific Union, previously known as International Council of Scientific Unions, is a nongovernmental organization created in 1931 with a global membership that brings together 40 international scientific Unions and Associations and over 140 national and regional scientific organizations including Academies and Research Councils to advance scientific knowledge.

⁴⁵ Bodansky, Bruneée; and Rajamani (n41) 97.

⁴⁶ World Climate Programme (WCP), World Meteorological Organization (WMO), United Nations Environment Programme (UNEP), International Council of Scientific Union, *Report of the International conference of the Assessment of the role of carbon dioxide and of other greenhouse gases in climate variations and associated impacts*; collection and series, WMO No (1986).

⁴⁷ WMO, ‘Proceedings of the Tenth World Meteorological Congress held in Geneva 4-28 May 1987.’ WMO Doc No 698. < https://library.wmo.int/doc_num.php?explnum_id=6066 > accessed 25 May 2022.

⁴⁸ Benoit Mayer, *International Law on Climate Change* (Cambridge University Press, 2018) 35.

⁴⁹ Dupuy and Viñuales (n42) 27.

⁵⁰ Bodansky (n40) 464.

⁵¹ Dupuy and Viñuales (n42) 28.

The Government of Canada organised an international conference, ‘The Changing Atmosphere: Implications for the Global Security’ in Toronto in 1988.⁵² The Conference brought together over 300 scientists and policymakers from 48 countries.⁵³ It recommended that governments and industry should reduce CO₂ emissions by 20 per cent of 1988 levels by the year 2005 and the need for an international treaty to implement policies to address climate change.⁵⁴ It was also in 1988 that the issue of climate change was raised for the first time at the UN General Assembly (UNGA).⁵⁵ The General Assembly resolution on the protection of the global climate for present and future generations recognised climate change as a common concern of mankind and called for a global framework for timely action to deal with climate change.⁵⁶ Okereke noted the UNGA resolution calls for the “options for possible strengthening of relevant existing international legal instruments or elements for inclusion in a possible future international convention on climate.”⁵⁷ Therefore, the year 1988 is marked as a critical moment for the intergovernmental response to climate change.⁵⁸

The first Heads of State Conference on climate change was held in 1989, followed by Ministerial Conference on Atmospheric Pollution and Climate Change in Noordwijk, Netherland, in 1989.⁵⁹ The conference reflected on international and domestic politics and the complexity of climate change. The conference saw a divide between the Global North and South and some divide within the North on how to address climate change. According to Gupta political statements, the countries emphasised the difference between the rich (industrialised) and poor (developing) countries in causing climate change. The divide within the Global North was reflected in a disagreement on whether or not to set quantitative limits for greenhouse gas emissions.⁶⁰ Nonetheless, the conference concluded with a declaration that called for the need to stabilise emissions

⁵²WMO, Environment Canada and UNEP, ‘Proceedings of the World Conference on the Changing Atmosphere: Implications for Global Security’, held in Toronto (27 to 30 June 1988) WMO No.710. <<https://digitallibrary.un.org/record/106359?ln=en>> accessed 25 May 2022.

⁵³ Bodansky (n40) 462.

⁵⁴WMO, Environment Canada and UNEP (n52).

⁵⁵ Bodansky (n40) 465.

⁵⁶ UN General Assembly (UNGA) Resolution 43/53, ‘Protection of Global Climate for Present and Future Generation of Mankind’ (6 December 1988) UN Doc A/Res/43/53.

⁵⁷ Chukwumerije Okereke, ‘The politics of interstate climate negotiations’ in Boykoff, *The Politics of Climate Change: A Survey* (Routledge, 2009) 43.

⁵⁸ Bodansky, Brune e and Rajamani (n41) 99.

⁵⁹ Joyeeta Gupta, ‘A history of international climate change policy’ (2010) 1 *Wiley Interdisciplinary Reviews: Climate Change* 637. See also, (n41) 99.

⁶⁰ Bodansky (n40) 467.

of CO₂ and other greenhouse gases (GHGs) not controlled by the Montreal Protocol⁶¹ while ensuring the development of the world economy.⁶²

Gupta argues that early political declarations such as the Noordwijk Declaration articulated the notion of leadership and the differential role of countries in addressing climate change.⁶³ She further claims such declaration pointed out the differential roles of developed and developing countries and called for differentiated responsibilities.⁶⁴ This meant that developed countries would be taking the lead in reducing their emission of GHGs while providing support for developing countries, including technologies to reduce the rate of emission growth and adapt to climate change.⁶⁵

The other important high-level intergovernmental conference was the Second World Climate Conference (SWCC) in 1990, which consisted of discussion among heads of governments from 138 countries.⁶⁶ The conference attracted a larger number of technical experts and ministers reflecting the increased political interest in climate change. The conference was attended by a larger number of technical experts as it was preceded by a preparatory negotiation which convened to prepare a decision text for submission to the ministers.⁶⁷ However, even with the solid technical preparations, the conference adopted a declaration that failed to specify internationally agreed target of emission reductions of GHGs. It recognised several principles, including the principle of equity and the common but differentiated responsibility of countries at different levels of development and the concept of sustainable development to guide efforts to be taken by countries.⁶⁸

⁶¹ Montreal Protocol on Substance that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3 (the Montreal Protocol).

⁶² Noordwijk Declaration on Atmospheric Pollution and Climate Change (7 November 1989).

⁶³ Okereke (n57) 43.

⁶⁴ *ibid.*

⁶⁵ See Gupta (n 59) 638.

⁶⁶ Bert Bolin, 'Man-induced Global Change of Climate 'The IPCC Findings and Continuing Uncertainty Regarding Preventive Action' (1991) 18 *Environmental Conservation* 297.

⁶⁷ *ibid.*

⁶⁸ WMO No.710. (n52) 164.

2.1.1. Establishment of Intergovernmental Negotiating Committee on Climate Change

As Okereke outlined, the call by the 1988 UN GA resolution for an international legal instrument to address climate change and the awareness raised by the conferences mentioned above led to additional decisions by the UNGA. The 1990 UN General Assembly Resolution⁶⁹ established a single intergovernmental negotiating process,⁷⁰ to initiate the negotiation of international agreement on climate change under the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC) to be led by the UNEP and WMO. After a strong call by developing countries that argued climate change was a political issue as well as a technical one, the decision excluded UNEP and WMO from leading the technical negotiation.⁷¹ Paterson elaborated on these political issues as wide-ranging economic implications of climate change on countries and the injustice of the international economic system.⁷²

Okereke argues that establishing the single negotiating body under the UN as a negotiating medium gave control to the state decision-makers on political issues.⁷³ The resolution limited the role of UNEP and WMO to only providing technical and logistic support for concluding a legal instrument with appropriate commitment before the UN Conference on Environment and Development in 1992.⁷⁴

The INC held five sessions between February 1991 and May 1992 with the aim of reaching an international legal regime for climate change.⁷⁵ Bodansky explains international legal regimes as a network of rules, institutions, and decision-making procedures. In addition, legal regimes consist of rules that constrain behaviour, with effective monitoring and a compliance mechanism to resolve disputes.⁷⁶ Similarly, Bodansky recalls that INC negotiations focused on reaching agreed rules and most states were willing to accept a framework convention.⁷⁷

⁶⁹ UNGA Res 45/212, 'Protection of Global Climate for Present and Future Generations of Mankind' (21 December 1990) UN Doc A/RES/45/212.

⁷⁰ Mayer (n48) 35.

⁷¹ Okereke (n57).

⁷² See, Mathew Paterson, *Global Warming and Global Politics* (Routledge, 1996).

⁷³ Okereke (n57) 51.

⁷⁴ UNGA Res 45/212 (n69) para 10 and para 11.

⁷⁵ Bodansky, Brune e and Rajamani (n41) 102.

⁷⁶ Bodansky (n40) 431.

⁷⁷ *ibid.*

However, INCs negotiations were not successful in agreeing on a more specific commitments to limit GHGs.⁷⁸ For understanding the INC process, Bodansky highlights four important factors.⁷⁹ First, although many scientists have stressed the severity of the consequences of climate change, governments had high uncertainties with every aspect of the negotiation, i.e. future emissions of GHGs, the effects of these emissions on atmospheric concentrations and the sensitivity of the climate system to increased concentration. Second, the high pressure of the costs of limiting GHG emissions both economic and political, were felt. The third critical factor was the divergent state interests between the Global North and South. Governments had diverging interests concerning efforts to address climate change, some on the potential costs of abatement and others on adaptation costs depending on responsibility, different starting points, countries energy resources, and vulnerability to the adverse impacts of climate change. Finally, the INC negotiation had a complicated political dynamic as the negotiations reflect not only the divide between the Global North and South but also the divide within the North. Bodansky elaborates on the divide between developed and developing countries on the use of historical and per capita baseline to control net or gross GHG emissions of GHGs. Developing countries argued the main responsibility of reducing emissions should be borne by developed countries due to historical high emissions of GHGs⁸⁰ as well as demanding financial and technological transfer to support their efforts to reduce emissions.⁸¹ On the other hand, developed countries were divided on setting targets and timetables for reducing GHGs emissions amongst themselves.

Given these challenges, the INC negotiations took 16 months, and as Rajamani notes, countries were able to reach an agreement on the last hours before the negotiations were scheduled to conclude.⁸² The United Nations Framework Convention on Climate Change (UNFCCC) was adopted by acclamation on the evening of 9 May 1992.⁸³

⁷⁸ Bodansky (n40) 430.

⁷⁹ Bodansky, Bruneée and Rajamani (n41) 103.

⁸⁰ Arnulf Grubler and Yasumasa Fujii, 'Inter-generational and Spatial Equity Issues of Carbon Accounts' (1991) 16 Energy 1397.

⁸¹ Okereke (n57) 17.

⁸² Bodansky, Bruneée and Rajamani (n41) 103.

⁸³ The Convention (n4).

2.1.2. The Framework Convention on Climate Change

The UNFCCC established climate change as a “common concern to humankind” and provides a basic framework for the climate change regime.⁸⁴ Rajamani notes that the UNFCCC puts in place a long-term, evolutionary process to address climate change by laying down the regime’s ultimate objective (Article 2). Fisher⁸⁵ supports the view that the Convention sets a framework recognizing a problem, sets goals, encourages action, reporting and reviewing procedures for implementation of obligations and importantly establishes a body for adopting the decisions necessary to promote effective implementation of the Convention and make further recommendation of action through the meeting of the Conference of Parties (COP) in Article 7.⁸⁶

The main guiding principles for defining obligations of Parties, the principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC) are provided under Article 3 of the Convention.⁸⁷ It should be noted that many developed countries had been opposed to the principle of CBDR.⁸⁸ However, developing countries called for strong rationale for differential treatment focused on the responsibility and capacity led to the framing of this Article. Gupta highlights these principles imply all Parties to the FCCC have common responsibilities, however, the responsibilities are differentiated on the basis of their contribution to causing the problems and their capabilities to address them.⁸⁹

Recalling the broad consensus in literature, Okereke argues “equity is at the heart of the climate regime”⁹⁰ and was the one of the bases for differentiation. Rajamani further agrees equity and CBDRRC are not the only bases but also guide how Parties will be

⁸⁴ Lavanya Rajamani, ‘The United Nations Framework Convention on Climate Change: a framework approach to climate change’ in Daniel A Farber and Marjan Peeters (eds), *Climate Change Law* (Edward Elgar, 2016) 206.

⁸⁵ Elizabeth Fisher, *Environmental Law: A Very Short Introduction* (Oxford University Press, 2017).

⁸⁶ The COP is the supreme decision-making body of the Convention established by Article 7 of the Convention. Parties to the Convention meet annually, to review the implementation of the Convention and its other legal instruments. The COP adopts decisions necessary to promote the effective implementation of the Convention, including institutional and administrative arrangements.

⁸⁷ The Convention (n4) Article 3.

⁸⁸ Cinnamon P Carlarne, Kevin R Gray and Richard G Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 15.

⁸⁹ Okereke (n57).

⁹⁰ Chukwumerije Okereke, ‘Climate Justice and the International Regime’ (2010) 1 *Wiley Interdisciplinary Reviews: Climate Change* 464.

differentiated.⁹¹ She stated that CDDRRC is operationalised in Article 3.1 of the UNFCCC as “[a]ccordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof” obligating developed country Parties to take lead. Whereas Article 3.2 of the FCC recognised the specific needs and special circumstances of developing country Parties that bear a disproportionate burden under the Convention. In addition, Article 4.3 of the Convention provides the differentiation of Parties obligation on the provisions of support to developing country Parties, inter alia, financial ⁹² and technological resources.⁹³

The UNFCCC differentiation took a categorical approach and established four categories.⁹⁴ The first category is 36 Parties listed in Annex I of the Convention often refers to ‘developed countries’ and countries that are undergoing the process of transiting to market economy, second is 25 Parties listed in Annex II only consisting of developed country Parties, the third category is a total of 11 from the 36 Parties listed in Annex I but not Annex II and are referred to ‘countries transiting to market economy’, and the last category are Parties not listed in the Convention annexes are referred to ‘developing countries’.

Bodansky further notes the long-term and evolutionary nature of the UNFCCC through the establishment of scientific and implementation committees for scientific assessment (Article 13 and 14). In Article 9 of the Convention a subsidiary body for scientific and technological advice (SBSTA) was established to provide scientific and technological knowledge relating to climate change to facilitate the implementation of the Convention, and Article 10 established the subsidiary body for implementation (SBI) for the assessment and review of the effectiveness of the Convention. The UNFCCC also established a permanent secretariat for facilitating the implementation of the Convention and making arrangements for the COP and the subsidiary bodies (Article 8).

⁹¹Lavanya Rajamani, ‘The Nature, Promise, and Limits of Differential Treatment in the Climate Regime’ (2006) 16 Yearbook of International Environmental Law 81.

⁹² The Convention (n4) Article 4.3.

⁹³ The Convention (n4) Article 4.5.

⁹⁴ the Convention (n4) See annexes.

The Convention has also set procedural obligations for reduction, reporting and review of greenhouse gas levels (Article 4, 5 and 12) and financial and technical obligations on developed country Parties to support the implementation of climate action by establishing a financial mechanism. (Article 4.3 and 11).⁹⁵ The UNFCCC Article 11 established the financial mechanism for the provision of financial resources to support developing countries' projects to address climate change. Developed country Parties called for the Green Environmental Facility (GEF) to serve as a financial mechanism of the Convention rather than a completely new dedicated fund, it is to be recalled that the GEF was established in 1990 to support developing countries address environmental impacts on global warming, pollution, biodiversity, and depletion of ozone layer.⁹⁶ Since, then the Parties have established an operating entity of the financial mechanism under Article 11 of Convention dedicated to only funding climate change, the Green Climate Fund (GCF).⁹⁷

The Convention set reporting obligations and designed the reporting and reviewing procedures under Article 12,13 and 14. During the pre-negotiation of the UNFCCC, Parties discussed different mechanisms for monitoring and evaluating individual parties' implementation progress and review of their obligations.⁹⁸ Article 12 set an obligation on all Parties to communicate information related to the implementation of the Convention through the communication of the national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases and description of Party's effort to implement climate action. However, the obligation has differentiation timeline for communication and support provisions as a condition for reporting.⁹⁹ The review mechanism of the Convention, 'resolution of questions regarding implementation', is provided in Article 13 and it requested the COP to further consider and establish a multilateral consultative process on question of implementation.¹⁰⁰ As, one of the aims of the Thesis is to understand how compliance mechanisms work, Article 13 is discussed in details in Section 2.2 below.

⁹⁵ Bodansky (n40) 538.

⁹⁶ the Convention (n4) Article 11.

⁹⁷ Decision 1/CP.16, paragraph 102, 'The Cancun Agreements: Outcome of the work of the Ad Hoc working Group on Long-term Cooperative Action under the Convention' (15 March) FCCC/CP/2010/7/Add.1

⁹⁸ Bodansky (n40) 543.

⁹⁹ The Convention (n4) Article 12.4.

¹⁰⁰ The Convention (n4) Article 13.

The COP as mandated in Article 7 of the Convention reviewed the implementation of the obligations and adopted two legal instruments for promoting effective implementation and achieving its objective. The Convention laid the legal basis for adopting additional legal instruments, include the Kyoto Protocol discussed below and Paris Agreement discussed in Chapter 3.

2.2.3. Kyoto Protocol (KP)

The Convention promoted participation by all Parties for addressing climate change and avoided a legally binding targets and timetables.¹⁰¹ However, Parties to the UNFCCC negotiated and adopted the KP in 1997, an international agreement which commits Parties by setting internationally binding emission reduction targets.¹⁰² The Kyoto Protocol was the product of the “Berlin Mandate”¹⁰³. This mandate came from a decision at COP 1 that proposed strengthening the commitments of developed country Parties through the adoption of a protocol or another legal instrument.¹⁰⁴ Such a protocol would aim to specify the obligations of developed country Parties as provided under Article 4.2 of the Convention, in particular by limiting and quantifying anthropogenic emission of GHGs.¹⁰⁵ The Berlin Mandate settled the top down regulatory approach provided in Article 4.1 negotiating quantified emission limitation and reduction objectives (QELROs) by developed country Parties.¹⁰⁶ The negotiation for setting legally binding quantified emission limitation and reduction commitment of GHGs from defined sectors¹⁰⁷ by percentage of base year or period¹⁰⁸ for developed

¹⁰¹ Bodansky, Bruneée and Rajamani (n41) 158.

¹⁰² The Kyoto Protocol (n5).

¹⁰³ Decision 1/CP.1, ‘The Berlin Mandate: Review of Adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a Protocol and decisions on follow-up’, (6 June 1995) Berlin, FCCC/CP/1995/7/Add.1.

¹⁰⁴ *ibid.*

¹⁰⁵ The Berlin Mandate, (n103), p 4.

¹⁰⁶ Sebastian Oberthur and Hermann E. Octt, *The Kyoto Protocol: International Climate Policy for the 21st Century*, (Berlin-Heidelberg: Springer-Verlag, 1999) Chapter 4.

¹⁰⁷ The Kyoto Protocol (n5) Annex A defines the greenhouse gases; Carbon dioxide (CO₂), Methane (CH₄), Nitrous oxide (N₂O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs), Sulphur hexafluoride (SF₆); and the Sectors/source categories as; Energy, Industrial processes, Solvent and other product use, Agriculture, and Waste for limitation and reduction of emission.

¹⁰⁸ The Kyoto Protocol (n5), Annex B, defines the quantified emission limitation or reduction commitment by percentage of base year, i.e., countries will provide their base year to qualify against

country Parties and reaching that through a consensus was challenging. The main contentious issue during the negotiation was the different views on the legally binding quantitative emission targets between the European Union (EU) and the United States (US) with support from other non-EU Annex II developed country Parties.¹⁰⁹ The EU called for a stringent target whereas the US was calling for a flexible setting of targets.¹¹⁰ As a result, the Berlin Mandate negotiations took two years and were among the most difficult international negotiations.¹¹¹

The KP places a heavier burden on developed country Parties as the Berlin Mandate specified the negotiations ‘shall’ be guided by inter alia, Article 3 of the Convention, the principles of equity and CBDR. The KP sets legally binding obligation individually and/or jointly on developed countries that their aggregate anthropogenic carbon dioxide equivalent emission of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B.¹¹² Accordingly, the KP requires developed country Parties listed in Annex I to the UNFCCC to reduce emissions by at least 5% below the 1990 levels in its first commitment period from 2008-2012.¹¹³

The US rejected the KP in 2001 and it took more eight years to enter into force. It entered into force on 16 February 2005 in accordance with Article 25 that provides it should enter into force on the ninetieth day on which 55 Parties to the Convention, including Annex I Parties which account for at least 55% of the total carbon dioxide emissions for 1990 have deposited legal instruments.¹¹⁴

The Kyoto Protocol provisions established flexible mechanisms as the Clean Development Mechanism to support achievement of quantified emission limitation and reduction through projects in Article 12 and decided institutional arrangement

their emission reductions, or period for emission reduction time frame, i.e., the first commitment period of Protocol (2008-2012).

¹⁰⁹ Bodansky, Bruneée and Rajamani (n41) 160.

¹¹⁰ *ibid.*

¹¹¹ The Berlin Mandate, (n101) 4.

¹¹² The Kyoto Protocol (n5) Article 3 para 1.

¹¹³ Lavanya Rajamani, *From Berlin to Bali and beyond Killing Kyoto Softly*, International and Comparative Law Quarterly. Volume 57, (2008) 913.

¹¹⁴ There are 192 Parties (191 states and 1 regional economic integration organization) to the KP <https://unfccc.int/process/the-kyoto-protocol/status-of-ratification>.

supporting the implementation of the Convention, i.e., secretariat, SBSTA and SBI shall serve the Protocol *mutatis mutandis*. Furthermore, the Kyoto Protocol states the COP is the supreme body and will serve as a meeting of Parties to the Protocol, and the Conference of Parties as the meeting of the Parties to the Protocol (CMP) will regularly review and adopt decisions necessary to promote the effective implementation of the Protocol (Article 13).

The compliance system and dispute settlement provisions were agreed in Article 19 and Article 20. Scholars agree the Kyoto Protocol had a significant role in the evolution of the climate change regime and important lessons for designing international agreement, in particular, on emission targets and compliance mechanism.¹¹⁵ In section 2.3 below the Kyoto Protocol compliance system will be discussed to identify lesson learnt for the consideration of its possible role for achieving equity and climate justice.

At COP7 in 2001, Parties to the KP adopted the Marrakesh Accords that provided the needed detailed rules for its implementation. The rules include procedures for accounting for emission reductions, operating rules for market mechanisms, and establishment of a compliance system including procedures set out for non-compliance.¹¹⁶

2.2. Compliance Mechanisms of the climate change regimes

This section will discuss the compliance mechanisms of the Convention and the Kyoto Protocol. It will review literature on the negotiation of the compliance mechanism, their function and lessons for the newly established compliance Mechanism of the Paris Agreement that will be discussed in Chapter 6.

2.3.1. Compliance Mechanism under the UNFCCC

During the negotiations of the Convention, Parties were confronted with the challenge of finding a balance between traditional dispute settlement and non-compliance

¹¹⁵ See, Bodansky, Bruneée and Rajamani (n41) 161; and Sebastian Oberthur (n80) 122; and (n104).

¹¹⁶ See, Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001. Addendum. Part two: Action taken by the Conference of the Parties. Volume I, FCCC/CP/2001/13/Add.1, See also FCCC/CP/2001/13/Add.4/Corr.1.

procedure.¹¹⁷ Traditional dispute settlement provisions tend to be adversarial and have several consequences ranging from allegations of a breach, negotiations and consultation between the states concerned, the judicial mechanism of dispute settlement or, as appropriate, mediation, conciliation or inquiry.¹¹⁸ As Farhana Yamin and Johanna Depledge observed the traditional dispute settlement has not been used in multi-lateral environmental agreement (MEAs).¹¹⁹ Thus, the negotiation for addressing questions of implementation progress were focused on non-compliance procedures. These procedures are proactive, preventative, non-confrontation and non-punitive procedures that aim to facilitating implementation.¹²⁰ As Bodansky also argued traditional adversarial procedures were inappropriate for a global concern affecting all Parties and caused by some, whereas non-compliance procedures were considered to promote cooperation and to facilitate implementation to address it.¹²¹

During the negotiations, there was a shared view that a multilateral, non-adversarial procedure would be preferable to traditional dispute settlement.¹²² Parties agreed that the compliance mechanism would be forward looking and assist parties to comply with their obligations. Accordingly, Parties discussed two proposals; ad hoc panel/panels or the establishment of a single committee (Implementation Committee) to deal with non-compliance.¹²³ The proposal for an ad hoc panel aims to design a process to resolve questions of implementation and interpretation of the Convention. The process will take up issues that have not yet ripened into formal legal disputes and provides an analysis of the extended legal aspects of the parties' commitment.¹²⁴ The outcome and recommendation of such process will be presented by the ad hoc panel to the COP to take action as appropriate. The other proposal called for a standing committee in order to avoid the difficulties of relying on ad hoc panels, i.e. negotiating and approving, and this committee will be composed of technical experts to resolve question of

¹¹⁷ Jacob Werksman, 'Designing a compliance system for the UN Framework Convention on Climate Change' in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law*, (New York, Earthscan, 1996) 103.

¹¹⁸ Bodansky, Bruneée and Rajamani (n41) 237.

¹¹⁹ Farhana Yamin and Joanna Depledge, *The International Climate Change Regime a Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004) 382.

¹²⁰ *ibid.*

¹²¹ Bodansky (n40) 547; and see generally A.Chayes and A.H.Chayes, *The New Sovereignty: Compliance with International Regulatory Agreement* (Harvard University Press, 1998) 3.

¹²² Bodansky, Bruneée and Rajamani (n40) 153.

¹²³ Bodansky (n40) 548.

¹²⁴ *ibid* 447.

implementation.¹²⁵ Parties, however, questioned the political ramifications of establishing an ad hoc panel through a decision whereas others considered a single committee of technical nature not to be appropriate for performing such a quasi-political function as a non-compliance review.¹²⁶

Parties agreed to establish a standing committee for multilateral consultative process (MCP) to consider questions regarding implementation at the first COP. The UNFCCC Article 13 reads [t]he COP shall, at its first session, consider the establishment of a multilateral consultative process, available to parties on their request, for the resolution of question regarding implementation of the Convention.’’¹²⁷

Accordingly, COP 1, as per the recommendation of the INC, decided to establish an ad hoc open-ended working group of technical and legal experts¹²⁸ to study all issues relating to the establishment of a multilateral consultative process and design.¹²⁹ It also requested the ad hoc open-ended working group to report its findings to the COP at its second session.¹³⁰ The ad hoc working group, however, could not complete its work by COP 2. The COP 2 decided to continue the work beyond COP2 and requested a report of the group’s findings after completing its work.¹³¹ After 4 years of negotiations, in 1998, the ad hoc group completed its work on the terms of reference for the multilateral consultative process at COP 4.¹³²

2.3.2. Design of the Multilateral Consultative Process under Article 13

The COP 4 decision pursuant to Article 13, established an MCP process and a standing multilateral consultative committee (“the Committee”) to serve the MCP. The objective of the MCP was to resolve questions regarding the implementation of the Convention

¹²⁵ Bodansky, Brune e and Rajamani (n41) 153.

¹²⁶ *ibid.*

¹²⁷ The Convention (n4) Article 13.

¹²⁸ Daniel M. Bodansky, ‘The Emerging Climate Change Regime’ (1995) 20 Annual Review Energy Environment 425.

¹²⁹ Decision 20/CP.1, ‘Establishment of a multilateral consultative process for the resolution of questions regarding the implementation of the Convention Article 13’ (6 June 1995) FCCC/CP/1995/7/Add.1 59.

¹³⁰ *ibid.*

¹³¹ Decision 4/CP.2, ‘Future work of the Ad hoc Group on Article 13’ (29 October 1996) FCCC/CP/1996/15/Add.1, 7.

¹³² Decision 10/CP.4, ‘Multilateral consultative process’ (25 January 1999) FCCC/CP/1998/16/Add/1, 42.

by providing advice to assist parties to overcome difficulties encountered in their implementation of the Convention and to promote its implementation.¹³³ The main difference of MCP from the traditional approach of dispute-settlement mechanism is its non-confrontational nature. The COP 4 decision provides that the MCP process was to be conducted in a facilitative, cooperative, non-confrontational, transparent and non-judicial manner.¹³⁴ The decision also includes different procedures for taking up questions regarding implementation of the Convention.¹³⁵ The procedures include those related to a party with respect to its own implementation, a group of parties with respect to their own implementation, a party or group of parties with respect to the implementation by another party or group of parties, and by the COP. The decision also provides the consideration by the committee should as appropriate assist in clarifying and resolving the questions of implementation and provide advice and recommendations on technical and financial resources.¹³⁶

However, the ad hoc group, completing its work on the draft terms of reference of the MCP was unable to agree on the composition of the MCP committee.¹³⁷ Parties could not agree on the number of members for the committee, with the proposals ranging from 10 to 25 members. Parties also could not agree on the geographical representation of memberships of the committee.¹³⁸ The composition and number of the committee membership is important for identifying the question of implementation and reaching decision for addressing non-compliance. Therefore, the terms of reference of the MCP could not be adopted. The COP 4 called for further consideration of the issue the following year. However, the focus of the negotiations and attention shifted to the establishment of a compliance system under the Kyoto Protocol, the parties never followed up on the MCP.¹³⁹

¹³³ *ibid.*

¹³⁴ Gregory Rose, 'A Compliance System for the Kyoto Protocol' (2001) 24 *University of South Wales Law Journal* 590.

¹³⁵ Werksman (n117) 104.

¹³⁶ *ibid* 105.

¹³⁷ *ibid.*

¹³⁸ Bodansky, Brune e and Rajamani (n41) 154.

¹³⁹ *ibid* 155.

2.3. The Design of Kyoto's Compliance System

As discussed above in 2001 at COP 7 the Marrakesh Accords, many outstanding issues that were necessary for initiating the implementation of the KP were adopted. These include the design of the compliance system, including sets of rules, procedures and institutions intended to 'facilitate, promote and enforce compliance' with the Kyoto Protocol commitments.¹⁴⁰ Jacob Werksman notes the compliance system of the KP represents over a decade of efforts by Parties to the Convention and the Protocol, and tailors a compliance system that fits a regime whose features continuously evolved.

The starting point for the negotiations on the design and the role for the compliance system under the Protocol was Article 18 of the Protocol, which provides that:

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve 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, considering the cause, type, degree, and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

Article 18 provided the mandate and created a procedural obligation to prepare a compliance system for the adoption at the first session of the Conference of the Parties serving as the Meeting of the Parties (COP/CMP).¹⁴¹ The negotiation of the KP compliance system was initiated by the adoption of a decision at COP 4 of the Buenos Aires Plan of Action in 1998.¹⁴² The decision emphasised the need for the preparation of the entry into force of the Kyoto Protocol, however, the Protocol entered into force in 2005. The decision also includes the work needed on the elements of the Protocol that relate to obligation of the Kyoto Protocol and its compliance regime.

¹⁴⁰ Jacob Werksman, 'The Negotiation of a Kyoto Compliance System', in Olav Schram Stokkem Jon Hovi and Geir Ulfstein (eds), *Implementing the Climate Regime* (Earthscan, 2005) 17.

¹⁴¹ *ibid.*

¹⁴² Decision 1/CP.4, 'The Buenos Aires Plan for Action' (25 January 1999) FCCC/CP/1998/16/Add.1. 4.

For the implementation of the compliance system part of the Buenos Aires Plan of Action, a Joint Working Group (JWG) on compliance was established in June 1999 by the subsidiary bodies of the UNFCCC, i.e. SBI and SBSTA.¹⁴³ The negotiation and elaboration of the Kyoto Protocol compliance continued through the submission of parties to the JWG, and the compilation of submissions by the Co-chairs of the JWG and the UNFCCC secretariat.¹⁴⁴ The first meeting of the JWG was held in July 1999, and the meeting produced a questionnaire and invited Parties to submit their views on the compliance system.

The questions covered the issues such as the objective and the nature of the compliance mechanism, institutional and procedural arrangements, the relationship with the review process under Article 8 of the KP¹⁴⁵ and the consequences of non-compliance.¹⁴⁶ The submissions from Parties reflected the different positions of countries and groups under the UNFCCC. Developing countries negotiated as a bloc under the traditional UN caucus-G77 and China. The main concern of developing countries was to develop a compliance system that reflected the principles of the UNFCCC, in particular “common but differentiated responsibilities”. The G77 was represented by South Africa as a coordinator and spokesperson for compliance issues during the negotiation. This was to ensure the compliance mechanism and the procedures to be developed reflect the differential treatment provided in the Convention.¹⁴⁷

The delegations of Brazil, China, India, Iran, Samoa, and Saudi Arabia were particularly active in shaping the views of the G77 and China position.¹⁴⁸ Another active group with the G77 and China was the group of Alliance of Small Island States

¹⁴³ Bodansky (n40) 589.

¹⁴⁴ See, submission from Parties; FCCC/SB/1999/MISC.4 and Add 1, 2, 3, 29 April 1999; FCCC/SB/1999/MISC.12, Add 1-2, 22 September 1999; FCCC/SB/2000/MISC.2.

¹⁴⁵ The KP requires Parties in Annex I to provide supplementary information necessary to demonstrate compliance with the commitments under the Protocol in their national communication submitted under the Article 12 of the UNFCCC. Article of 8 of the KP further provides the information submitted by these Parties should be reviewed by expert review teams, thorough and comprehensively with the aim of assessing the implementation of the commitments of Parties, identifying potential challenges for implementation, and finding of questions of the implementation that potential will initiate the work of the compliance regime.

¹⁴⁶ Xueman Wang and Glenn Wisner, ‘The Implementation and Compliance Regimes under the Climate Change Convention and Its Kyoto Protocol’ (2002) 11 *Review of European Community and International Environmental Law*, 188.

¹⁴⁷ (n144).

¹⁴⁸ Werksman (n117) 105.

(AOSIS) that pushed for an effective compliance system with enforcement procedures. The group stressed the need for follow up procedures with Parties that are found to be not complying. The developed country groups' attitudes towards the compliance system varied among the wealthier industrialised countries. There was a clear difference between the European Union (EU) and other developed countries groupings, known as the JUSCANZ and the Umbrella Group.¹⁴⁹ The JUSCAN was made up of Australia, Canada, Japan, New Zealand, Norway, Switzerland, and United States. The JUSCAN members then formed a core group, the Umbrella Group, with the exception of Switzerland. Switzerland then joined the OECD members that including Mexico and Korea.

In the same year of 1999, the JWG held its second meeting. At the end of the meeting the co-chairs of the JWG presented proposals to be considered for the design of a compliance system.¹⁵⁰ As outlined by Wang and Wisner, informal consultations and workshops helped speed up the negotiation of the compliance system that resulted in a draft text by the JWG co-chairs at the third meeting in June 2000.¹⁵¹ They noted that the co-chairs position on the institutional and procedural structure of the compliance mechanism was supported by many Parties.

It was at COP 7 in November 2001 that Parties adopted the negotiating text of the compliance procedures and mechanism for the Kyoto Protocol. After four years of negotiation and, as Werksman puts it, after trade-offs between the political groupings and combined efforts of the co-chairs of the JWG with the support of the UNFCCC secretariat, the compliance text was adopted as part of the Marrakech Accords.¹⁵²

¹⁴⁹ *ibid.*

¹⁵⁰ See, UNFCCC Report of the Joint Working Group on Compliance on its work during the eleventh sessions of the subsidiary bodies, Procedures and Mechanism Relating to Compliance under the Kyoto Protocol, 3 November 1999, FCCC/SB/1999/CRP.7.

¹⁵¹ *ibid.*

¹⁵² Decision 24/CP.7, 'Procedures and mechanisms relating to compliance under the Kyoto protocol' (21 January 2002) FCCC/CP/2001/13/Add. 3.

2.3.1. Procedures and Mechanism of the Kyoto Protocol

Many scholars agree that the Kyoto Protocol compliance system is sophisticated¹⁵³ and a testing ground for compliance theory.¹⁵⁴ Chapter Five discusses the compliance mechanism of the MEAs and the KP's distinctive compliance system features and procedures. In addition, Bodansky, Bruneée and Rajamani have stated that the KP's compliance system is the most ambitious and elaborate multilateral environmental agreements (MEA) compliance regime in operation today.¹⁵⁵

The Marrakech Accord decision on the procedure and mechanism of the compliance system¹⁵⁶ established a compliance committee. The objective of the committee is to facilitate, promote and enforce compliance. Therefore, the committee is responsible for verifying compliance with the obligations set by the Protocol and for adopting decisions and non-compliance procedures.¹⁵⁷

The compliance committee consists of a plenary, a bureau and two branches.¹⁵⁸ The committee has twenty members elected by the COP, ten of whom serve in the facilitative branch and the other ten serve in the enforcement branch. The facilitative branch (FB) is tasked to promote compliance with the obligation of the Kyoto Protocol considering the principle of CBDRRC.¹⁵⁹ The FB provides advice to all Parties facing difficulties and serves as an 'early warning' function to deal with potential cases of non-compliance. The Enforcement Branch (EB) addresses cases of non-compliance of developed countries with their quantified emission reduction targets in accordance with Article 3.1 of the Kyoto Protocol.¹⁶⁰

¹⁵³ Francesca Romanin Jacur, 'The Kyoto Protocol's Compliance Mechanism', in Daniel A Farber and Marjan Peeters, *Climate Change Law*, (Cheltenham, UK, Edward Elgar 2016) 239. See also, Bodansky, Bruneée and Rajamani (n41) 196.

¹⁵⁴ Meinhard Doelle, 'Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design' (2010) 1 *Climate Law* 237.

¹⁵⁵ Bodansky, Bruneée and Rajamani (n41) 196.

¹⁵⁶ Decision 27/CMP.1, 'Procedures and mechanisms relating to compliance under the Kyoto Protocol' (2005) FCCC/KP/CMP/2005/8/Add.3. 92.

¹⁵⁷ *ibid.*

¹⁵⁸ (n156).

¹⁵⁹ *ibid.*

¹⁶⁰ Sebastian Oberthur, "Compliance Under the Evolving Climate Change Regime", in Daniel A Farber and Marjan Peeters, *Climate Change Law*, (Edward Elgar, 2016) 239.

The plenary of the compliance committee consists of the members of the facilitative and enforcement branches. It is responsible for reporting to the COP and overall administration of the compliance process. The bureau of the compliance committee allocates implementation questions to the appropriate branch in accordance with the mandates of each branch. The chairs and vice-chairs of the two branches constitute the bureau.¹⁶¹

As Doelle has highlighted, the Kyoto Protocol compliance regime is distinctive and promising for containing both facilitating and enforcement obligations under the Protocol. It is also unique as the compliance regime is linked to a market mechanism for a punitive measure of non-compliance and has a sharp differentiation between developed country Parties and developing country Parties providing a different set of procedures.¹⁶²

2.4. Conclusion

As reflected in the literature review, the Convention has set the framework for the climate change regime and led to the adoption of two international treaties, the Kyoto Protocol and the Paris Agreement, which will be discussed in Chapter 3 below. It is also noted that the operationalisation of the principles of equity and CBDRRC were amongst the political issues during the negotiation of the treaties and that contributed to the North and South divide between the Parties of the Convention. The Convention differentiated Parties to different categories, developed country Party and developing country Party and set differentiated obligations for reducing greenhouse gas concentration in the atmosphere and towards achieving its objective in Article 2.

The Convention subsequently evolved to setting a more stringent quantified emission reduction targets on developed country Parties compared to their developing counterparts for addressing climate change. The Kyoto Protocol was adopted in 1997 but took 8 years to enter into force following the differing views amongst developed country Parties. However, the Kyoto Protocol has a significant role in advancing the efforts on climate change and establishing novel systems with its market and

¹⁶¹ (n156) 97.

¹⁶² (n153).

compliance system. The Kyoto Protocol compliance system is amongst unique compliance systems. It had both a facilitative and enforcement branch, where the facilitative role addressed the question of implementation and had a pre-emptive feature to address non-compliance. The Kyoto Protocol compliance system also had a punitive feature for causes of non-compliance by developed country Parties that restricted the participation of that Party from the market mechanism of the Protocol.

The experiences and lessons learned from negotiations of both the Convention and the Kyoto Protocol, the role of the principles of equity and CBDRRC and the features and procedures of their compliance system inform the discussion in the different chapters of the thesis. As this chapter also highlighted, the climate regimes viewed the principles as guiding the obligations of Parties rather than following their implementation, which the Thesis has identified as a gap. In the next chapter, the Paris Agreement, which was adopted under the Convention but with significant differences from the Kyoto Protocol, will be discussed.

Chapter 3 The Paris Agreement

This chapter will discuss the Paris Agreement (PA) and examine how the climate change regimes' principles and obligations have evolved. It introduces its provisions, obligations, and institutions for facilitating its implementation. It will also introduce the 'oversight system' of the Agreement that assesses the implementation progress, including the Compliance Mechanism of the Paris Agreement, which is further discussed in Chapter 6. The first section of the chapter will discuss the legal nature of the Agreement, highlighting its difference from the UNFCCC and the Kyoto Protocol. The second section analyses the PA to identify its procedural and substantive obligations and lays the foundation for Chapters 8 to 10. I will discuss the proposed models for the Compliance Mechanism and its role in achieving equity and climate justice. In addition, the tables in this chapter summarise and present the relevant provisions of the Paris Agreement that are important for the models. The third section will introduce the 'oversight system' established by the PA for following up on the implementations of obligations. The last section will discuss the Agreement's institutional arrangements.

3.1. Legal Nature of the Provisions of the Paris Agreement

The lack of political support for the second commitment period of the Kyoto Protocol led to negotiations on a new international agreement on climate change extending beyond 2020.¹⁶³ Therefore, in 2011 the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) was established at COP 17 to negotiate and reaching a new, enhanced, legally binding agreement “applicable to all Parties” to address climate change.¹⁶⁴ The negotiations took four years, and the Paris Agreement was adopted in 2015.¹⁶⁵

The Paris Agreement is a multilateral agreement that strengthens the global response to the threat of climate change by enhancing the implementation of the Convention. The Agreement provides that both developed country Parties and developing country

¹⁶³ Lavanya Rajamani, 'From Berlin to Bali and Beyond: Killing Kyoto Softly?' (2008) 57 *International and Comparative Law Quarterly* 909.

¹⁶⁴ UNFCCC Decision 1/CP.17, “Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action” (11 December 2011), para 2.

¹⁶⁵ Paris Agreement (n12).

Parties should take action to achieve the objective of the Agreement. It also includes climate finance, and technology transfer, which are important for implementing climate action and enhancing subsequent actions of developing countries.

The Paris Agreement consists of 29 Articles, including provisions on mitigation, adaptation, loss and damage, finance, technology development and transfer, capacity building, transparency of action and support, global stocktake and facilitating implementation, and compliance. The Agreement also includes articles on institutional arrangements to serve the Agreement. The Paris Agreement opened for signature on 22 April 2016, and it entered into force on 4 November 2016. As of May 2022, 193 countries are Parties out of the 195 signatories to the Agreement from the original 197 Parties to the Convention.

Parties to the Convention recognised the need for strengthening climate action to address the urgent impacts of climate change. In December 2015, Parties to the Convention adopted the Paris Agreement by Decision 1/CP21.¹⁶⁶ Decision 1/CP21 also adopted key Paris outcomes, including a decision on intended nationally determined contributions (INDCs), a work programme of the Paris Agreement (decisions to give effect to and elaborate the Agreement) and a decision on enhanced action before 2020. The Paris Agreement's decision also established an Ad Hoc Working Group on the Paris Agreement (APA). The APA was mandated to develop rules for the implementation of the PA. The legal form or nature of the Paris Agreement was central to the Paris negotiations.¹⁶⁷ The different types of obligations under the Agreement are carefully negotiated outcomes amongst the Parties.¹⁶⁸

The Paris Agreement has been characterised as ‘historic’, a ‘landmark’ and a ‘monumental triumph’ by heads of state, governments, and scholars.¹⁶⁹ The Agreement is seen as a turning point in global climate governance as it sets an ambitious collective goal for all Parties.¹⁷⁰ The Paris Agreement differs from the Kyoto Protocol, which sets

¹⁶⁶ Decision 1/CP.21, ‘Adoption of the Paris Agreement’, (29 January 2016) FCCC/CP/2015/10, Add.1, para27.

¹⁶⁷ Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25 *Review of European Community & International Environmental Law* 142.

¹⁶⁸ Lavanya Rajamani, ‘The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations’ (2016) 28 *Journal of Environmental Law* 328.

¹⁶⁹ Bodansky, Bruneée and Rajamani (n41) 209.

¹⁷⁰ *ibid.*

legally binding obligations only on developed country Parties.¹⁷¹ The KP required developed country Parties to the UNFCCC to reduce emissions by at least 5% below 1990 levels in its first commitment period from 2008-to 2012.

International law and climate change law scholars have debated the legal nature of the Agreement. Scholars have different interpretations of the legal nature of the Paris Agreement. Richard Falk characterises the Paris Agreement as ‘voluntary’ and ‘with no obligation to comply.’¹⁷² Another scholar Anne-Marie Slaughter described the Paris Agreement as a ‘statement of good intentions rather than international law’.¹⁷³ She argues treaties under international law should have ‘enforceable rules’ with ‘sanction for non-compliance and must be ‘ratified by domestic parliament to become part of domestic law.’ She concludes that the Paris Agreement has ‘none of these.’¹⁷⁴

On the other hand, Lavanya Rajamani, recognising the Paris Agreement is mixed with provisions with weak normative content, argues that it contains a carefully calibrated mix of hard and soft obligations, with each type of obligation playing a distinct role.¹⁷⁵ The ‘hard obligations’ of conduct are reflected on procedural communication mitigation efforts and finance, in conjunction with a rigorous oversight system, and the ‘soft obligations’ peppered throughout the instrument in relation to implementation of mitigation efforts, adaptation, loss and damage. The provision of support as means of implementation creates good faith expectations for Parties. Therefore, she claims the Paris Agreement entails some procedural binding obligations of conduct, and the cascading levels of its obligations are designed to meet its purpose.

Daniel Bodansky argues that the Paris Agreement is a treaty under international law and that it creates legal obligations for its Parties, and compliance with these obligations is not voluntary.¹⁷⁶ He accepts the argument by other scholars that the Paris Agreement cannot be applied by domestic courts, or it may not require legislative approval in some

¹⁷¹ Kyoto Protocol (n102).

¹⁷² Richard Falk, ‘Voluntary’ International Law and the Paris Agreement’ <<https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/>> accessed 28 March 2019.

¹⁷³ Anne-Marie Slaughter, ‘The Paris Approach to Global Governance’ (Project Syndicate, 28 December 2015) <<https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12>>

¹⁷⁴ *ibid.*

¹⁷⁵ Rajamani (n168) 338.

¹⁷⁶ Bodansky (n167) 142.

countries, and that it lacks enforcement mechanisms. However, he states that these are not the tests of whether an international agreement qualifies as a treaty, nor does the fact that some of the Paris Agreement's provisions do not create obligations means that none of them do or that the Agreement as a whole is not law. He concludes that the confusion about the legal character of the Paris Agreement involves a failure to distinguish between the issues of legal form, enforceability, and domestic acceptance of the Agreement.¹⁷⁷ Other scholars have described the Paris Agreement as 'a crème brûlée,' combining harder procedural commitments with softer substantive provisions.¹⁷⁸ They argue that this has the potential to encourage flexible responses by its Parties to changing conditions within a stable and long-term architecture.

3.2. Obligations under the Paris Agreement

3.2.1. Preamble of the Paris Agreement

Like many international treaties, the Paris Agreement and its decisions have a preamble section that provides the context of the Agreement. The preamble of an international treaty is not legally binding, as it does not create rights and obligations on its Parties. However, as provided under the general rule of interpretation of the Vienna Convention on the Law of Treaties (1969), it is important to understand and interpret treaties' operative provisions.¹⁷⁹

The preamble section of the Paris Agreement contains paragraphs that provide context for the implementation of the Agreement. The Paris preamble established the link between the Agreement and Convention.¹⁸⁰ The Parties agreed on this by decision 1/CP.17 of the UNFCCC, which decided to negotiate an agreed outcome with legal force "under the Convention."¹⁸¹ The preamble also reiterated the objective and the principles of the UNFCCC Convention by specifying that the implementation of the Paris Agreement should be in pursuit of the objectives of the Convention, being guided

¹⁷⁷ *ibid* 143.

¹⁷⁸ Jonathan Pickering, et.al. 'Global Climate Governance Between Hard and Soft Law: Can the Paris Agreement's 'Crème Brûlée' Approach Enhance Ecological Reflexivity?' (2019) 31 *Journal of Environmental Law* 2.

¹⁷⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969; in force 27 January 1980) 1155 UNTS 331 (VCLT), Article 31.

¹⁸⁰ Paris Agreement (n12) preamble, recital 2.

¹⁸¹ (n164).

by its principles.¹⁸² However, amongst the areas in which the Paris Agreement evolved are the principles of the Convention. For the purpose of this thesis, it is important to note these changes and implications for guiding obligations and their implementation under the Paris Agreement.

As discussed in Chapter 2, the Party's obligations are guided by the principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC). Whereas the preamble of the Paris Agreement reads [i]n pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances (CBDRRC-NC).¹⁸³ Rajamani states that this means that the principles of the Convention, in particular the principle of common but differentiated responsibilities and respective capabilities, apply to the Paris Agreement but differentiated responsibilities and individual capabilities are captured to reflect current different national circumstances of countries.¹⁸⁴

In addition, the preamble of the Paris Agreement contains references related to CBDRRC, including the specific needs and special circumstances of developing countries,¹⁸⁵ intrinsic relationship between climate change actions, responses and impacts and equitable access to sustainable development and eradication of poverty in developing countries,¹⁸⁶ the right to development¹⁸⁷ and just transition¹⁸⁸. For the first time under the UNFCCC, the preamble of the Paris Agreement notes “the importance for some of the concept of “climate justice” when taking action to address climate change”¹⁸⁹. It acknowledges the importance of “intergenerational equity”.¹⁹⁰ The table below presents some of the key preambular paragraphs for the thesis. Chapter 7 examines the role of these principles, particularly equity, CBDRRC-NC and climate

¹⁸² Paris Agreement (n12) preamble, recital 2.

¹⁸³ *ibid.*

¹⁸⁴ Bodansky, Bruneée and Rajamani (n41) 221.

¹⁸⁵ Paris Agreement (n12) preamble, recital 5.

¹⁸⁶ *ibid.*, recital 8.

¹⁸⁷ *ibid.*, recital 11.

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*, recital 13. See also, Chukwumerije Okereke and Philip Coventry, ‘Climate Justice and the International Regime: Before, During and After Paris’ (2016) 7 *Wiley Interdisciplinary Reviews: Climate Change* 834.

¹⁹⁰ *ibid.* (n12) recital 11.

justice, in guiding implementation and exploring frameworks for achieving their implementation through the Paris Agreement's Compliance Mechanism.

Table 1. Key Preambular Paragraphs

Paragraph 1 of the preamble of the Paris Agreement	Established the link between the UNFCCC and the Paris Agreement
Paragraph 3 of the preamble of the Paris Agreement	Reiterated the objective and the principles of the Convention; “In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”
Paragraph 4 of the preamble of the Paris Agreement	Urged the need for an effective and progressive response to the urgent threat of climate change.
Paragraph 8 of the preamble of the Paris Agreement	Recognised the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty.
Paragraph 13 of the preamble of the Paris Agreement	Notes the importance for some the concept of “climate justice”, when taking action to address climate change.

3.2.2. Objective of the Paris Agreement

Article 2 (1) of the Paris Agreement sets the objective of the Agreement.¹⁹¹ It states that the Agreement enhances the implementation of the Convention. Rajamani argues that signals the centrality of the Convention in the evolution of the climate regime.¹⁹² Article 2 Agreement enhances the implementation of the Convention, including its objective by strengthening the global response to the threats of climate change in the context of sustainable development.¹⁹³ It also sets three sub- objectives on the limiting emission and establishing the long-term temperature goal, increasing the ability for adaptation and making financial flows consistent with low emission and climate resilient development path.¹⁹⁴

¹⁹¹ Rajamani (n168) 341.

¹⁹² Rajamani (n168) 342.

¹⁹³ Paris Agreement, (n12) Article 2.

¹⁹⁴ Mayer (n48) 47.

Article 2 (1) reads,

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change.

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development in a manner that does not threaten food production; and

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

Thorgeirsson states that the above objective sets the context for implementing the Paris Agreement. He suggests the aim should be read together with Article 4 (1) of the Paris Agreement for limiting the temperature to well below 2°C, Article 7 of the Paris Agreement for increasing the ability to adapt to the adverse impacts of climate change and Article 9 of the Paris Agreement for aligning financial flow with low emissions development pathways.¹⁹⁵

In addition to the preamble, Article 2(2) of the Paris Agreement provides that differentiation of efforts to implement the Agreement will be based on “equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.” Rajamani argues that Article 2 (2) is an operational provision guiding the binding obligations on Parties and lays the foundation for the implementation.¹⁹⁶ Equity and the CBDRRC principles and guidance on implementation are discussed and examined in detail in Chapter 7.

3.2.3. Climate action under the Paris Agreement

Bodansky refers to Article 3 of the Paris Agreement as crosscutting the provisions of the Agreement on mitigation, adaptation, finance, technology, capacity building and

¹⁹⁵ Halldor Thorgeirsson, ‘Objective (Article 2.1.)’ in Daniel Klein et al (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press, 2017) 125-127.

¹⁹⁶ Lavanya Rajamani, ‘Guiding Principles and General Obligation (Article 2.2 and Article 3)’ in Klein et al, *ibid.*

transparency.¹⁹⁷It provides that parties have an obligation to undertake and communicate ambitious and progressive efforts through nationally determined contributions (NDCs). Mayer argues that NDCs are international law obligations that arise from two sources.¹⁹⁸ NDCs are treaty obligations that arise under the Paris Agreement, which imposes an obligation of conduct on Parties. The communication of NDCs itself may constitute unilateral declarations that also create legal obligations.¹⁹⁹ In addition, Article 3 recognises the need to provide support for developing country Parties for the effective implementation of this Agreement.

3.2.4. Mitigation

The Paris Agreement sets an ambitious ‘direction of travel’ for the climate regime and provides extensive obligations, including binding obligations of conduct in relation to mitigation contributions for Parties.²⁰⁰ Article 4.1 of the Paris Agreement provides a long-term global emission pathway in order to achieve the long-term temperature goal. This is through countries committing to reach global peaking of greenhouse gas emissions as soon as possible while recognising that peaking will take longer for developing country Parties.²⁰¹ And by the second half of this century, countries must aim to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases based on equity, and in the context of sustainable development and efforts to eradicate poverty.²⁰²

i. Submission of NDCs

Among the strong procedural obligations of the Paris Agreement, Article 4 (2) sets a procedural commitment.²⁰³ It reads, ‘Each Party shall prepare, communicate, and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.’ This provision creates individual obligations on

¹⁹⁷ Bodansky (n167) 147.

¹⁹⁸ Benoit Mayer, ‘International law Obligations Arising in Relation to Nationally Determined Contributions’ (2018) 7 *Transnational Environmental Law* 251.

¹⁹⁹ *ibid* 268.

²⁰⁰ Lavanya Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (2016) 65 *International and Comparative Law Quarterly* 493.

²⁰¹ *ibid*.

²⁰² Rajamani (n200).

²⁰³ Paris Agreement (n12) Article 4 (2).

Parties, uses the imperative ‘shall’ and requires domestic measures. Rajamani concludes the obligation is one of conduct rather than the result as the phrase ‘intends to achieve’ in the first sentence of Article 4 (2) establishes a good faith expectation from Parties rather than requiring them to do so.²⁰⁴ The obligation of conduct requires all Parties to prepare, communicate and maintain successive NDCs. The UNFCCC Secretariat is mandated to record the submitted NDCs in a public registry in accordance with Article 4 (12).

ii. Implementation of NDCs and Support

During the negotiation of the Paris Agreement, Parties had different views on the legal nature of NDC implementation. In addition to the procedural obligation of NDCs under Article 4 (2), the European Union argued there should also be an obligation to implement the commitment to ‘achieve’ NDCs. However, the United States, supported by China and India, rejected this by arguing that this will have the same legal status the Kyoto Protocol and an obligation to achieve, and implement will discourage participation of Parties and the raising of ambition.²⁰⁵ However, the Paris Agreement sets a ‘shall’ obligation on Parties to pursue domestic measures to achieve their NDCs.²⁰⁶ Winker suggests the pursuit of domestic measures may include the development of NDCs to implement and achieve NDCs.²⁰⁷

The Paris Agreement sets an obligation on developed countries to provide support (i.e., finance, technology, and capacity building) for developing countries for the implementation of their NDCs and recognise that enhanced support for developing country Parties will allow for higher ambition in their actions.²⁰⁸

iii. Progression of NDCs and Differentiation

All Parties to the Paris Agreement have an obligation to maintain successive NDCs that represent a progression beyond their existing NDCs.²⁰⁹ The successive NDCs should

²⁰⁴ Rajamani (n200) 498.

²⁰⁵ *ibid*, 498-499.

²⁰⁶ Paris Agreement (n12) Article 4 (2).

²⁰⁷ Harald Winkler, ‘Mitigation (Article 4)’ in Daniel Klein et al (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press, 2017) 147.

²⁰⁸ *ibid*.

²⁰⁹ Paris Agreement (n12) Article 4 (3).

also reflect the highest possible ambition.²¹⁰ Article 4(3) provides that ‘the highest possible ambition’ is differentiated amongst Parties and should reflect the principle of common but differentiated responsibilities and respective capabilities in light of different national circumstances.²¹¹

Article 4 (4) of the Paris Agreement provides that developed countries should take the lead by undertaking economy-wide absolute emission reduction targets, whereas developing countries enhance their mitigation efforts.²¹² It also encourages developing countries to move towards economy-wide emission reduction over time or limitation targets in the light of their different national circumstances. In addition to the differentiation mentioned above, the Paris Agreement recognises special circumstances for Least Developed Countries (LDCs) and Small Island Developing States (SIDs).²¹³ These countries may prepare and communicate strategies, plans and activities for low greenhouse gas emissions development. Winkler concludes that the different forms of mitigation in Article 4 (4) and Article 4 (6) are nuanced form of differentiation of obligations on Parties.²¹⁴

iv. Timeframes of NDCs

Another clearly legally binding provision of the Paris Agreement is Article 4 (9), which requires all parties to communicate their NDCs every five years and be informed on the outcomes of Parties' collective progress towards achieving the purpose of the Agreement, referred to as global stocktake referred to in Article 14. However, the Paris Agreement does not provide timeframes for the length and implementation periods of NDCs, i.e., some Parties have communicated 10 years while others have communicated 5 years contribution in 2015.²¹⁵ At the adoption of the Paris Agreement, the Parties had agreed the Conference of the Parties serving as the meeting of the Parties to the Agreement (CMA) will decide a common time frame for NDCs. After seven years after the adoption of the Paris Agreement, the COP26 decided on a common time that

²¹⁰ Winkler (n207) 148.

²¹¹ Paris Agreement (n12) Article 4(5).

²¹² The 2006 IPCC Guidelines defines economy-wide targets as covering all economic sectors, including energy, industrial process and product use, Land use land use change and forestry, agriculture, and waste.

²¹³ Paris Agreement (n12) Article 4.6.

²¹⁴ Winkler (n207) 152.

²¹⁵ Ethiopia, South Africa, and United States have submitted a target up to 2030, and Anglo, Mozambique and Solomon Island have 5-year targets.

encourages Parties to communicate NDCs in 2025 with an end date of 2035, and in 2030 NDCs with a time frame of 2014.²¹⁶ The role of the CMA defined in Article 16 of the Paris Agreement will be discussed below.²¹⁷

v. Information and Accounting of NDCs

In order to facilitate clarity, transparency and understanding of NDCs, Article 4.8 of the Agreement states that all Parties shall provide detailed information while communicating their NDCs. The information to be provided by Parties is provided under decision 1/CP.21 paragraph 27, and such information may include quantifiable information on the reference point as the base year, time frames, periods for implementation, scope, and coverage, planning processes, assumptions and methodologies and accounting for anthropogenic greenhouse gas emissions.²¹⁸ The obligation under Article 4 (8) to provide information when communicating NDCs is a legally binding. However, the information to be provided is only optional, with countries able to choose from the list of items enumerated in decision 1/CP—21 paragraph 27. The decision of the Paris Agreement recognises the need to develop further guidance on the information. In addition to providing information, parties have a legally binding obligation to account for the anthropogenic emissions and removals of their NDCs. In their accounting, Parties are obliged to promote environmental integrity, transparency, accuracy, completeness, comparability, and consistency and to ensure the avoidance of double counting.²¹⁹

Table 2. Key Article 4 provisions

Article 4 (2)	Each Party “shall” prepare, communicate and maintain successive NDCs.
Article 4 (3)	Successive NDCs will represent progression and ambition beyond the current Parties NDCs, reflecting its common but differentiated responsibilities and respective capabilities, in light of different national circumstances.

²¹⁶ Decision 6/CMA.1, ‘Common time frames for nationally determined contributions referred to in Article 4, paragraph 10, of the Paris Agreement’ (8 March 2022) FCCC/PA/CMA/20021/10/Add.3, para 2.

²¹⁷ Article 16 of the Paris Agreement provides the Conference of the Parties serving as the meeting of the Parties to this Agreement (CMA) will regularly review the implementation of the Agreement and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall also perform the functions assigned to it by the Agreement. The

²¹⁸ Decision 1/CP.21 (n166), para 27.

²¹⁹ Paris Agreement (n12), Article 4 (13).

Article 4 (4)	Provides differentiated features of NDCs, developed countries to undertake economy wide emission reduction targets, while developing countries enhance their mitigation efforts, and encourages overtime to take economy wide emission reduction targets.
Article 4 (5)	Support to developing countries for the implementation of their NDCs. It is a “shall” obligation.
Article 4 (8)	Requires Parties to provide the necessary information for clarity, transparency and understanding, in accordance with the rules.
Article 4 (13)	Requires Parties ‘shall’ account for their NDCs.

vi. Further NDCs Guidance

As discussed above, the decision 1/CP.21 that adopted the Paris Agreement mandated the CMA to give additional guidelines and agree on relevant decisions for the implementation of the Paris Agreement.²²⁰ Bodansky argues such additional decisions pursuant to the Articles of the Paris Agreement may create legal obligations on its Parties.²²¹ Parties in 2018 reached a decision at COP 24 a decision on further guidance in relation to mitigation section and provide the information necessary for clarity, transparency and understanding applicable to their NDCs.²²² The details of the NDC guidance of the decisions on the mitigation sections are discussed both in Chapter 8 and Chapter 9 of the thesis.

3.2.5. Adaptation

The Convention, in its objective, highlights the importance of adaptation. The Convention sets that its legal instruments should achieve the stabilization of greenhouse gas concentrations in the atmosphere to allow ecosystems to adapt naturally to the climate change.²²³ During the Paris Agreement negotiation, developing countries stressed the importance of adaptation to address the adverse impacts of climate change.²²⁴ Developing countries, including African countries, called for political and

²²⁰ See Paris Agreement (n12), Article 4 (8), Article 4 (9) and Article 4 (13).

²²¹ Bodansky (n167) 148.

²²² Decision 4/CMA.1 ‘Further guidance in relation to the mitigation section of decision 1/CP.21’. (19 March 2019) FCCC/CMA/2018/3/Add.1.

²²³ The Convention (n4) Article 2.

²²⁴ Bodansky, Bruneée and Rajamani (n41) 237.

legal parity of mitigation and adaptation throughout the Paris Agreement negotiations.²²⁵ The Paris Agreement recognised the importance of adaptation in its objective and devoted a specific article to it (Article 7).²²⁶

i. Global Goal for Adaptation

Under Article 7 (1) the Paris Agreement established a global goal on adaptation for enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change in the context of the temperature goal.²²⁷ The Article also states global goal on adaptation should enhance resilient with a view to contributing to sustainable development and ensuring adequate adaptation response.

Mayer says Article 7 is general call for the need to protect “people, livelihoods and ecosystems” from the impacts of climate change and emphasises the relationship between mitigation outcomes, adaptation needs and adaptation costs.²²⁸ Whereas Bodansky found that the Article has one clear legal binding obligations and many soft law provisions.²²⁹

ii. Adaptation Communication

The Paris Agreement sets an obligation in which all countries have to periodically submit and update an adaptation communication containing their priorities, implementation and support needs, plans and actions.²³⁰ The clear legal binding obligation in relation to adaptation communication under Article 7 (11) prescribes that adaptation communication, once submitted, shall be submitted and updated periodically.

In Article 7 (10) of the Paris Agreement it sets the vehicle for communicating adaptation efforts. It sets that adaptation communication can be submitted and periodically updated as a component of NDCs as referred to in Article 4 (2). Accordingly, 46 Least Developed Countries (LDCs), 53 African countries, 30 Latin

²²⁵ *ibid.*

²²⁶ Paris Agreement (n12) Article 7.

²²⁷ *ibid.*

²²⁸ Mayer (n48) 170.

²²⁹ Bodansky, Brune e and Rajamani (n41) 237.

²³⁰ Paris Agreement (n12), Article 7 (10).

American and Caribbean States, 7 Eastern European and 2 Western European States have included adaptation in their NDCs.²³¹ The detailed guidance and agreed components of the adaptation communication are discussed in Chapter 9.

iii. Adaptation Contribution

The Paris Agreement set a legally binding obligation on all countries in Article 7.9 which states “Each Party shall, as appropriate, engage in adaptation planning processes and implementation of actions, including the development or improvement of relevant plans, policies and/or contributions.” The legally binding obligation on adaptation planning and implementation takes into account the local dimension of adaptation.²³² The Article states that countries should, as appropriate, formulate and implement adaptation actions, assess impacts and vulnerability, monitor, and evaluate their adaptation actions and build resilient socioeconomic and ecological systems.

iv. Adaptation and the Global stocktake

The Paris Agreement will assess collective progress of Parties towards achieving the purpose of the Agreement in the form of a global stocktake referred to in Article 14. The global stocktake involves adaptation, including recognising adaptation efforts of developing countries, enhancing the implementation of adaptation action, reviewing the adequacy and effectiveness of adaptation and support provided and reviewing overall progress in achieving the global adaptation goal.²³³

Table 3. Key Article 7 provisions

Article 7 (1)	Established the Global Goal on Adaptation: enhancing adaptive capacity, strengthening resilience, and reducing vulnerability.
Article 7(3)	Recognition of adaptation efforts by developing countries.
Article 7 (9)	Requires Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions.
Article 7 (10)	Each Party should, as appropriate, submit and update periodically an adaptation communication, which may include its priorities, implementation, and support needs, plans and

²³¹ UNFCCC ‘Synthesis report on the aggregate effects of the intended nationally determined contributions’ (30 October 2015) FCCC/CP/2015/7.

²³² Rajamani (n168) 355.

²³³ Paris Agreement (n12), Article 7 (14).

	actions, without creating any additional burden for developing country Parties.
Article 7 (11)	The adaptation communication shall be, as appropriate, submitted and updated periodically, as a component of or in conjunction with other communications or documents, including a national adaptation plan, a nationally determined contribution as referred to in Article 4, paragraph 2, and/or a national communication.
Article 7 (13)	Continuous and enhanced international support shall be provided to developing country Parties for the implementation of paragraphs 7, 9, 10 and 11 of this Article, in accordance with the provisions of Articles 9, 10 and 11.

3.2.6. Finance

As discussed in Chapter 2, climate finance is an essential piece of the climate regime both under the Convention and Kyoto Protocol, and it was a key determinant in reaching the Paris Agreement.²³⁴ Under the Article 9 the Paris Agreement sets a clear legal obligation on developed country Parties to provide financial resources to assist developing country Parties with respect to both mitigation and adaptation efforts in continuation of their existing obligations under the Convention.²³⁵ In addition, in Article 9 (3) of the Paris Agreement that requires climate finance should represent progression beyond the previous efforts.

Also, Article 9 for the first time sets a legally binding individual procedural obligation on developed country Parties to biennially communicate indicative quantitative and qualitative financial support, while encouraging other Parties to communicate such information on voluntary basis.²³⁶ Similar to the above provisions of the Paris Agreement, decision 1/CP.21 agreed to negotiate and agree on additional implementation guidelines. Accordingly, the following rules were adopted; including the elements for quantitative and qualitative ex-ante information and sets developed countries Parties shall provide information on their projected level of public financial resources to developing countries starting 2020, established a dedicated online portal for posting and recording the biennial communications and to prepare a compilation

²³⁴ Jorge Gastelumendi and Inka Gnittke, 'Climate Finance (Article 9)' in Daniel Klein et al (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press, 2017) 239.

²³⁵ Paris Agreement (n12) Article 9 (1).

²³⁶ Gastelumendi and Gnittke (n235) 247.

and synthesis of the info reported starting from 2021 and to inform the global stocktake; and developed accounting rules for finance provided and mobilised through public interventions- under the transparency Framework.²³⁷ The above-mentioned decisions are further discussed in the Chapter 9.

Table 4. Key Article 9 provisions

Article 9 (1)	Required developed country Parties ‘shall’ provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.
Article 9 (3)	Requires the mobilisation of climate finance should represent a progression beyond previous efforts.
Article 9 (5)	Requested developed country Parties shall biennially communicate indicative quantitative and qualitative information, including, as available, projected levels of public financial resources to be provided to developing country Parties. Encouraged other Parties providing resources are to communicate biennially such information on a voluntary basis.
Article 9 (7)	Developed country Parties shall provide transparent and consistent information on support for developing country Parties provided and mobilised through public interventions biennially in accordance with the modalities, procedures and guidelines to be adopted by the CMA.

3.3. Reporting, and Review of the Paris Agreement

The section above discussed the obligations of Parties under the Agreement, and this section will discuss the mechanism established by the Paris Agreement for following up on the implementation of the obligations. The Paris Agreement established the transparency framework, the compliance mechanism and the global stocktake under the Article 13, Article 14, and Article 15, respectively, to assess the progress of implementation by individual Parties and assess collective progress towards the

²³⁷ Decision 12/CMA.1, ‘Identification of the information to be provided by Parties in accordance with Article 9, paragraph 5, of the Paris Agreement’ (19 March 2019) FCCC/CMA/2018/3/Add.1.

achievement of the objective of the Agreement. Bodansky, Bruneé, and Rajamani called the above provisions the ‘oversight system’ of the Paris Agreement.²³⁸

3.3.1. Transparency

Article 13 of the Paris Agreement established the transparency framework for action and support to build mutual trust and confidence and promote effective implementation, with built-in flexibility that considers Parties’ different capacities. Many scholars agree that the transparency framework is an important mechanism to hold states accountable through reporting as the obligation on NDCs does not have an obligation of result, with the premise that peer and public pressure can effectively ensure compliance.²³⁹

Article 13 also states the purpose of the transparency framework is to ensure clarity and tracking of progress toward achieving Parties’ NDCs and adaptation action,²⁴⁰ as well as to provide information on financial and technical support provided and received by Parties.²⁴¹

3.3.2. Reports under the Transparency Framework

The Convention requires Parties to submit national communications and biennial report implementation.²⁴² Parties to the Convention report on their progress in reducing emission and information on finance, technology and capacity building under the Convention’s reporting framework, i.e., national communication every four years and biennial reports for developed country Parties or biennial update report for setting country Parties.²⁴³ The Paris Agreement stipulates that the transparency framework will build on and enhance the transparency arrangement under the Convention.²⁴⁴ The new reporting requirement forgoes the bifurcated reporting framework under the

²³⁸ Bodansky, Bruneé and Rajamani (n41) 242

²³⁹ *ibid.* See also Yamide Dagnet and Kelly Levin, ‘Transparency (Article 13)’ in Daniel Klein et. al. (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press, 2017) 301; Harro Van Asselt, Hakon Saelen, and Pieter Pauw, *Assessment and Review under a 2015 Climate Change Agreement* (Nordic Council of Ministers 2015).

²⁴⁰ Paris Agreement (n12) Article 13 (7).

²⁴¹ Paris Agreement (n12) Article 13 (10).

²⁴² The Convention (n4) Article 12. See also, Decision 2/CP.17, “Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention” (12 March 2012) FCCC/CP/2011/9/Add.1.Paras 12-15.

²⁴³ *ibid.* decision 2/CP.17 paras 13 and 14.

²⁴⁴ Paris Agreement (n12), Article 13 (3).

Convention and establishes a single framework with flexibility for developing countries. Under Article 13 all Parties are required to submit their report on their progress in reducing emissions under their national inventory reports and information to track progress made implementing NDCs. Article 13 (4) prescribes that support shall be provided to developing countries to implement the Article.²⁴⁵

3.3.3. Technical Expert Review

The information submitted by all Parties in relation to their mitigation and information by developed country Parties on the provision of support will be subject to a technical expert review.²⁴⁶ Article 13.12 provides that the review process shall consist of a consideration of the Party's support provided and the implementation and achievement of its NDCs. It also provides for the differentiation of Parties in the review process. The process shall pay particular attention to the respective national capabilities and circumstances of developing country Parties.

Table 5 Key provisions of Article 13

Article 13.4	The transparency arrangements under the Convention, including national communications, biennial reports and biennial update reports, international assessment and review and international consultation and analysis, shall form part of the experience drawn upon for the development of the modalities, procedures and guidelines under paragraph 13 of this Article.
Article 13.7	Each Party shall regularly provide the following information: (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement; and (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4.
Article 13.8	Each Party should also provide information related to climate change impacts and adaptation under Article 7, as appropriate.
Article 13.9	Developed country Parties shall, and other Parties that provide support should, provide information on

²⁴⁵ Paris Agreement (n12), Article 13 (4).

²⁴⁶ Paris Agreement (n12) Article 13 (12).

	financial, technology transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11.
Article 13.11	Information submitted by each Party under paragraphs 7 and 9 of this Article shall undergo a technical expert review, in accordance with decision 1/CP.21. For those developing country Parties that need it in the light of their capacities, the review process shall include assistance in identifying capacity-building needs. In addition, each Party shall participate in a facilitative, multilateral consideration of progress with respect to efforts under Article 9, and its respective implementation and achievement of its nationally determined contribution.

3.4. Global Stocktake

The transparency framework is complemented by a ‘global stocktake’ every five years to assess collective progress toward long-term goals.²⁴⁷ It will consider in a comprehensive and facilitative manner: mitigation, adaptation and the means of implementation and support, and in light of equity and the best available science.²⁴⁸ Scholars cite global stocktake as essential and argue it has an important role in collectively assessing nationally determined contribution against Article 2.²⁴⁹ The first global stocktake will be in 2023 and will take place every five years thereafter unless otherwise decided by the CMA. Under Article 14 (3) the Paris Agreement states that the outcome of the global stocktake shall inform Parties in updating and enhancing their actions and support in accordance with the relevant provisions of the Agreement.²⁵⁰ The decision adopted to guide the global stocktake process to be based on equity and the best available science and include information collection and preparation process and technical assessments of the information.²⁵¹

²⁴⁷ Paris Agreement (n12) Article 14 (1).

²⁴⁸ *ibid.*

²⁴⁹ Harald Winkler, ‘Putting Equity Into Practice in the Global Stocktake Under the Paris Agreement’ (2019) 20 *Climate Policy* 124. See also, Bodansky, Bruneée and Rajamani (n41) 244.

²⁵⁰ Paris Agreement (n12) Article 15.3.

²⁵¹ Decision, 19/CMA.1 Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21(19 March 2019) FCCC/PA/CMA/2018/3/Add.2.

Table 6. Key provisions of Article 14 (Global stocktake)

Article 14(1)	The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake"). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.
Article 14 (3)	The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action.

3.5. Compliance Mechanism of the Paris Agreement

The Paris Agreement established a mechanism to facilitate implementation and promote compliance with its provisions.²⁵² Article 15 of the Agreement also decided that the mechanism will consist of a committee and agreed on its guiding principles. Chapter 6 discusses in detail the Paris Agreement’s Compliance Mechanism, its negotiating history, and procedures for facilitating implementation and promoting compliance. As Bodansky, Bruneée, and Rajamani highlight Article 15 is a ‘skeletal provision establishing a mechanism and provides only minimal guidance on how it will work’.²⁵³ This Thesis has also identified this gap and will introduce possible models for the Compliance Mechanism to facilitate implementation and a possible additional role of achieving equity and climate justice under the Paris Agreement.

3.6. Paris Agreement Institutions

The institutional arrangement for supporting the operation and implementation of the Paris Agreement is contained in Article 16, 17, 18 and 19.²⁵⁴ In these Articles the Paris Agreement

²⁵² Paris Agreement (n12) Article 15 (1).

²⁵³ Bodansky, Bruneée and Rajamani (n41) 244.

²⁵⁴ Christina Voigt, ‘Institutional Arrangements and Final Clauses (Article 16-29)’ in Daniel Klein et al (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press, 2017) 353.

extended the mandate existing institutions under the Convention, both the Subsidiary Body for Scientific and Technology Advice (SBSTA),²⁵⁵ and the Subsidiary Body for Implementation (SBI),²⁵⁶ and the Secretariate.²⁵⁷ The function and role of these bodies was discussed in Chapter 2.

3.6.1. Conference of the Parties Meeting as the Parties of the Paris Agreement (CMA)

Article 16 (1) decided the meeting of the Convention will serve as a meeting of Parties as the Parties of the Paris Agreement (CMA). The Agreement sets the CMA as the governing body and mandated it to review the Agreement's implementation and take the necessary decision for its effective implementation.²⁵⁸ Article 16 (4) reads;

Article 16 (4) The Conference of the Parties serving as the meeting of the Parties to this Agreement shall keep under regular review the implementation of this Agreement and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Agreement and shall:

- (a) Establish such subsidiary bodies as deemed necessary for the implementation of this Agreement; and
- (b) Exercise such other functions as may be required for the implementation of this Agreement.

After the adoption of the Paris Agreement, the CMA has met three times as a meeting of the Parties of the Paris Agreement and has adopted decisions to guide the implementation of the Paris Agreement further.²⁵⁹ The decisions by the CMA are discussed in Chapter 7 to Chapter 10 and referred to as the Paris Agreement and its decisions.

3.6.2. Final Clauses (Article 20-28)

The Agreement includes a final clause similar to other international treaties on process for ratification and entry into forces that requires doublet threshold of 'least 55 Parties to the

²⁵⁵ Paris Agreement (n12) Article 18.

²⁵⁶ Paris Agreement (n12) Article 19.

²⁵⁷ Paris Agreement (n12) Article 17.

²⁵⁸ Christina Voigt (n254) 357.

²⁵⁹ CMA 1, CMA 2 and CMA 3 were held in 2018, 2019, and 2021 respectively.

Convention and accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions’ under Article 20 and Article 21. Similar to the Convention and the Kyoto Protocol, the final clauses of the Agreement also include provisions for the process for amendments,²⁶⁰ dispute settlement,²⁶¹ voting process²⁶² and withdrawal.²⁶³

3.7. Conclusion

Chapter 3 has identified and mapped the principles, legal obligations, and ‘oversight’ system of the Agreement. These legal obligations inform the discussion in Chapters 8 to 10 on the Compliance Mechanism Models proposed by this thesis. The Paris Agreement has been referred to as a ‘landmark’ and ‘historic’ under the climate regime. The Agreement agreed to enhance the implementation of the Convention, and it sets long-term ambitious, aspirational goals under Article 2. The Agreement has evolved from the Convention and Kyoto Protocol of setting top down legally binding obligations based on groupings of Parties to nationally defining the contribution targets for reducing emissions.

Scholars agree the differentiation of Parties from its bifurcated form of developed country Parties and developed country Parties under the Convention is nuanced under the Paris Agreement. The Agreement introduced a new framing of the principles of the Convention, the implementation to be guided by equity, and CBDRRC – ‘in the light of different national circumstances.’ The Paris Agreement reflected equity and CBDRRC-NC four times, each to guide relevant obligations and implementation of climate action. The Agreement also agreed on new related principles including ‘equitable access to sustainable development and eradication of poverty’, the ‘right to development’, ‘intergenerational equity’ and ‘just transition’ to guide the implementation of the Paris Agreement.

The Paris Agreement sets both procedural and substantive obligations on all Parties, in relation to mitigation, adaptation, and finance. In Article 4 it sets a procedural obligation on all Parties to prepare and submit their national defined mitigation reduction targets every five years, and it also sets that the successive NDCs should reflect ambition and progression compared to the initial commitments. Article 4 is one of the provisions of the Paris Agreement where

²⁶⁰ Paris Agreement (n12) Article 23.

²⁶¹ *ibid* Article 24.

²⁶² *ibid* Article 25.

²⁶³ *ibid* Article 28.

differentiation of Parties is reflected as it requires developed country Parties to take the lead in reducing emissions. The Paris Agreement further sets out that Parties should enhance adaptation efforts and communicate their efforts to the UNFCCC. In addition, the Paris Agreement recognises that financial resources will contribute to enhancing ambition and sets an obligation on developed country Parties in continuation of their existing obligation under the Convention to provide climate finance to developing countries to support the implementation of both mitigation and adaptation efforts.

The Agreement has also anchored review systems for assessing the implementation of both individual and collective obligations. Parties are required to report on the progress and achievement of their NDCs, and information on the financial support provided and received under the transparency framework of the Agreement, whereas the Global Stocktake will assess collective progress towards long-term goals in Article 2 (1) of the Paris Agreement.

The Compliance Mechanism in Article 15 of the Agreement is also a mechanism that follows up on individual obligations. Scholars have referred to it as a ‘skeletal provision establishing this mechanism’ due to Article 15’s limited guidance on the review and follow up process.²⁶⁴ This Thesis has also identified this gap and aims to propose models for the Compliance Mechanism to facilitate implementation and to enhance its role in achieving equity and climate justice. In addition to the legal obligations of the Paris Agreement, it is also important to understand ‘why’ states comply with international treaties and to identify the relevant lessons for the PA’s Compliance Mechanism. Chapter 4 discusses the theories of compliance under international law and international relations to inform the thesis’ proposed models in Chapters 8 to 10.

²⁶⁴ Bodansky, Bruneée and Rajamani (n41) 244.

Chapter 4: Theories of Compliance: Lessons for the Compliance Mechanism of the Paris Agreement

The previous chapters have reviewed the core climate change regimes in international law. Chapter 2 discussed how Parties adopted the Framework Convention for stabilizing greenhouse gas emissions, and further strengthened the Convention by setting stricter targets under the Kyoto Protocol. However, the IPCC reports have definitively found that human activities have contributed to worsening climate change and that avoidance of its adverse impacts requires urgent action, and this contributed to the adoption of the Paris Agreement as considered in Chapter 3. Chapter 3 also found that the review mechanisms of the Agreement, in particular the Compliance Mechanism, could have an enhanced role in facilitating implementation and in contributing toward the achievement of equity and climate justice. This chapter aims to understand the theories of why and when states comply with international law with a view to informing that potentially enhanced role.

The chapter comprises of the discussion of theories of compliance under international law and other related disciplines to shed some light on the motivation of compliance by states. To answer the main research question as to how the compliance mechanism of the Paris Agreement can help in achieving equity and climate justice, a foundational understanding of how compliance with international agreements in general works is essential. This discussion will enrich the development of the different models of how the mechanism can be designed to enhance equity and climate justice. The theories will provide guidance on understandings of different schools of thought on how and why states comply with the commitments they enter into through international agreements. The discussion of theories helps to tease out factors that are considered as determinants of compliance by authors from different disciplinary persuasions. The compliance literature even by legal scholars follows methodological approaches that mostly involve lessons drawn through the use of interdisciplinary theoretical considerations from the fields of international law and international relations as well as perspectives from regulatory theory.²⁶⁵

²⁶⁵ See, Steven R. Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *American Journal of International Law* 291. The practice of incorporating theoretical sections in the work of international law scholars has also been seen as a stylistic addition to the general approach of focusing on just the rules and primary legal sources for analysis of questions of legal nature. A study like this one, aiming to give some insights into a better way to design and apply a compliance system, will benefit from theoretical perspectives and what different authors have identified to be important in understanding why states comply or not comply.

Compliance as a concept, when explored in connection with international law, is intrinsically linked to the behaviour of states as the end result of norms. This linkage calls for a more theoretical injection compared to a concept that is apt for a purely legalistic scrutiny. Particularly, the design of a compliance mechanism or the attempt to find ways of using the mechanism to pursue goals that might be difficult to achieve or contentious can benefit from a broader foundation. These foundations are even more important to cases where a new purpose is being pursued through the compliance system. It might be helpful for the discussion to explore what allowances are permissible in the flexibilities offered by what is expected of a compliance system in established theoretical approaches. Therefore, this chapter aims to understand why states comply with obligations under international law and to draw the elements that need to be considered in the compliance mechanism under the climate change regime within the framework of the Paris Agreement to explore further what the mechanism offers in terms of the achievement of climate justice and equity goals of the agreement.

The theories presented below have been developed by scholars from different disciplines, and the focuses and lessons from them vary. These variations can be seen in, for example, differences based on the unit of analysis chosen. The literature from the international relations discipline uses states as the main unit of analysis to see how they act in their international interactions, while international law scholars tend to look at the rules themselves as what need to be analysed to extrapolate some conclusions on how states act. As the purpose of this section is to take lessons from different perspectives, there is no particular choice made as to what to use as the unit of analysis.

The theories of compliance sometimes blur the line between the inquiry into why states actually follow the rules and the investigation into how effective or impactful the rules are.²⁶⁶ For the purpose of clarity, the distinction between compliance and related concepts such as implementation, effectiveness, and enforcement need to be addressed from the outset. Implementation is related to the process by which states incorporate the agreed terms in international law agreement into practice. In most cases, this is a component of compliance of states with an agreement. Effectiveness of a rule is about how good the rule is in achieving the

²⁶⁶ Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance,' in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds.) *The Handbook of International Relations* (Sage Publications, 2012) 539.

ends it sets. If curbing climate change is the goal of the agreement, for example, implementation can be about making sure there are domestic legislative and institutional mechanisms in place to make the agreement practically applicable. The effectiveness of this agreement will be determined by how much the rules are contributing to dealing with the problem they purport to tackle. A fully implemented treaty may not be effective if it does not achieve the goals set for it, or a fully implemented treaty with proper domestic application laws and institutions might fail to be effective because of the limitations of the practical application of the laws. For instance, a study on the conservation and management of fisheries in the North Atlantic States found that despite the high level of implementation of the relevant treaties, the decline in the fish stock in the area was not curbed.²⁶⁷ Furthermore, a fully implemented treaty even within the domestic law and implementation of such law in the domestic system may fail to be effective due to the failure of the substantive content of the treaty to achieve the end result it wants to achieve.

Coming to enforcement, this is a mechanism of ensuring compliance with an agreement through arrangements, ranging from soft nudges and assistance designed to encourage adherence to the rules to rigorous sanctions imposed by other parties to the agreement for non-compliance at the international level or those imposed by the state on domestic actors for violation of rules applied in fulfilment of commitments made in the agreement.²⁶⁸ Enforcement is characterised by a “persuasive continuum” of measures providing a range that spans facilitative options to punitive ones.²⁶⁹

²⁶⁷ See Jacqueline Alder and Gail Lugten, ‘Frozen Fish Block: How Committed Are North Atlantic States to Accountability, Conservation and Management of Fisheries?’ (2002) 26 *Marine Policy* 345.

²⁶⁸ The somewhat related concept of enforcement pyramids developed in the responsive regulation literature might be interesting to mention here, although it is focused on municipal regulatory mechanisms as opposed to the international. Compliance with regulatory rules can be motivated by policies or measures that range from assistance to sanctions with punishment mechanisms to force adherence to the rules. Braithwaite, for example, presents a Pyramid of support and a pyramid of sanctions in his example on the regulation of medicines. In this example, the pyramid of support involves a pyramid with a base section dedicated to education and persuasion aimed at encouraging positive acts, and a top section for the award of the Nobel Prize in medicine. On the pyramid of sanctions, the base section is devoted to education and persuasion about a problem which, for instance, can be a failure to implement regulatory requirements. On the top of the sanctions pyramid is the loss of license to sell medicines. This staggered approach towards encouraging compliant behavior and discouraging non-compliant behaviour might be adapted to the international sphere well. In the climate change regime, the argument can be made that it is possible to envisage a compliance system that involves capacity building, naming, and shaming, sanctions of different levels in a staggered manner. See, John Braithwaite, ‘The Essence of Responsive Regulation’ (2011) 44 *University of British Columbia Law Review* 475.

²⁶⁹ Jutta Brunne, ‘A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol’ (2002) 13 *Tulane Environmental Law Journal* 223.

The relationships between states in different areas of concern in the international arena are mostly agreed between the parties involved. These include guidelines on their interactions and how certain activities of mutual interest within the territories of the states concerned are regulated. Amongst others, these sets of rules are usually put into effect through international conventions, agreements, customs, and principles of law recognised by civilised nations which make up what is known as international law.

However, the age-old debate on the nature of international law as a non-law due to the lack of the traditional enforcement mechanism as in the domestic legal sphere divides scholars and practitioners alike. One of the major questions related to international law has to do with the motivation and reason behind why states comply with it. The question takes different forms, including those challenging the whole essence of international law as a system of a legal order. Among the arguments, the major one is based on the lack of a traditional lawmaker, enforcer and interpreter in the international arena to create the coercive nature that characterises a legal rule.²⁷⁰ This argument boils down to a rejection of the relevance of international law in determining how a state acts in the international arena in favour of other explanatory factors such as power. On the other hand, counter-arguments shift the emphasis to the need to calibrate the system rather than engaging in abstract debates about whether international law is relevant in determining the relationship between states.²⁷¹ Arguments that put forward the idea that law is followed due to the threat of punishment in case of violation, as purported by the positivist legal theorists, for example, fail to fully explain the range of normative instruments that enjoy compliance without the sanctions attached. There are arguments to be made, for instance, for the tendency of people to adhere to domestic legal rules because it is the right thing to do. Understanding why states comply with international law in general and, conversely, why they do not comply with some international law, helps to improve the effectiveness of international cooperation.

In the following sections, a brief introduction to the major theoretical perspectives on why states comply with international law will follow. The discussion starts with the two traditional sources of the theories: international law and international relations. Then two theories that follow might be considered as more overarching theories that touch on and explain compliance

²⁷⁰ Andrew T Guzman, 'A Compliance Based Theory of International Law' (2002) 90 California Law Review 21.

²⁷¹ Lori Fisler Damrosch, 'Enforcing International Law Through Non-Forcible Measures' (1997) 269 Collected Courses of the Hague Academy of International Law 19.

from a perspective that might recall the elements of some of the theories described in the traditional topologies already discussed. It is important to acknowledge the cumulative explanatory value all the theories add for the future analysis in this research.

4.1. Theories of compliance under International law and International Relations

The question relating to why states comply with international law rules has been the subject of much discussion both in traditional international relations circles as well as, increasingly, in the field of international law.²⁷² For international law and international relations scholars, the question of why states comply with international law has become a point of convergence in both disciplines. Traditionally, both sides dealt with the issue in a self-contained manner.²⁷³ However, the recent work on compliance has built on what has been done on both sides to create an interdisciplinary source of materials where scholars have utilised insights from both International Law (IL) and International Relations (IR) theories as well as other disciplines.

The motivation for compliance is at the core of these discussions - why do states comply with rules? Different answers and arguments have been submitted in the literature. These theories, which will be discussed further below, will try to pinpoint the factors that lead states to comply with international law. The contribution of these different sides of the argument should not be seen as competing but as complementary. It may be less important to find one particular reason for compliance than to understand the different factors that make up the complex set of circumstances in which a state complies with international law rules. The different sides of the analysis and explanations of why states do or do not comply with IL are important for designing international commitments and improving their effectiveness.²⁷⁴

The concept of compliance is discussed on the basis of two different understandings of how rules in the international arena are developed from the perspective of the underlying assumption as to how states see the interaction of the global community of states. Some consider a cooperation model of the global community where rules are made on a voluntary

²⁷² See Jose E. Alvarez, 'Why Nations Behave' (1998) 33 Michigan Journal of International Law 303.

²⁷³ Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, 'International Law and International Relations Theory: A New Generations of Interdisciplinary Scholarship' (1998) 93 American Journal of International Law 367.

²⁷⁴ Asher Alkoby, 'Theories of Compliance with International Law and the Challenge of Cultural Difference' (2008) 4 Journal of International Law and International Relations 152.

basis, usually with the intention of complying with them.²⁷⁵ Others have considered an anarchist model, states only considering their own interest and choosing to act in a competitive rather than cooperative manner and where states try to come up with rules to minimise damages created in a non-cooperative scenario.²⁷⁶ In this sense, the anarchical perspective is not seen as a problem that needs to be solved but a recognition of the state of affairs in the international arena that needs to be accounted for when dealing with the question of compliance. In the absence of a traditional structure of governance which assumes a lawmaker and enforcer in the international sphere, the anarchist model, thoroughly discussed in the international relations literature, provides that there is no hierarchy of rules, enforcer of law and supreme authority.²⁷⁷ It is, for example, possible to make a case for a realist theory in an anarchical model. An extension of the debate on the importance of international law dictating how states act in the international arena, it perceives compliance in an anarchist model as having more to do with ways of gaining adherence detached from the enforcer. Even in the absence of an enforcer, it is possible for states to act in self-interest to comply with international agreements.

Furthermore, a difference exists between theorists as to the extent of the anarchical relationship between the states, with some assuming a full Hobbesian scenario while others tend to accept that nature of the relationship between states in an anarchical model would allow for states not needing to compete on everything and pursuing mutually acceptable self-interest motivated behaviours.

In his important work, Guzman generally classified the traditional theories of compliance within international law into two groups, one for those used by IL scholars and the other for theories by IR scholars. Under the traditional legal theories, he lists the managerial model, consent-based theory, legitimacy theory and transnational legal process theories.²⁷⁸ Under international relations theories, he places neo-realists, institutionalist theory, and liberal theories, which are discussed further below. Burgstaller similarly, classifies theories of compliance into three major categories. He presents a typology of compliance theories as

²⁷⁵ Tom Ginsburg and Richard H. Adams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Settlement,' (2004) 45 *William and Mary Law Review* 1229.

²⁷⁶ *ibid.*

²⁷⁷ Helen Milner, 'The Assumption of Anarchy International Relations Theory: A Critique' (1991) 17 *Review of International Studies* 67.

²⁷⁸ See Guzman (n270). For a survey of the theories see, Raustiala and Slaughter, (n266) 550; for an annotated bibliography see, William Bradford, 'International Legal Compliance: Surveying the Field' (2005) 36 *Georgetown Journal of International Law* 495.

falling into one of a Realist, Institutionalist or Normative categories.²⁷⁹ Realist theories present compliance as a function of rationalist self-interest driven decision by states to adhere or not to international norms. However, there is a significant variation among particular theories that fall under this umbrella.²⁸⁰ Normative realism, for instance, holds that states can use their national interest to rationalise commitments made in international contexts. It provides a state commits to act in a way that will advance its national interest. However, the state does not need to claim it explicitly as the national interest is also reflected in the expected behaviours of other states in terms of the negotiating positions, they hold, or the way other countries also implement the agreement. Neoclassical realism is based on the prediction that power and influence are sought by states to respond to the uncertainties of international anarchy. It assumes that the more power a state has, the more it shapes the magnitude and ambition of the norm.²⁸¹ Compliance with rules dictated by powerful states will be more likely to be complied with by them. The power behind such rules might also mean better compliance by other states who would be influenced into conformity.

The classifications and categorisation of the theories may not be clear cut as some authors may recognise one particular theory under one umbrella. In contrast, others may opt to classify the theory in another category according to the emphasis they choose. This is partially due to the nature of the theories, which may overlap in their explanatory power and unit of analysis. For example, while Guzman considers arguments presented by Slaughter²⁸² as part of the category of liberal theories, Burgstaller considers her arguments within a group he terms normative approaches devoted to theories that argue that states follow norms out of a sense of obligation to abide by the content of the norms through adherence to natural law or inherent justice. According to liberal theory, a state with liberal values will be more likely to comply with international norms due to its predisposition to follow agreed on and legitimate rules. This similar scenario can be seen from a normative perspective in as much as liberal states follow these rules due to the state's proclivity to abide by norms with normative essence.²⁸³

²⁷⁹ See Markus Burgstaller, *Theories of Compliance with International Law*, (Martinus Nijhoff Publishers, 2004) 95-102.

²⁸⁰ *ibid.*

²⁸¹ Gideon Rose, 'Neoclassical Realism and Theories of Foreign Policy,' (1998) 51 *World Politics* 144. Approaching the theories from the angle of foreign policymaking and the determinants of what leads a state to adopt a particular policy stand, the author discusses the importance of power structures in the interaction between states.

²⁸² Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.

²⁸³ *ibid.*

4.2. Traditional Legal Theories of Compliance

Under the traditional legal theories, Guzman, elaborating on the work of Chayes and Chayes, argues for the managerial model as an effective primary model for compliance on the basis of a cooperative, problem-solving approach that emanates from a consent-based instrument including, for example, treaties agreed to solve a common transnational problem such as climate change. By looking at non-compliance as a problem rather than opting for an explanatory theory, managerialism tries to find a better way for states to achieve the goals of the agreements into which they enter. The managerial theory was pioneered by Chayes and Chayes to develop a systematic way of improving compliance based on the assumption that states have the general propensity to comply with international obligations.²⁸⁴ The theory points to problems of clarity of terms of agreements, and lack of capacity and resources as the major sources of non-compliance as opposed to a deliberate choice by states to break the rules. Managerialism advocates an approach that rests on the cooperative tendencies of states. Based on the assumption that compliance is desired by all parties, it posits the best way to do that will be to “manage” the compliance with these rules using methods such as improved transparency mechanisms to anticipate non-compliance, including through reporting of implementation and addressing the problems through, for example, technical or financial assistance for those who need it.²⁸⁵

Chayes and Chayes bring together some features of the theories advanced in the IL literature to build their theory of compliance heavily focused on facilitating state adherence to the rules of international law.²⁸⁶ The theory suggests states normally comply with international law motivated by three factors: efficiency, interest, and the nature of norms that create a sense of obligation to follow them.²⁸⁷ The theory is referred to as a “synthesising theory” due to the aggregated explanations borrowed from realist, institutional and normative theories in the IR literature.²⁸⁸ The key managerial claim is that if there are instances of non-compliance, they

²⁸⁴ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, (Harvard University Press 1998) 178.

²⁸⁵ See Emeka Duruigbo, ‘International Relations, Economics and Compliance with International law: Harnessing Common Resources to Protect the Environment and Solve Global problems’ (2001) 31 *California Western International Law Journal* 177.

²⁸⁶ Abram Chayes and Antonia Handler Chayes (n284).

²⁸⁷ *ibid* 3.

²⁸⁸ Raustiala and Slaughter (n266) 543.

generally are inadvertent. The theory provides apart from the rare instances where states blatantly disregard their international law obligations, non-compliance is a result of state incapacity, resources constraints or ambiguity of the rule itself. Managing the agreements, therefore, would entail making resources available and working better on making treaty language more precise and applicable.

On the other hand, the legitimacy theory seeks to explain why nations obey international law, and it goes beyond the normativist claim that treaties are expected to be obeyed out of the normative essence they carry that demands adherence. The fundamental premise of legitimacy theory is that the states obey rules that they perceive to have been reached in accordance with the right process.²⁸⁹ According to Franck, rules that are legitimate are bound to be complied with due to the pull factor of legitimacy.²⁹⁰ Franck understood legitimacy as a result of four different factors: textual determinacy, symbolic validation, coherence and adherence. Textual determinacy, which deals with the understandability of the rules themselves from a clarity and transparency perspective, is the first factor. The applicability of the rules to a specific situation has to be clear. Secondly, the rules have to be followed by ‘Symbolic Validation’ – that is a regular application of rules that will give the general certainty that the rules will be applied and are not just declarations of the hopeful expectations of states in their international relations. Coherence is another factor considered. It refers to the consistency in application and its interaction with other commitments between the parties involved. Finally, the factor he calls adherence looks at the degree to which a rule fits within the normative hierarchy of rules about rulemaking.²⁹¹

The focus of the legitimacy theory is on the rule and rulemaking process itself and does not base the compliance of states on outside factors that, for example, speak to the motives for reaching and adhering to the rules, such as rational self-interest. It builds on the standpoint of a society of states under a cooperation model as opposed to an anarchist perspective where states act unilaterally from self-interest positions only. Franck insists on what he calls the "compliance pull" as the major element that dictates if rules are complied with or not.

²⁸⁹ *ibid.*

²⁹⁰ See Thomas M. Franck, *Fairness in International Law and Institutions*, (Oxford Clarendon Press 1995)

²⁹¹ See Frank, *ibid.* See also, Raustiala and Slaughter (n266) 541.

Another important traditional legal theory identified by Guzman is the transnational legal process theory. This theory focuses on how public and private actors interact in various fora at both the domestic and international level to make, interpret, enforce, and internalise rules of international law. Guzman, referring to the work of Professor Harold Koh,²⁹² emphasises the theory's critique of a major aspect of the rational actor models of international law (discussed in the following section) that treat states as unitary actors, and for the failure to incorporate the role of non-state actors. These non-state actors include multinational corporations, non-governmental organisations, international organisations, private individuals, and others. Professor Koh argues that through the interaction among the different actors, including both state and non-state actors, patterns of behaviour and norms emerge. He argues that such norms are internalised by the actors, and that leads to their incorporation in domestic legal institutions of states which, in turn, will lead to compliance.²⁹³ Compliance is, therefore, the cumulative effect of the interaction of all the relevant actors contributing to the internalisation of the norms into the domestic law that ultimately guides the behaviour of states. Social movements and private sector actors have contributed in the decision of governments to comply with international agreements.

The argument can be made that the transnational legal process theory might serve as a significant explainer in cases like the PA which relies heavily on the domestic interpretation and codification of an international agreement, that is designed in a way that expects states to define their own commitments individually. Nationally determined contributions can be interpreted as the basic interpretations and internalisations of an international agreement. Countries, by declaring their contributions to the goals set by the PA, commit themselves to comply with the agreement. However, the work of the compliance mechanism, which has yet to be fully operational, will be essential in determining how the commitments submitted as nationally determined contributions fare in terms of fulfilling the obligations set by the agreement.

²⁹² Harold H. Koh, 'Transnational Legal Process' (1994) 75 Nebraska Law Review 181.

²⁹³ On the role of NGOs on the monitoring of compliance- see, for example, David S. Ardia, 'Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment' (1998) 19 Michigan Journal of International Law 497.

4.3. Traditional International Relations Theories of Compliance

Guzman argues that while the traditional approaches of legal scholarship continue to remain important, in recent years, a new approach has emerged. This approach comes from political science and the theory of international relations. He identified three relevant IR theories, as mentioned above. The Neo-Realist theory, which Guzman identified as "an outgrowth [of] classical realism", regards states as unitary actors and the relevant unit in international relations. The Neo-Realist theory assumes that international cooperation exists when it is in the interest of the affected states. Here, the interest of states is mainly power and security, with the former being considered as the primary influencing factor on international behaviour.²⁹⁴

Based on the critique of international law as a tool created by powerful states to impose their will on other weaker ones, realists hold that the law does not actually dictate how states act. It is power, and other factors summed up in the term "state national interest" that determine if states act a certain way instead of another. With regards to the relevance of international legal instruments to how states act internationally, realists posit power is the most important determinant. Decisions states make is, however, based on their self-interest regardless of the status as imposers of their interest or on the receiving end of other countries' power positions. Foreign policy-based theories such as cost-benefit analysis by states developed by Neuhold, for example, introduced into realism calculations made by states of their costs and benefits in order to make foreign policy decisions including if it will be within the national interest of a state to comply with the particular international norms.²⁹⁵ Considerations of non-compliance will also be based on costs of it calculated based on what sanctions are, the likeliness of their application and the possibility of being caught.

The other important international relations theory is institutionalism which has three distinct variations: rational choice, historical and sociological. The rational choice Institutionalism theory views states as the primary international actors and considers them as rational unitary agents interacting in an anarchical world. These institutionalists believe that states can create institutions, including legal rules that affect the behaviour of states and play a role in facilitating

²⁹⁴ See Joseph M. Grieco, 'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism' (1988) 42 *International Organization* 485.

²⁹⁵ Hanspeter Neuhold, 'The Foreign-Policy Cost-Benefit-Analysis Revisited' (1999) 42 *German Yearbook International Law* 84.

cooperation.²⁹⁶ Sociological institutionalism underlines the importance of the social and cognitive aspects of institutions to identify and analyse the basic global social structure that underpins institutional arrangements.²⁹⁷ Although sociological and historical institutionalists share the idea that social norms and institutions shape the behaviour states, historical institutionalists insist that existing institutions influence the creation of new institutions and behaviour rather than a scenario where historical institutions are shaped by new rules. In other words, historical institutionalism concerns itself with how embedded social norms and institutions impact the actions and behaviours of political actors in the international sphere.²⁹⁸ March and Olsen propose a new institutionalism that emphasises the role of transnationally interconnected domestic institutions such as administrative bodies, judicial entities and policymakers as the new institutional agents that deal with compliance and application of international obligations.²⁹⁹ Insight from historical institutionalism might be particularly important in the study of the justice and equity compliance in the Paris Agreement . The analytical perspective this theory offers might be helpful in understanding how the long-established equity and common but differentiated responsibility principles have formed a historical institutional standing to provide some guidance as to how to approach the issue in the Paris Agreement. We will be returning to this issue in subsequent chapters on how equity and justice are understood in the Convention that encompasses the Paris Agreement.

The final theory is the liberal theory, that argues key actors for international relations are private groups and individuals, rather than just states. The liberal theory is interested in the particulars of domestic politics in addition to the interaction of states.³⁰⁰ According to Slaughter, the willingness of states to submit to legal obligations and their implementation in due course is dependent on the nature of domestic politics and involvement of individuals, institutions and civil society.³⁰¹ These prerequisites are most likely to be found in states where liberal values are embedded in the state function behaviour. Compliance, therefore, will be more likely in a liberal state than otherwise. The willingness of the state is also supported by

²⁹⁶ Burgstaller (n279) 99.

²⁹⁷ Martha Finnemore, 'Norms, Culture, and World Politics: Insights from Sociology's Institutionalism' (1996) 50 *International Organization* 326.

²⁹⁸ Peter A. Hall, 'Politics as a Process Structured in Space and Time' in Orfeo Fioretos, Tullia G Falletti, and Adam Sheingate (eds) *The Oxford Handbook of Historical Institutionalism*. (Oxford University Press, 2016) 32.

²⁹⁹ See, James G March and Johan P. Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organization* 943.

³⁰⁰ Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.

³⁰¹ *ibid.*

the likelihood of civil society and organised engagement of interest groups that could push for compliance with an agreement. In the case of the Paris Agreement, we do notice this trend happening as more and more liberal countries are committing to rigorous mitigation commitments as a result of sustained pressure from the citizenry. Compliance to the equity and justice components of what is expected of these countries, however, will have to be carefully considered.

4.4. Enforcement Theory

One of the multidimensional perspectives relevant to both IL and IR conception of compliance, enforcement theory, starts from a criticism of the position held by many scholars that states, for the most part, do comply with international norms.³⁰² The theory highlights the strategic dimension of cooperation, the role of enforcement, and the quality of rules and institutions for complying with international norms.³⁰³ According to enforcement theorists, compliance is usually more likely in situations where the commitments are shallow and in weaker international regimes in terms of the level of limitation on the sovereignty of the member states.³⁰⁴ The more intrusion in sovereignty is envisaged in a treaty, the less likely it is to be complied with.³⁰⁵ The more intrusive and strong an international regime is, the more domestic interests will be affected, and the costs and benefits involved in implementing it becomes more significant.³⁰⁶ Raustiala and Slaughter argue that such intrusive and strong international regimes have the most extensive enforcement systems necessitated by the intricacy of the commitments and the need to detail and clearly spell out the rules of implementing and enforcing the rules. Therefore, the pressure created by the desire of states to stay in good standing in the international community by complying with all their agreements may cause them to take on only those less intrusive commitments they are sure to comply with.³⁰⁷

³⁰² For methodological challenges to the conclusion made by prior writers on compliance being the norm. See for e.g., American Society of International Law, 'How are Nations Behaving?' (2002) 96 American Society of International Law Proceedings 205.

³⁰³ Raustiala and Slaughter (n266) 550.

³⁰⁴ *ibid.*

³⁰⁵ See Jutta Brunnee, 'A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol' (2000) 13 Tulane Environmental Law Journal 223.

³⁰⁶ Chayes and Chayes (n284) 543.

³⁰⁷ George W. Downs et al., 'Is the Good News About Compliance Good News About Cooperation?' (1996) 50 International Organizations 379.

In practice, however, states have a more dynamic and pragmatic approach towards compliance with the more intrusive commitments. The best mechanism of compliance can, therefore, be one with room for limitedly tolerable non-compliance to happen due to political considerations and that allows some space to handle other policy pursuits.³⁰⁸ The theory argues compliance mechanisms should be pragmatic enough to provide space for some flexibility to ensure the overall integrity of the agreements remains unharmed. Raustiala and Slaughter argue that the choice of rules, of both substantive nature and those that deal with compliance, in international regimes could raise the costs of compliance or lower it. They highlight, for example in terms of the substantive content of agreements, the choice of tradable emission reduction units in the Kyoto Protocol on climate change that may lower aggregate compliance costs compared to non-transferable targets, thereby promoting compliance.³⁰⁹ A compliance mechanism that primarily focuses on transparency and provision of information platform would differ in the costs involved to a system of compliance that mandates the establishment of a separate institutional set up to follow up the implementation of an agreement and adjudicatory entities in case of violation of the rules stipulated.

In sharp contrast to the reliance of the enforcement theory on mechanisms of enforcement as the major cause for compliance, normativism presents an alternative account that is based on the portrayal of international law as a system of law that induces compliance due to its normative nature.³¹⁰ This normative nature will exist even in the absence of sanctions attached to non-compliance. However, for example, Goldsmith and Posner argue that compliance can exist only when realist considerations of self-interest are aligned with the normative content of rules.³¹¹ The normative content of the rules includes the origin, content and the operation of the international regime that is likely to lead the state to treat the rules seriously. The transnational legal process theory, for example, can be classified in the normative category. The theory argues the normative nature of rules, and therefore the need to comply with them emanates from the internalisation of international obligations into their domestic legal order, thereby securing their compliance with the norm.³¹² The enforcement of the international

³⁰⁸ Chayes and Chayes (n284) 543.

³⁰⁹ *ibid.*

³¹⁰ Jutta Brunee and Stephen J. Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) 13 *Finch Yearbook of International Law* 1.

³¹¹ Jack L. Goldsmith and Eric A. Posner, 'International Agreements: a Rational Choice Approach' (2003) 44 *Virginia Journal of International Law* 113.

³¹² Koh (n292); see also Harold H. Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

agreement rules, according to this theory comes from the inherent enforceability and applicability of domestic rules due to the existence of a mechanism already in place to discharge that duty.

The process of internalising international obligations into domestic rules is what is essential here as it is what creates the crucial normative content which entails the duty to comply. Koh claims that a nation's choice to obey the international agreement originates from the legal process that includes contestations of disagreements and reinforcement of acceptable actions by other states with whom it is engaged in the mutually agreed arrangements. The interaction between the different actors in the international rulemaking including states and non-state actors develops the international rule that is then internalised into a domestic law that can be enforceable enabling it to guide the behaviour of states internally and internationally. The international process that involves reaching an agreement and refining the obligations that emanate from such an agreement through a process of contestation and positive reinforcements cannot be seen separately from the domestic process that internalises the agreed upon rules. The continuum of the process through the international to the domestic is what is important for the compliance of states with their international obligations.

4.5. Reputational Theory

Another important theory that features in both IL and IR perspectives is the reputation theory. In the circumstances of what he calls low politics issues, Guzman argues for a reputational theory of compliance which suggests states comply with international law rules because they want to be perceived as fulfilling their duties and are members of the international community.³¹³ Once they determine their interests, states pursue the implementation of rules they have agreed with other members of the international community in the interest of keeping their good standing. This theory shares some aspects of the enforcement theory that bases the choice/obligation of states to follow international law rules on the power of enforcement behind the rules agreed in terms of the magnitude and likelihood of enforcement measures that can include on the less stringent end of the spectrum naming and shaming mechanisms. Due to the incentive of cooperation and staying in good standing with the international community, and the disincentive provided by losing out on the benefits of international cooperation, states will opt to comply with international norms. Kelly suggests that the basis of the Realist assumptions

³¹³ Guzman (n270).

of calculation of benefits and costs could be reconsidered in the scenario that states become enmeshed in regimes for the sake of pursuing reputational gains.³¹⁴ Particularly in the area of international environmental law, rational choice preservation of reputation can serve as a viable alternative to enforcement heavy approaches that involve sanctions as it promotes self-imposed adherence to the rules by states interested in gaining and maintaining their reputations.³¹⁵

4.6. Conclusion

From a practical point of view, and of interest for the purposes of this chapter, compliance has become an issue of regime design concerned with how to choose which mechanism to incorporate in the design of international legal regimes.³¹⁶ Compliance theories and mechanisms designed into international regimes can be seen as a spectrum ranging from those based on enforcement models (which themselves span between strict sanctions and naming and shaming mechanisms that play to the reputational concerns of States), to information exchange, assisted, and cooperative compliance mechanisms. The end goal that needs to be achieved and the best way to achieve it are the crucial factors in the regime design process. These theories and the foundations on which they are built are, therefore, very important in designing effective and efficient systems of compliance. The lesson for the purpose of this study is on the nature of the problem and the different approaches for institutional designs that are envisaged by these theories.

Building on the introduction provided above on the major theoretical contributions made in trying to understand the compliance of states with international commitments, we now need to consider whether these theories might help to shed some light on pertinent questions to the overall research question. Fundamental questions as to what constitutes compliance/non-compliance with the Paris Agreement and how state adherence can be helped along need to be pursued further. More specifically, the exploration of how one can measure compliance with the justice and equity standards of the Paris Agreement, and what the role of the compliance mechanisms of the Agreement will be in this process, need to be carefully considered. The theories discussed above can help in clarifying the assumptions that form the conceptual basis for the analyses that follow in the subsequent parts of the research.

³¹⁴ Claire R. Kelly, 'Realist Theories and Real Constraints' (2004) 44 *Virginia Journal of International Law* 545.

³¹⁵ See Peter H. Huang, 'International Law and Emotional Rational Choice' (2002) 31 *Journal of Legal Studies Education* 231.

³¹⁶ Raustiala and Slaughter (n266).

The nature of the Paris Agreement as a treaty-based on individually assessed obligations in terms of Nationally Determined Contributions brings in the importance of lessons from theories such as the transnational legal process theory that looks at domestic processes as much as international acts taken by states. The theory suggests that a better involvement in the internalisation process by all stakeholders can result in better compliance. Lessons from managerialism are also very pertinent in substantive questions to be further explored in this study's substantive model. As identified by the theory, clarity of the terms of treaties to create legal determinacy and addressing capacity limitations are determinants of compliance. These identifications provide excellent entry points for analytical purposes for the design and appraisal of a compliance system for the Paris Agreement.

The compartmentalised view that sees compliance as a matter one issue to the exclusion of all others is of little use in trying to understand how to improve compliance and design a system that can ensure the best possible outcomes. Unpacking what needs to happen for better compliance as studied from the theories developed by scholars that look at different reasons and motivations for compliance might give us a better starting point for discussions that follow in upcoming chapters. Understanding non-compliance might be very important to explore how the compliance system can help in achieving justice and equity. In the coming chapter, a discussion of what compliance mechanisms of other multilateral environmental agreements (MEAs) look like and lessons to be learned from these mechanisms will be undertaken to ground the theoretical guiding points from this chapter in practical examples from a set of international agreements that share similar goals with the Paris Agreement. A further use for these theories will also be explored in the chapter on the compliance mechanism of the Agreement and the ultimate models for how to utilise the Compliance Mechanism of the Agreement to achieve equity and climate justice.

Chapter 5: Compliance Mechanism of MEAs

The previous chapter has addressed the factors important for understanding compliance with international obligations in the abstract by presenting different perspectives from theories of compliance from international law and international relations literature. This chapter aims to understand compliance of states and compliance mechanisms under international law, in particular under environmental law and climate change treaties. It aims to address contextual limitation of compliance mechanisms and factors that need to be considered for the design of a politically viable and successful compliance model for the Paris Agreement. The chapter builds on the discussion of theories of compliance under international law in Chapter Four which explored state motivations for compliance. The first section of this chapter aims to provide the definition of compliance in the context of actual practice in relation to MEAs followed by a second section that reviews selected compliance mechanisms and their processes. The third section deals with the design of compliance mechanisms, with the last section dedicated to a table presenting the key features of selected MEAs to provide examples of the details discussed in the chapter.

Chapter Four attempted to answer the question of why states comply with international law.³¹⁷ It discussed the concept of compliance on the basis of two different understandings. The first describes compliance based on a cooperation model of the global community where rules are made on a voluntary basis, usually with the intention of complying with them. On the other hand, others have considered an anarchist model where states try to come up with rules for compliance to address or reverse a problem created in a non-cooperative scenario.³¹⁸ That chapter discussed the theories of compliance, and how to incorporate those insights in the design of a compliance mechanism under an international legal regime.³¹⁹ The findings of Chapter Four concluded that compliance theories and compliance mechanisms designed into international regimes can be seen as a spectrum ranging from strict sanctions-based models to facilitative ones, i.e. those based on information exchange, provision of support and cooperation. Compliance theories and the foundation of the design of compliance mechanisms are, therefore, very important in designing effective and efficient systems of compliance.

³¹⁷ See Jose E Alvarez, 'Why Nations Behave' (1998) 33 Michigan Journal of International Law 303.

³¹⁸ Tom Ginsburg and Richard H. Adams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Settlement' (2004) 45 William and Mary Law Review 1229.

³¹⁹ (n278)

5.1. Compliance and Compliance Mechanism under International Law and Multilateral Environmental Agreements (MEAs)

As discussed in Chapter Four the question why states comply with international law goes beyond international law scholarship and it has been a subject of significant discussion in international relations (IR). International law and IR scholars have considered compliance in terms of the effect of internationally agreed norms causing the change in the behaviour of states and in relation to the enforced implementation of such norms.³²⁰ As discussed in Chapter Two authors such as Louis Henkin argue that almost all states observe the principles of international law and their obligations.³²¹ He explains that states observe these rules under international law because they consider implementation as a national interest, a moral responsibility and a way to maintain their relationship with other states. Henkin goes further to say, if states do not observe international law, it is not a case of bad faith, but it is because of lack of capacity or information.³²² Other legal scholars support these arguments that underscore the need to solve the challenges of capacity and clarify to improve compliance.³²³ International relations literature, also thoroughly discussed in Chapter Two, provides a response to the question “why” states comply by understanding the nature of the norms and the nature of the states. Some of the answers submitted in the literature rely on realist approaches.³²⁴ Others emphasise a legitimacy based argument to explain how norms can shape states’ actions, and the role of norms in framing social interaction and influencing actors and interests.³²⁵ The contribution of these different sides of IR as a discipline should not be seen as competing but as complementary and providing understanding of different factors that make up the complex set of circumstances in which a state complies with obligations.

Considering that the Paris Agreement is part of the general multilateral environmental agreements’ legal framework, it will be important to see how other agreements of similar purpose and legal structure have approached the matter of compliance with what they prescribe. In so doing, some lessons as to what lies at the core of the institutional and legal mechanism created to promote compliance in international environmental agreements can be drawn. The innovation of self-imposed/self-defined obligations and how to encourage states to comply

³²⁰ Chayes and Chayes (n284) 42.

³²¹ See Louis Henkin, *How Nations Behave* (Columbia University Press, 1979) 46-48.

³²² (n284).

³²³ *ibid* 38.

³²⁴ *ibid*.

³²⁵ *ibid*. 42; see also Slaughter, Tulumello and Wood (n273) 367.

with such obligations through, for instance, the non-compliance mechanisms of the Montreal Protocol, could serve as examples to elaborate on and further analyse the options available for the Paris Agreement in general and equity considerations therein in particular. This chapter, therefore, will focus on exposing the common elements that underline the compliance systems in MEAs and lessons that could be learned for the Paris Agreement Compliance Mechanism with a particular application to the equity and climate justice considerations mandated therein.

5.2. Definition of compliance and compliance mechanisms

This section will provide the definition of compliance and compliance mechanisms under international law, with particular reference to MEAs. It will further provide the definition of compliance and compliance mechanisms under climate change treaties. The concept of compliance is defined in different ways in the academic literature according to the discipline and the subject studied.³²⁶ International law scholars define compliance as state's conformity with treaty rules.³²⁷ The concept of compliance can also be understood from a perspective comparing behaviour to specific treaty provisions, a treaty's broader spirit and principles.³²⁸ In addition, definitions provided in particular treaties may envision a compliance that goes beyond conformity with treaties rules, in terms of for example, creating domestic legislation to incorporate international law into the national legal system, and practical implementation of the rules.³²⁹ In the following section, definitions from selected MEAs are discussed.

5.2.1. Compliance and Compliance Mechanisms under MEAs

The United Nations Environment Programme (UNEP) is the mandated body under the United Nations (UN) system that sets the global environmental agenda, promotes environment protection and serves as an authoritative advocate for the global environment.³³⁰ The UNEP Guideline on environmental law defines MEAs as the results of international action by

³²⁶ Zerrin Savaşan, 'Paris Climate Agreement: 'A Deal for Better Compliance?' Lessons Learned from the Compliance Mechanisms of the Kyoto and Montreal Protocols' (Springer International Publishing, 2019) 19.

³²⁷ Roger Fisher, *Improving Compliance with International Law* (University of Virginia Press, 1981) 20.

³²⁸ Ronald B Mitchell, 'Designing a compliance system for the UN Framework Convention on Climate Change,' in James Cameron, Jacob Werksman and Peter Roderick, *Improving Compliance with International Environmental Law*, (Earthscan, 1996) 5.

³²⁹ Zerrin Savaşan, (n326) 19.

³³⁰ Dupuy and Viñuales (n42) 11.

government to develop rules through treaties to protect the environment.³³¹ The guideline sets out that MEAs cover a broad range of environmental issues, including global environmental protection, management of hazardous substances and chemicals, prevention and control of pollution, desertification, management and conservation of natural resources, biodiversity, wildlife, and environmental safety and health, in particular human health. It defines compliance under MEAs as “fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and legal instruments adopted under the multilateral environmental agreement.”³³²

MEAs are multilateral treaties concerning environmental matters adopted between three or more states, and are treaties intended to be inclusive in membership and substantive scope.³³³ Compliance with these agreements is usually presented as conformity of states with the treaty’s procedural and substantive obligations.³³⁴ Reporting duties are essentially procedural, and obligations to reduce emissions, for example, by an agreed target within an agreed time can be seen as substantive and are subject to different measurements of compliance. Thus, according to this definition, non-compliance occurs when states do not follow these obligations from the related MEAs.³³⁵ For the purposes of the Paris Agreement, the procedural and substantive nature will be discussed in detail in Chapters Eight and Nine of this Thesis covering my proposed Procedural and Substantive Models for the Compliance Mechanism. In the sections below the concept of non-compliance will be discussed in detail.

Compliance mechanism systems in MEAs are developed in response to the limitations of adversarial channels of bilateral dispute settlement in international law for addressing multilateral environmental concerns.³³⁶ The nature of these kinds of agreements, that are usually agreed to address issues of common concern, coupled with the implementability of the measures agreed upon in non-competitive scenarios opens the door for a more cooperative and facilitative handling of differences in the process of applying the treaties or disagreements arising out of these differences. A compliance mechanism is designed to encourage compliance

³³¹ Decision UNEP/SS.VII/4, Governing Council of the United Nations Environment Programme: Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements. (February 2002).

³³² *ibid.*

³³³ Zerrin Savaşan (n326) 23.

³³⁴ Decision UNEP/SS.VII/4 (n322).

³³⁵ Zerrin Savaşan (n326).

³³⁶ Anna Huggins, *Multilateral Environment Agreements and Compliance: The Benefits of Administrative Procedures* (Routledge, 2018) introduction section.

with the treaty's procedural and substantive obligations, and it often includes positive incentives such as financial or technical assistance to states.³³⁷ Compliance mechanisms also have the role of overseeing states' implementation of their obligations under MEAs through provisions of performance review information, procedures for non-compliance and measures to address non-compliance.³³⁸

To understand how MEAs aim to achieve compliance and take into account the general approach followed in the compliance mechanisms of MEAs, a broad classification into two groups is possible, with one group focusing on control while the other seeks facilitation.³³⁹ Chapter 2 discussed that the Kyoto Protocol compliance mechanism is differentiated based on obligations under the Protocol, and the enforcement branch is limited to addressing non-compliance by the developed country Party. Similar, as presented below in the table, the non-compliance procedures of MEAs takes into account the circumstance of developing country parties, for example the Montreal Protocol has a grace time for developing country for meeting the obligations under the Protocol, and Cartagena Protocol on Biosafety recognises the special needs of developing countries.

Based on obligations on Parties some mechanisms try to ensure compliance through confrontational means, such as holding parties accountable through responsibility, liabilities, and trade restrictions while other mechanisms apply non-confrontational and facilitative means including provision of financial and technical assistance.³⁴⁰ The table below has identified two MEAs that apply restriction on countries that are found to be non-compliant. The Kyoto Protocol enforcement branch, for instance, suspends the eligibility of a party from participating in the market mechanism established by the Protocol whereas the Montreal Protocol suspends the party from enjoying specific rights and privileges under the Protocol.

The contrast between the two systems is a manifestation of the (perceived) need to enforce some obligations on the one hand and the choice made by states to pursue more measures that would help non-conforming parties to be assisted into conforming. Similar to the above, the

³³⁷Teall Crossen, 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *Georgetown International Environmental Law Review* 478.

³³⁸ *ibid.*

³³⁹ Natalia Escobar-Pemberthy, 'Promoting the Implementation of International Environmental Law' in Vesselin Popovski, *The Implementation of the Paris Agreement on Climate Change* (Routledge, 2019) 58.

³⁴⁰ Zerrin Savaşan, (n326) 26.

table below on MEAs Compliance Mechanism has identified a range of measure that could facilitate and support parties to comply from providing advice, technical support and capacity building to address the challenge to assisting the party with technical assistance on technology and delivering access to financial resources.

However, it is also important to note that measures that could be utilised in a facilitative manner can easily be turned into punitive ones with more confrontational consequences. For example, a performance review mechanism can be a facilitative system as long as it is used to identify areas of non-compliance to contribute to future compliance. However, it can also be adversarial if it is supplemented by enforcement measures even if the measures are meant to nudge the non-conforming party into conformity. Measures seemingly harmless, such as naming and shaming mechanisms, can be more of a stick approach than a carrot.

In the international climate change regimes, compliance involves the conformity of states with both substantive obligations, i.e. reduction of greenhouses gas emissions and procedural obligations, i.e. communication or reporting requirements, adaptation and finance efforts³⁴¹ The international climate change regimes set out provisions on questions regarding implementation³⁴² settlement of disputes,³⁴³ and compliance mechanisms.³⁴⁴ Unlike the above classification of compliance mechanisms, as will be argued and presented in this thesis, the climate change regimes only attempt to foster compliance through facilitation and international cooperation.³⁴⁵ The design of the Paris Agreement as a bottom-up arrangement with self-determined obligation at its core has something to do with this choice of a facilitative compliance mechanism with the goal to help countries comply as opposed of only holding them accountable in cases of non-compliance. A stricter Compliance Mechanism would have resulted in Parties making contributions closer to their minimum efforts in fear of compliance measures. Counterintuitively, such a loose facilitative Compliance Mechanism is suitable for a Paris-like arrangement reliant on self-determined contributions, with better effectiveness and compliance.

³⁴¹ Farhana Yamin and Joanna Depledge (n119) 380.

³⁴² The Convention (n4) Article 13.

³⁴³ The Convention (n4) Article 14.

³⁴⁴ The Kyoto Protocol (n5) Article 18.

³⁴⁵ Benoit Mayer, 'Construing International Climate Change Law as a Compliance Regime' (2017) 7 *Transnational Environmental Law* 134.

As Farhana Yamin and Johanna Depledge observed, traditional dispute settlement provisions tend to be adversarial and have several consequences that are not advanced in the climate change regimes.³⁴⁶ The Convention offered possible bases for dispute settlement with respect to any dispute concerning application of the Convention to the International Court of Justice (ICJ) in accordance with the rules and procedures of the court, arbitration or conciliation committee.³⁴⁷ Although these mandates are on the softer side, because of the possibility of binding determinations possible at the end of the processes, it could be argued they have more weight behind them. However, procedures for arbitration or conciliation have not been adopted by the COP.³⁴⁸ Thus, compliance under the climate change regimes was advanced through proactive, preventative, non-confrontational, and non-punitive procedures that aim to facilitate implementation of obligations.³⁴⁹ Bodansky argues that traditional adversarial procedures were inappropriate for a global concern affecting all states and caused by some, as with climate change, and procedures should be considered in light of promotion of cooperation and to facilitate implementation.³⁵⁰ With near universal membership in the Paris Agreement, issues related to promoting the joining of more members, like was the case for Kyoto Protocol, is not apparent, and therefore cooperation between Parties is mainly focused around taking collective measures to tackle a common challenge.

As discussed in Chapter 2, Parties to the Convention established a standing committee to consider questions regarding implementation at the first COP in accordance with its Article 13. The objective of the committee was to resolve questions regarding the implementation of the Convention through a multilateral consultative process (MCP) and advise parties on difficulties encountered in the implementation of the UNFCCC and to promote understating of the Convention.³⁵¹

Following the adoption of the Kyoto Protocol and the agreement to establish a compliance mechanism for the new protocol, Article 18 established a compliance mechanism. It provided the mandate to approve appropriate and effective procedures and mechanisms to determine and

³⁴⁶ Yamin and Depledge (n119) 382.

³⁴⁷ The Convention (n4) Articles 14 (2), 14(6) and 14(7).

³⁴⁸ The Convention (n4). The COP is the supreme decision-making body of the Convention established by Article 7 of the Convention. Parties to the Convention meet annually, to review the implementation of the Convention and any other legal instruments that the COP adopts and take decisions necessary to promote the effective implementation of the Convention, including institutional and administrative arrangements.

³⁴⁹ Yamin and Depledge (n119) 382.

³⁵⁰ Bodansky (n40) 547.

³⁵¹ Decision 10/CP.4 (n132) 42.

to address cases of non-compliance with the provisions of the Protocol at the first session of the Conference of the Parties serving as the Meeting of the Parties (CMP).³⁵² The Parties to Kyoto Protocol adopted these procedures at their seventh session and resolved many outstanding issues that are necessary for initiating its work. These included the design of the compliance system comprising of sets of rules, procedures and institutions intended to ‘facilitate, promote and enforce compliance’ with the Kyoto Protocol commitment.³⁵³ Chapter 2 discussed the two branches of the Kyoto Protocol, the facilitative branch and the enforcement branches and the roles.

The recently adopted climate change agreement, the Paris Agreement states in Article 15 that “[a] mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.”³⁵⁴ It also provides that the mechanism consists of a committee that is expert-based and facilitative in nature and functions in a manner that is transparent, non-adversarial and non-punitive.³⁵⁵ The Paris Agreement provides that the committee should operate under the modalities and procedures adopted by CMA.³⁵⁶ After three years of negotiations, Parties adopted the modalities and procedures for the effective operation of Article 15. The decision defined the purpose, scope, institutional arrangements, initiation, process, procedures, measures, and outputs of the committee referred to in Article 15(2).³⁵⁷ Furthermore, the decision provides that additional rules of procedures should be developed by the committee for the consideration of the CMA at its third session in November 2020, informed by the principles of transparency, facilitation, the non-adversarial and non-punitive function, and paying particular attention to the respective national capabilities and circumstances of Parties.³⁵⁸ Chapter Six will discuss in details the Compliance Mechanism of the Paris Agreement.

³⁵² The Kyoto Protocol (n5) Article 13 (4).

³⁵³ Werksman (n140) 17.

³⁵⁴ The Paris Agreement (n12) Article 15 (1).

³⁵⁵ *ibid.*

³⁵⁶ The Paris Agreement (n12) Article 16.

³⁵⁷ Decision 20/CMA.1 Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, (19 March 2019) FCCC/PA/CMA/2018/3/Add.2.

³⁵⁸ *ibid* 61.

5.2.2. Compliance and Non-compliance Procedures under MEAs

In a significant number of MEAs, there has been a move towards the development of compliance mechanisms and procedures in order to ensure the end targets are achieved.³⁵⁹ Some of these agreements include the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on International Trade in Endangered Species (CITES), the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal (the Basel Convention), the Cartagena Protocol on Biosafety to the Convention on Biodiversity, and the Convention.³⁶⁰ Although the individual systems developed by the agreements may have features that are peculiar to the issue they try to address and the choices made in terms of institutional arrangements and procedural guidelines, there are common features to provide a basis for analysis. The compliance procedures and institutional arrangements that are common to the above MEAs include dedicated committees, rules on the initiation of procedures, safeguard procedures and response measures.³⁶¹

In addition to procedures that allow MEAs to encourage and facilitate implementation of the agreements, some anticipate and legislate for the possibility of circumstances where parties might fail to comply with the agreement and provide non-compliance procedures designed to promote compliance and allow states to address the challenges to conform to their obligations.³⁶² Non-compliance under MEAs has broad scope as it encompasses not only ‘breaches’ but also conduct that is inconsistent with the environmental obligations and potential breaches of obligations.³⁶³ As presented in the table below, some MEAs allow parties to give early warning of a possible non-compliance as in the case of the CITES Convention, and the Basel Convention has a procedure for a party that is concern or affected by another party to initiate a possible non-compliance consideration. Non-compliance procedures respond to scenarios such as those that try to address an actual or potential violation of obligations stipulated in an agreement. In addition, such non-compliance procedures seek to avoid the

³⁵⁹ Jane Bulmer, Minehard Doelle, and Daniel Klein, ‘Negotiating History of the Paris Agreement’ in Daniel Klein, et al. (eds.), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017) 57.

³⁶⁰ *ibid.*

³⁶¹ Jane Bulmer, ‘Compliance Regimes in Multilateral Environmental Agreements’ in Jutta Brunnée, Meinhard Doelle, and Lavanya Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press, 2012) 58.

³⁶² *ibid.* 63.

³⁶³ Dupuy and Viñuales (n42) 43.

adversarial connotations entailed by the concept of ‘breach’ and characterises the non-conformity with a standard as a deviation that can be resolved.³⁶⁴

MEAs rely on compliance mechanisms and procedures that are necessary to bring the non-compliant party back into compliance in the specific circumstance of the case.³⁶⁵ The specific circumstance of a party includes technical or financial challenges to meet their obligations, which is especially pertinent in the case of developing countries. The importance of the consideration of the specific circumstance of states in the process of agreeing on substantive as well as implementation requirements of an agreement should be emphasised for least developed countries and small island developing country parties that may struggle to meet their obligations unless they are assisted in the process of implementation.³⁶⁶ In the compliance process also, equity considerations can be used to determine whether processes are designed in a way that could take into account circumstances that would have impact on the participation of a party in the compliance mechanism processes. Equity principles are needed both in substantive sharing of obligations, procedural implementation of the shared obligations, processes of determining whether the obligations are met, and any remedial measures to be taken as a consequence.

More specifically, as we saw initially above, the climate change regimes have similar compliance procedures. The compliance with different components of the regime is guided by the general rules of the framework Convention and specialised agreements for specific treaties. The Kyoto protocol with its specialised Compliance Mechanism and the Paris agreement process that is under development form the basis of compliance with climate change agreements. The Convention compliance procedures, for example, as presented in Chapter 2 include procedures for a party with respect to its own implementation, a party or group of parties with respect to the implementation by another party or group of parties, and by the COP.³⁶⁷ Decision 10/CP.4 provides procedures for the establishment of compliance committee, procedures for process, and procedures for measures and outcomes. The decision also provides that the consideration by the committee should, as appropriate, assist in clarifying and resolving

³⁶⁴ *ibid.* See also Tullio Treves et al (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press, 2009).

³⁶⁵ Sebastian Oberthur, Compliance under the evolving climate change regime: Cinnamon P. Carlane, Kevin R. Gray and Richard G. Tarasofsky, *The Oxford Handbook of International Climate Change Law*, (Oxford University Press, 2016) 121.

³⁶⁶ Dupuy and Viñuales (n42) 285.

³⁶⁷ Decision 10/CP.4 (n132) 42.

the questions of implementation (procedures for cooperation) and provide advice and recommendations on the procurement of technical and financial resources (procedures for the effective implementation).³⁶⁸ The Kyoto Protocol compliance mechanism with its compliance committee consisting of facilitative and enforcement branches, as presented in Chapter 2, is a sophisticated system³⁶⁹ and is considered a testing ground for compliance theory.³⁷⁰ The Kyoto Protocol has two separate branches both facilitating and enforcement obligations under the Protocol. It is also unique as it has a clear punitive measure for non-compliance and has a sharp differentiation of measures between developed country Parties and developing country Parties, as the punitive measure only applies to developed country Parties under the Kyoto Protocol.

A special feature of the Kyoto Protocol, the Expert Review Team (ERT) is composed of experts that review the performance of each Annex I Party and provide thorough and comprehensive technical assessment.³⁷¹ The ERTs are there to provide independent information to the review process and identify 'questions of implementation'. However, they do not have the competence to determine non-compliance in a party's performance. The compliance committee was established by the Marrakech Accord decision (at the meeting of the Parties to the Kyoto Protocol in 2005) on the procedure and mechanism of the compliance system.³⁷² This includes specific procedures for determining cases of non-compliance. The committee has procedures for verifying compliance of Parties with their obligations and procedures for reaching decisions with regards to non-compliance, with the facilitative branch assisting in the fulfilment of the obligations of non-Annex I countries while the enforcement branch applies the non-compliance procedures on Annex I countries under the protocol.³⁷³ The work of the EB starts with a determination of breach which is followed by assistance to meet the obligations.

It was outlined in Chapter two that the Kyoto Protocol compliance committee consisted of a plenary, a bureau and two branches, i.e., the facilitative branch and the enforcement branch.³⁷⁴ The committee has twenty members elected by the COP, ten of whom serve the facilitative branch and the other ten serve in the enforcement branch. The facilitative branch (FB) has

³⁶⁸ *ibid.*

³⁶⁹ Jacur (n153) 196.

³⁷⁰ Doelle (n154).

³⁷¹ Rene Lefeber, 'From the Hague to Bonn to Marrakesh and Beyond: A Negotiating History of the Compliance Regime under the Kyoto Protocol' (2001) 14 Hague Yearbook of International Law 24.

³⁷² Decision 27/CMP.1 (n156) 92.

³⁷³ *ibid.*

³⁷⁴ *ibid.*

procedures for providing advice and facilitation to *all* Parties in implementing the Protocol, and for promoting compliance by Parties with their obligations under the Kyoto Protocol, taking into account the principle of common but differentiated responsibilities and respective capabilities as contained in Article 3, paragraph 1, of the Convention. The Enforcement Branch (EB), in contrast, addresses cases of non-compliance only by *developed* countries with their obligations under Kyoto Protocol.³⁷⁵

The procedures for the FB are in line with its role to advise and promote facilitation of assistance to individual parties, facilitation of financial and technical assistance, and recommendations to the party concerned to address compliance challenges.³⁷⁶ The EB, on the other hand, has procedures to determine based on the ERT recommendations, non-compliance of Annex I Parties by taking into account the cause, type, degree and frequency of the non-compliance of that Party, and it can apply different consequences based on those factors.³⁷⁷ The consequences of a determination of non-compliance by the EB entails a declaration of non-compliance followed by a mandate on the violating member to prepare an action plan to bring itself into conformity containing the assessment of the causes of non-compliance and what it intends to do to rectify the problems. Furthermore, consequences can entail reduction of emission allowances for the second commitment period and suspension of the party from participation in the market mechanisms under the Protocol.³⁷⁸

5.3. Design of Compliance Mechanisms

Designing an effective and efficient compliance mechanism for an international agreement depends on many factors. Some of these factors such as the clarity of the rules to be applied, institutional set up, realist considerations related to political issues in making and implementing international agreements have been discussed in chapter two dealing with theoretical approaches as to why states comply with international law. Argument can be presented that, for example, the designs of compliance systems should rely on institutionalist principles to elicit successful compliance rather than realist ones given their scepticism on the impact of treaties on states' behaviour.³⁷⁹ However, considering that a 'compliance system' is only a subset of rules and procedures that influence the compliance level of a treaty, other elements

³⁷⁵ Jutta Brunnée, 'The Kyoto Protocol: A Testing Ground for Compliance Theories?' (2003) 63 Heidelberg Journal of International Law 274. Available at SSRN <https://ssrn.com/abstract=2088177> accessed 25 May 2022.

³⁷⁶ *ibid.*

³⁷⁷ Decision 27/CMP.1 (n156)102.

³⁷⁸ Brunnée (n375) 271.

³⁷⁹ Mitchell (n328) 16.

such as the political viability of a mechanism - a matter that would appeal to realists- should be part of the design.³⁸⁰ In the case of the Paris Agreement, for its political viability, the facilitative nature is important to the Parties and although all the details of the Compliance Mechanism have not been agreed, the Agreement itself has made sure that the design of the Mechanism will be to facilitate implementation and promote compliance in a non-adversarial and non-punitive manner. Building on the discussion in Chapter Four on compliance theories, it is important to see how actual treaties within the broader multilateral environmental agreements have designed their compliance systems. This section, therefore, aims to outline the key features of compliance mechanisms and compliance procedures for successful compliance with MEAs. The result of this section informs the elaboration of the proposed compliance models for the Paris Agreement in Chapters 8 to 10.

5.4. Features of Compliance Mechanisms and Procedures

The Compliance mechanism and procedures in MEAs have a number of common features.³⁸¹ These common procedures include dedicated committees, rules on the initiation of procedures, safeguard procedures and response measures.³⁸² This Chapter has identified five common categories of features of compliance mechanisms and procedures.³⁸³ The climate change compliance systems mirror these common features. These categories of common features can combine to form the base of a compliance mechanism with room for specialization, responsiveness for the specific need of the particular agreement under consideration, and the nature of the obligations for which they try to ensure compliance. These categories will be set out briefly below and then discussed in more detail in the sections that follow.

The objective and purpose related content is the first category. Although the content and focus of the expressed intent behind the mechanisms might differ, the need for internal consistency and the achievement of overall target of the Agreement make objective and purpose essential for a compliance mechanism design. Second, the institutional arrangement envisaged for the compliance mechanism is an essential feature to take into account. Third, is the source of

³⁸⁰ Oran Young, *Compliance and Public Authority: A Theory with International Applications* (Johns Hopkins University Press, 1979) 104.

³⁸¹ Jutta Brunneé, Meinhard Doelle, and Lavanya Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press, 2012) 58.

³⁸² Lefeber (n371).

³⁸³ Brunneé, Doelle, and Rajamani (n381) 58- 69. See also: Jacur (n153) 205-250; Dupuy and Viñuales (n42) 235-261, Oberthur (n160) 121-133.

information- the assessment of compliance depends on information and how the information is gathered making the source of information utilised in the compliance system another category of essential features. Another feature, the fourth, is the way the mechanism approaches triggers or initiation procedures and consequences or measures by the compliance mechanism. These cover a wide array of procedural choices and legal designs applied by different MEAs. The final feature of compliance mechanisms in MEAs looks at the relationship of the compliance mechanism with other bodies internally as constituted or financing systems under the MEA and externally, including with experts, NGOs, or the private sector.

i. Objective and Purpose

The treaties and the enabling clauses of compliance mechanisms typically (and rather uncontroversially) provide a provision on their objective and purpose.³⁸⁴ The Basel Convention compliance mechanism, for example, provides the objective ‘to facilitate, promote, monitor and aim to secure the implementation of and compliance with the obligations under the Convention’.³⁸⁵ The Minamata Convention on Mercury compliance procedures under its Article 15(5), states will promote the implementation and reviews compliance with all the provisions of the Convention. Also, the Kyoto Protocol compliance procedures have the objective of facilitating, promoting, and enforcing compliance with the commitments under the Protocol,³⁸⁶ and the Paris Agreement Compliance Mechanism purpose is to facilitate implementation of and promote compliance with the provisions of the Paris Agreement established under Article 15 of the Agreement.³⁸⁷

ii. Institutional arrangements

As discussed above most MEAs, and climate change regimes provide the necessary institutional arrangements for successful compliance. Bulmer states that there are generally three main institutional arrangements: a small committee focused only on compliance issues; a general mechanism or committee charged with range of mandates during the international sessional period; and the governing body of the treaty.³⁸⁸

³⁸⁴ Brunneé, Doelle and Rajamani (n381) 65.

³⁸⁵The Basel Convention, Article 15(5).

³⁸⁶ Decision 27/CMP.1, (n156) 93.

³⁸⁷ Decision 20/CMA.1 (n358) 60.

³⁸⁸Jutta Brunneé, Meinhard Doelle, and Lavanya Rajamani (n382) 66.

Most MEAs, and all the three international climate change regimes have established smaller committees composed of around 10-20 members elected by the parties based on scientific, technical, socio-economic, or legal expertise and equitable geographical representation. The Minamata Convention on Mercury and the Basel Convention, for example, established their Implementation and Compliance Committees as a subsidiary body of the Conference of the Parties. Establishment as a subsidiary body entails more permanence and association with the enabling legal instrument than an arrangement that establishes a committee through subsequent decisions of parties to the agreement. Institutional arrangement in the form of a committee is subject to less strict review procedures as compared to a subsidiary body meaning that it might be easier to change the legal and institutional set up.

The institutional arrangements of the Kyoto Protocol include two functioning branches and a plenary. The mandates of these branches are divided in accordance with the Protocol's commitments. As discussed in section 1.2 of this Chapter all parties and obligations can be brought before the Facilitative Branch, but the Enforcement Branch has exclusive jurisdiction over the specified, legally binding, and target-related commitments of the Annex I countries. The Kyoto Protocol also has another layer of general institutional arrangement which it calls the plenary.³⁸⁹ The plenary of the Protocol mainly has a coordination and administrative function. The plenary reports to the meeting of the parties of the Kyoto Protocol (CMP) annually; applies any general policy guidance handed down by the CMP; makes proposals on administrative or budgetary matters to the CMP; and develops further draft rules of procedure for adoption by the CMP.³⁹⁰

iii. Sources of Information

Mitchell and Werksman have elaborated the importance of sources of information for compliance.³⁹¹ Compliance mechanism require sources of information to facilitate its work from initiating the consideration of a possible non-compliance, evidence to support the consideration and in some of the MEAs compliance mechanisms seek expert advice to inform their work.³⁹² Mitchell and Werksman, emphasis that treaties have developed different transparency frameworks to maximise the amount and quality of information collected on

³⁸⁹ *ibid.*

³⁹⁰ Decision 27/CMP.1 (n156) Section III.

³⁹¹ Ronald B Mitchell (n329)19 and 89.

³⁹² See, Basel Convention, CITES Convention, and the Paris Agreement compliance mechanism.

compliance and non-compliance with provisions of treaties as well as degrees of analysis.³⁹³ With regards to information sources, the Kyoto Protocol compliance mechanism base their deliberations on information provided by reports of the Expert review Teams (ERTs), the party concerned itself, submission by another concerned party, and by the COP or CMP. The Facilitative Branch of the Kyoto Protocol itself can launch an investigation for identifying and collecting information and seek expert advice for further information.³⁹⁴ The Paris Agreement Compliance Mechanism has defined its source of information for communication of obligations under Article 4 on mitigation, Article 7 on adaptation and Article 9 on finance of the Agreement.³⁹⁵ The Agreement has mandated the UNFCCC Secretariat to design and record submission of obligation in their respective portals. The Paris Agreement Compliance Mechanism, including its source of information is discussed in Chapter 6.

iv. Procedures for triggers and consequences

The trigger or initiation procedures launch the work of the compliance mechanism and start the consideration of question of implementation or non-compliance by a party. As provided in the literature and discussed in the above section, trigger, or initiation procedures (interchangeable used in MEAs) can be with regard to the question own compliance on the basis of assessment based on data gathered from sources of information discussed above.

Furthermore, MEAs and climate change compliance systems tend to provide a number of quasi-judicial procedures, involving a process whereby another party can submit a question on implementation or issue of non-compliance by other party. The mechanisms in the MEA can adjudicate the existence and consequences of a violation of obligations mandated by a legal instrument, the quasi-judicial nature of which enables them to continue to operate in a relatively multilateral, preventative, and non-confrontational fashion.³⁹⁶ Section 5.2.2. above discussed consequences or measures procedures in case of non-compliance. MEAs and the climate change regimes have sets of ‘consequences’ to address non-compliance such as naming and shaming schemes, strict follow up through action plans to bring states back into conformity, and suspension of rights and privileges granted by the agreement. The annual report of the compliance mechanism report to their governing bodies annually (COPs) on issues of non-

³⁹³ *ibid.*

³⁹⁴ Decision 27/CMP.1 (n156) See section VI, VII, and VIII.

³⁹⁵ Decision 20/CMA.1 (n358) 62.

³⁹⁶ Decision 27/CMP.1 (n156).

compliance where parties consider as ‘naming and shaming’ as the report will be available on the treaties’ website. Also, treaties such the Kyoto Protocol and Montreal Protocol have measures that include suspending right and privileges, including suspending the right of the party from participating in the Clean Development Mechanism (CDM) of the Kyoto Protocol, and suspending access to financial resources from the Multilateral Fund of the Montreal Protocol. These sets of consequences have been designed to utilise the incentives and disincentives that are built into the treaties and implementing decisions.³⁹⁷

v. *Relationship with other bodies*

Many of the MEAs as identified in the literature lay down the procedures to be followed including procedures for expert opinion, identifying the experts to be consulted, and reaching out to other institutions within and outside the treaty framework.³⁹⁸ The Kyoto Protocol, the Paris Agreement Compliance Committee, and the Montreal Protocol provide a procedure for the relevant committees to seek expert advice, and seek and receive information from processes, bodies, arrangements, and forums under or serving the respective agreements.³⁹⁹ It could be argued that in most MEAs, the compliance mechanism itself initiates the engagement with other bodies, including the constituted bodies of the treaties, experts on the issue, NGOs, or private sector.

The table below summarises the key features and procedures of the of the selected MEAs compliance mechanism.

³⁹⁷ See, Jutta Brunneé, Meinhard Doelle, and Lavanya Rajamani (n382).

³⁹⁸ Pierre-Marie Dupuy and Jorge Viñuales (n42).

³⁹⁹ Decision 20/CMA.1 (n357) Section VI Para 35.

Multilateral Environmental Agreements: Compliance Mechanisms

No.	MEA	Obligations and Institutional Frameworks for Compliance	Procedures
1.	<p>Convention on international Trade in endangered species of Wild fauna and flora (CITES)</p>	<p>The Convention regulates international trade of specimens of wild animals, fauna and flora with an aim protecting their survival. To this aim, the convention imposes an obligation on countries to subject international trade in specimens of selected species to control including by licensing of import, export, reexport and introduction from the sea of species.</p> <p>Countries has an obligation to designate at least one management and scientific authority (<i>Article IX</i>) that grants permits or certificates for trading in accordance with the Convention (<i>Arts. III, IV, V, VI, VII, and XV</i>). The Convention also sets obligations on countries to take appropriate domestic measures to prohibit trade in specimens in violation of its provisions and enforce its implementation (<i>Art. VIII, para. 1 and Appendix I or II</i>).</p> <p>The supreme body of the Convention, the Conference of the Parties (COP) directs and oversees the handling of compliance matters, particularly through the identification of key obligations and procedures. As the executive body of the Convention, the Standing Committee, acting in accordance with instructions from and authority delegated by the COP, examines general and specific compliance matters (<i>Resolution Conf. 11.3 (Rev.COP18)</i>).</p>	<p><u>Trigger/initiation Secretariat</u> (<i>Article XIII (1)</i>)</p> <ul style="list-style-type: none"> - When the Secretariat receives information about a trade of specimens included in Appendix I or II of the Convention. - Provisions of the Convention are not being effectively implemented. <p><u>Self-trigger</u> (<i>Resolution Conf. 11.3 (Rev.COP18)</i>)</p> <ul style="list-style-type: none"> - Parties can self- trigger and give early warning on any possible non-compliance including inability to provide information by a certain deadline, indicating the reasons and need for assistance. <p><u>Trigger by other Parties</u> (<i>Resolution Conf. 11.3 (Rev.COP18)</i>)</p> <ul style="list-style-type: none"> - Any party concerned by trade in specimens of CITES listed species by another party can bring the matter to the Secretariat. <p><u>Procedures for consideration of Non-compliance / procedures for process</u> (<i>Resolution Conf. 11.3 (Rev.COP18 (para 15-28)</i>)</p> <ul style="list-style-type: none"> - If the Party fails to take sufficient remedial action within a reasonable time, the compliance issue is brought to the attention of the Standing Committee. - Standing Committee may refer the matter to the Secretariat for follow up action including informing the party concerned or reject the compliance matter as trivial or ill-founded. - Compliance matters brought to the Standing Committee in accordance with its Rules of procedures (amended in July 2014) should be in writing including details as to specific obligation concerned and the

			<p>assessment of the reasons as to why the Party concerned may be unable to meet those obligations.</p> <ul style="list-style-type: none"> - Standing committee can decide to gather further information on the compliance issues including by seeking invitation from the Party concerned to undertake the gathering or verification of information. - Party Concerned has the right to participate in discussions with respect to its own compliance. <p><u>Measures/Non-compliance procedures</u></p> <ul style="list-style-type: none"> - Standing committee can provide advice, information, and appropriate facilitation of assistance (including in country assistance if requested by the Party) and capacity building support to the Party concerned. - Issuing of a written caution and requesting a response. - Public notification of non-compliance through the Secretariat to all Parties. - Issue a warning to the Party concerned that it is in non-compliance, e.g., in relation to national reporting and/or the National Legislation Project; - Request a compliance action plan to be submitted to the Standing Committee by the Party concerned identifying appropriate steps, a timetable for when those steps should be completed and means to assess satisfactory completion. - Recommendation to suspend commercial or all trade in specimens of one or more CITES listed species with a Party that is in non-compliance.
2.	Montreal Protocol on Substances that Deplete the Ozone Layer	The Montreal Protocol adopted under the Vienna Convention for the protection of the Ozone Layer have strengthened measures that control the emissions of substances that deplete the ozone layer. It sets time-targets action to reduce and eliminate the production and consumption of man-made chemicals that destroy the ozone layer.	<p><u>Triggers/ initiation</u> <i>(Annex II: Non-compliance procedure (1998) - Tenth Meeting of the Parties)</i></p> <ul style="list-style-type: none"> - Self-trigger, trigger by other party or group of parties and trigger by the Secretariat in writing supported by corroborating information on non-compliance. <p><u>Procedures for self- trigger</u></p>

		<p>The Montreal Protocol has identified 100 industrial chemicals known as ozone depleting substances (ODS) - which include chlorofluorocarbons (CFCs), halons, methyl bromide, carbon tetrachloride and methyl chloroform. The recent amendment to the Protocol, the Kigali Amendment (2016) called for the phasing-down of hydrofluorocarbons (HFCs) which were used as replacements ODS and contribute to climate change.</p> <p>Article 5 of the Protocol sets differentiated timetables for developed and developing countries to phase down the consumption and production of the different ODS. Furthermore, countries have an obligation to control the trade of ODS, reporting of data on ODS, national licencing systems to control the imports and exports of ODS.</p> <p>In Article 8 of the Montreal Protocol states “parties shall consider and approve procedures and institutional mechanism for determining non-compliance with the provision of the protocol and for treatment of Parties found to be in non-compliance. The Meeting of the Parties to the Protocol (MOP) adopted an ‘indicative list of measures that might be taken in respect of non-compliance’ and established Implementation Committee to follow issues of non-compliance. (<i>Annex II:</i></p>	<ul style="list-style-type: none"> - If a party concludes after making its best efforts, it is unable to comply with the obligations under the protocol, submits in writing the specific circumstance that it considers to be the cause of its non-compliance. <p>Trigger by other parties</p> <ul style="list-style-type: none"> - Secretariat within two weeks of receiving submission should inform the Party concerned. - Party has three months to reply or provide information, if the reply has not been received the secretariate should send a reminder to the Party. - No later than six months the secretariat should transmit the submission to the implementation committee. <p>Procedures for trigger by the Secretariate</p> <ul style="list-style-type: none"> - The Secretariat during preparation of report becomes aware of a non-compliance, it can request the Party concerned to provide additional information - The party concerned should respond to the request within three months if there is no response from the party concerned the Secretariate should include the matter in its report to the MOP (Article 12 (c) and inform the implementation committee
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3.	<p>Cartagena Protocol on Biosafety</p>	<p>The Cartagena Protocol on Biosafety is a supplementary agreement to the Convention on Biodiversity Diversity. It aims to protect biological diversity from the potential risks posed by living modified organisms taking also into account risks to human health, and specifically focusing on transboundary movements.</p> <p>The Protocol sets obligations on countries to ensure the development, handling, transport, use transfer and release of any living modified organism are undertaken in a manner that prevents or reduces risks to biodiversity (<i>Article 2</i>). It also established an advanced informed agreement procedure for providing information for making informed decisions before agreeing to the import of such organisms into their territory (<i>Article 7-12</i>). The Protocol also established a bio-safety clearing House to facilitate exchange of information on living modified organisms and to assist countries in the implementation of the Protocol (<i>Article 20</i>).</p> <p>In Article 34 the protocol mandated the meeting of the Parties to this Protocol (MOP) to consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Protocol and to address cases of non-compliance.</p> <p>The first meeting of the MOP (<i>decision BS-I/7</i>) established a compliance committee and adopted procedures to promote compliance with provision of the Protocol, to address cases of Parties' non-compliance, and to provide assistance or advice as appropriate. The decision provides <i>the compliance procedures shall pay particular attention to the special needs of developing country Parties, in particular the least developed</i></p>	<p><u>Triggers/ initiation</u> (<i>decision BS-I/7, IV</i>)</p> <p><u>Procedures for self- trigger:</u> submission to the compliance committee by the party itself with regards to challenge,</p> <p><u>Procedures for trigger by other Parties</u></p> <ul style="list-style-type: none"> - Submission by a party which is affected or likely to be affected with respect to another party non-compliance. <hr/> <p><u>Procedures for consideration of Non-compliance (process)</u> (<i>decision BS-I/7, III & V</i>)</p> <ul style="list-style-type: none"> - The Secretariat within fifteen days of receipt of the submission, should make the submissions available to the Party concerned, and transmit any response or information from the Party concerned to the compliance committee, - Party that has received a submission regarding non-compliance should respond or provide the necessary information within three months and no later than six months. - Compliance committee will identify the specific circumstances and possible causes of individual non-compliance, consider the information submitted to it regarding non-compliance, seek or receive relevant information from sources the Secretariat or experts. (<i>decision BS-II/1</i>) <p><u>Measures/Non-compliance procedures by the committee:</u> taking into account capacity of the Party concerned, especially developing countries Parties, LDCs and SIDs and factors as cause, type, degree, frequency of non-compliance;</p> <ul style="list-style-type: none"> - Provide advice or assistance to the Party concerned. - Recommendation on the provision financial and technical assistance, technology transfer, and other capacity building measures, and - Develop a compliance action plan within a timeframe agreed between the Party and the compliance committee. (<i>decision BS-I/7, VI</i>)
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4.	<p>Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal</p>	<p>The objective of the Basel Convention is to protect human health and the environment against the adverse effects of hazardous wastes. The provisions of the Convention set obligations on countries to reduce hazardous waste generation, restriction of transboundary movements of hazardous wastes except in accordance with the principles of environmentally sound management and ensure environmentally sound management of hazardous wastes or other wastes. (Article 3 & 4).</p> <p>In the event of a transboundary movement of hazardous wastes having been carried out illegally, the Convention attributes responsibility to one or more of the countries involved, and imposes the duty to ensure safe disposal, either by re-import into the State of generation or otherwise (Articles 8 and 9). The Basel Convention also provides for cooperation between parties, ranging from exchange of information on issues relevant to the implementation of the Convention to technical</p>	<p><u>Triggers/ initiation</u> (BC-VI/12, Paragraph 9)</p> <ul style="list-style-type: none"> - <u>Self – trigger:</u> a Party that concludes, despite its best efforts, will not fully implement or comply with its obligations. - <u>Trigger by other Parties:</u> a Party that concern or affected by a failure to comply with or implement the Conventions obligations by another Party with whom its directly involved. - <u>Trigger by the Secretariat:</u> on the possible difficulties on reporting obligations of a Party pursuant to its function under Article 14 and 16. <p><u>Procedures for consideration of Non-compliance (process)</u> (BC-VI/12, Paragraph 10)</p> <ul style="list-style-type: none"> - Submission on non-compliance should be addressed to the Secretariat, and should include matter of concern, relevant provisions of the Conventions and information substantiating the submission. - The Secretariat forwards the submission, within two weeks of it receiving the submission, to the Committee.

	<p>assistance, particularly to developing countries (<i>Articles 10 and 13</i>). The Secretariat is required to facilitate and support this cooperation, acting as a clearinghouse (<i>Article 16</i>).</p> <p>The Implementation and compliance committee of the Basel Convention was established as a subsidiary body to the Convention in 2002 (<i>Article 15 (e)</i>). The committee assists Parties to comply with their obligation under the Convention and facilitate implementation.</p> <p>Since its adoption in 1992, the Convention had a number of significant developments, banning of chemicals Amendment in 1995, inclusion of waste in annexes VIII and IX in 1998 and inclusion of regulatory system applying to cases where transboundary movements of plastic waste to the Annexes II, VIII and IX to the Convention become effective as of 1 January 2021).</p>	<p><u>Procedures for consideration of Non-compliance (process) triggered by other Parties</u> (<i>BC-VI/12, Paragraph 13-15</i>)</p> <ul style="list-style-type: none"> - The Secretariat within two weeks of it receiving the submission, should transmit a copy to the Party whose compliance with the Convention is in question and to the Committee. - Party whose compliance is in question may present responses and/or comments at every step of the proceedings of the compliance process. - Additional information provided in response by the Party concerned should be forwarded to the secretariat within three months of the date of the receipt of the submission by the Party in question except in cases that require extended period. <p><u>Measures/Non-compliance procedures: Facilitation Procedures by the committee:</u> recommend non-binding actions to address non-compliance (<i>BC-VI/12, Paragraph 19</i>)</p> <ul style="list-style-type: none"> - Advice on establishing or strengthening domestic regulation regimes, - Facilitate assistance to developing countries on access to finance and technical support, including technology transfer and capacity-building; - Elaborating of a voluntary compliance action plans (i.e. indicators of the plan, and timeline) and reviewing its implementation. <p><u>Measures/Non-compliance procedures: additional measures by the COP</u> (<i>BC-VI/12, Paragraph 20</i>) taking into account the cause, type, degree, and frequency of compliance difficulties,</p> <ul style="list-style-type: none"> - Prioritization of technical assistance and capacity-building and access to financial resources. - Issuing a cautionary statement and providing advice regarding future compliance.
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5.5. Conclusion

Compliance Mechanisms support the implementation of environmental treaties by ensuring the fulfilment of obligations by the contracting parties. This Chapter has discussed the common institutional arrangements of the compliance mechanisms, including dedicated committees to follow up on implementation and facilitate compliance, rules on the initiation or triggering of procedures for case of non-compliance, and procedures for measures or outcomes of the compliance mechanisms. The Chapter found that most MEAs, including the ones presented below in the table, set flexibility on the basis of capacity or circumstance of the parties. The Kyoto Protocol has two branches for facilitating implementation and enforcing non-compliance, where the enforcement of non-compliance only applied to developed country parties taking into account their obligations and CBDRRC. The Montreal Protocol has a special provision for developing country parties allowing for a grace period to meet their obligations and facilitating support for implementation; and the compliance mechanism of the Cartagena Protocol on Biosafety recognises the special circumstances of developing country parties, including SIDs and LDCs.

This Chapter has identified important features and procedures of compliance mechanisms. The main feature is that MEA compliance mechanisms have procedures for initiating or triggering their work. These procedures launch the consideration of non-compliance or questions of implementation by a party, and include self-triggering by the party itself, a party concerned or impacted by another party non-compliance, and the governing bodies of the MEA - the COP. After the triggering or initiation of non-compliance, the relevant compliance mechanism typically examines causes of non-compliance considering expert reports, reporting by the party and the Secretariat of the treaties. The final and another important procedure is the measure or outcome, where the compliance mechanism reaches a decision on a non-compliant party. The measures range from supporting the party both technically or financially to address the implementation challenge, to suspending the party's privilege and rights under the treaty. The next chapter, Chapter Six, discusses the Paris Agreement Compliance Mechanism in particular to draw out these common features, to describe further additional procedures, and to recommend further new procedures for an effective compliance mechanism that could also contribute toward equity and climate justice

Chapter 6: Compliance Mechanism of the Paris Agreement

6.1. Article 15: Compliance Mechanism

The Paris Agreement established a compliance mechanism in Article 15. Article 15 (1) reads: “[a] mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.”⁴⁰⁰ The mechanism consists of a committee that is expert-based and facilitative in nature and functions in a manner that is transparent, non-adversarial and non-punitive.⁴⁰¹ Article 15 (2) requested the Committee to pay particular attention to the respective national capabilities and circumstances of Parties. Finally, in Article 15 (3), the Paris Agreement gave a mandate for future work and sets out that the Committee should operate under the modalities and procedures adopted by the Conference of Parties of the Paris Agreement (CMA).⁴⁰²

In Chapter 3, Article 15 was introduced, and we found scholars including Bodansky, Bruneée, and Rajamani call it a ‘skeletal provision establishing the mechanism, and that provides only minimal guidance on how it will work.’⁴⁰³ During pre-Paris negotiations, the negotiations on the compliance mechanism were initiated a year before the adoption of adopting the Paris Agreement at COP20. The negotiations on the compliance mechanism were limited as the priority and focus were to agree on the substantive obligations of the Agreement. Christina Voigt notes that while some parties supported compliance, others objected to negotiating a compliance system before deciding on the obligations under the Agreement, arguing that it was ‘premature’.⁴⁰⁴ These different views led to Article 15 only establishing the mechanism and agreeing on general guidance.

The Paris Agreement's decision established an Ad Hoc Working Group on the Paris Agreement (APA).⁴⁰⁵ The APA was mandated to prepare draft decisions for consideration and adoption at the first session of the CMA. The COP requested the APA to develop the modalities and procedures for the effective operation of the committee referred to in Article 15, paragraph 2

⁴⁰⁰ Paris Agreement (n12) Article 15 (1).

⁴⁰¹ Paris Agreement (n12) Article 15(2).

⁴⁰² Paris Agreement (n12) Article 15 (3).

⁴⁰³ Bodansky, Bruneée and Rajamani (n41) 244.

⁴⁰⁴ Christina Voigt, ‘The Implementation and Compliance Mechanism of the Paris Agreement’ (2016) 25 *Review of European Community and International Environmental Law* 161.

⁴⁰⁵ Decision 1/CP.21 (n166) para 7.

of the Paris Agreement.⁴⁰⁶ As of 2022, the work to finalise the modalities, procedure, and operation of the Committee are ongoing.

6.2. Negotiating Article 15 Modalities and Procedures

The UNFCCC negotiation groups that actively negotiated Article 15 modalities and procedures include the Group of 77 and China (G-77), a negotiating group founded in 1964 under the UN Conference on Trade and Development (UNCTAD) and which now functions throughout the UN system,⁴⁰⁷ and represents developing countries. The G-77 consists of other regional groups, such as the African States, the Small Island Developing States and the group of Least Developed Countries. Developed countries negotiating groups under the Convention include the European Union, Umbrella Group, and Environmental Integrity Group. The other negotiation groups under the UNFCCC negotiation are the Arab Group, the Independent Alliance of Latin America and the Caribbean and the BASIC Group (Brazil, South Africa, India, and China).

After the adoption of the Paris Agreement, Parties started negotiating the modalities and procedures of the Compliance Mechanism, including its Committee in 2016. As presented in Chapter 5, the focus of the negotiations was on the common features and procedures. The negotiations for operationalising Article 15 focused on the purpose, scope of the work of compliance committee, initiation or triggers, outputs or measures, and the operationalisation of differentiated modalities and procedures reflecting national capabilities and circumstance of Parties.⁴⁰⁸

Parties had differing views on the scope of the work of the compliance committee. Most developed country Parties wanted to restrict the mandate of the Compliance Mechanism and its committee to only the procedural and individually binding obligations, whereas other Parties suggest that the scope of the compliance committee is as provided in Article 15 (1) which is to facilitate the implementation of and promote compliance with all the provisions of the Paris Agreement. As discussed in Chapter Three that identified and mapped the obligations of the

⁴⁰⁶ Decision 1/CP.21 (n166) paras 102 and 103.

⁴⁰⁷ G77 and China is a group of 134 developing countries, including China, and other UN treaty making bodies that have the G77 and China include the UN General Assembly, Convention on Biodiversity, UNCCD and Montreal Protocol.

⁴⁰⁸ UNFCCC, 'Report of the Ad Hoc Working Group on the Paris Agreement on the Seventh Part of its First Session, Held in Katowice from 2 to 8 December 2018' FCCC/APA/2018/6.

Paris Agreement, the procedural and individually binding obligations are communication and maintaining of NDCs in Article 4 (2), information for the clarity of the NDCs in Article 4 (8), and accounting of their NDCs in Article 4 (13), adaptation communication in Article 7 (10), and reporting of progress on implementation under the transparency framework in Article 13. Developed country Parties limited the mandate of the Compliance Mechanism and its Committee from considering collective financial obligations obligation under Article 9.⁴⁰⁹ As mentioned above, developing country Parties called for a compliance mechanism with a mandate to address and consider all obligations under the Paris Agreement.

Parties also have differing positions on the initiation/triggering procedures as some limit the trigger to be only a self-trigger or initiation by the Party itself, while other Parties propose that the work of the Committee could be initiated by information from other arrangements under the Paris Agreement, including information on the communication of NDCs or reports under the transparency framework.⁴¹⁰

Amongst the controversial issues in the negotiation under Article 15 is differentiation of Parties.⁴¹¹ Most developing countries Parties argued that the differentiated obligations under the Paris Agreement should be the basis for operationalising the differentiation provided under Article 15. As discussed in Chapter 3 obligations under Articles 4, 9 and 13 set differentiated obligation on Parties. On the other hand, most developed countries Parties argued that the Compliance Committee as reflected in Article 15 (2) should differentiate countries only on the basis of their national capability and circumstance.

The table below presents the views of the UNFCCC negotiating groups and national delegations that were key factors in the negotiation for developing the modalities and procedures, from submitting views to the UNFCCC Secretariat to leading the negotiations on Article 15.⁴¹²

⁴⁰⁹ See Susan Biniiaz, 'Elaborating Article 15 of the Paris Agreement: Facilitating Implementation and Promoting Compliance' (2017) 10 IDDRI Policy Brief 2. Susan Biniiaz was the lead legal adviser for the United States of America and the Head of Delegation of the US to the UNFCCC in 2021 and 2022.

⁴¹⁰ See below the analysis on the submission by Parties.

⁴¹¹ *ibid.*

⁴¹² FCCC/APA/2018/6 (n408).

Table 7 Negotiating Positions of UNFCCC negotiating groups and national delegations on Paris Agreement Compliance Committee

Party ⁴¹³	Scope	Initiation or trigger	Measure or outcome
<p>African Group</p> <p>The African Group represents 55 African countries, and it has been among the key negotiating groups on Article 15.</p>	<p>The African Group views was the scope of the compliance committee is defined under Article 15 (1) of the Paris Agreement, and that should be the basis for developing the modalities and procedures for the effective operation of the compliance committee.⁴¹⁴</p> <p>Differentiation Compliance Mechanism function to be guided by developed obligation of the Paris Agreement, facilitating for developing countries while promoting compliance developed country Parties.</p>	<ul style="list-style-type: none"> • Initiation by the different arrangements under the Paris Agreement; registries- (NDCs and finance) and transparency framework. • The trigger procedures should be consistent with the Paris. Agreement obligations, • Self-trigger by the itself party, and • Specific mandate to the compliance committee. 	<ul style="list-style-type: none"> • Proposed two functions facilitation of implementation for developing countries, should include consultations with the Party concerned to address causes of non-compliance, a procedure for assisting with the preparation of an action plan, and a procedure to facilitate implementation through provisions of technical support. • Promoting compliance function for developed countries should seek clarification from the Party concerned on issues of non-compliance. The committee should consult with the Party by requesting reasons and proposals for subsequent measures and action to be taken by the Party to address its non-compliance.
<p>Alliance of Latin America and the Caribbean (AILAC)</p> <p>AILAC is among the newly established</p>	<p>AILAC recommends that the modalities and procedures for the effective operation of the committee.⁴¹⁶</p> <p>Differentiation</p>	<ul style="list-style-type: none"> • Triggers should be a common to all Parties under the enhanced transparency framework 	<ul style="list-style-type: none"> • Sharing of information, experiences, and lessons learned, identification of challenges and assistance to the Party to elaborate an action plan and review its implementation. • Promotion of compliance, measures, taking into account the nature and extent of non-compliance,

⁴¹³ For all submissions by Parties, see < <https://unfccc.int/process/bodies/subsidiary-bodies/ad-hoc-working-group-on-the-paris-agreement-apa/information-on-apa-agenda-item-7/submissions-received-on-apa-item-7> >.

⁴¹⁴ Submission by the Republic of Mali on behalf of the African Group on the Modalities and procedures for the Effective Operation of the Compliance Committee to Facilitate Implementation and Promote Compliance referred to in Article 15, paragraph 2 of the Paris Agreement, 21 Sep 2017

⁴¹⁶ Submission by Peru on behalf of the AILAC group of countries - APA Agenda Item 7: 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, 15 September 2017, available at <http://www4.unfccc.int/Submissions/Lists/OSPSubmissionUpload/863_360_131499625357305140-SUBMISSION%20BY%20PERU%20ON%20BEHALF%20OF%20THE%20AILAC%20GROUP%20OF%20COUNTRIES.pdf>.

<p>negotiating groups and was established as a formal negotiating group in 2012.⁴¹⁵</p>	<p>Article 15 should be determined by the committee, and the committee should determine on a case-by-case basis as to the flexibilities to be afforded to the specific national capabilities and circumstances.</p>	<ul style="list-style-type: none"> • Non-fulfilment of reporting obligations and submission of findings from expert review teams and multilateral considerations under Article 13. 	<p>an appropriate system of consequence, including the committee could recommend the issuance of cautionary statements by the CMA.</p>
<p>Alliance of Small Island States (AOSIS)⁴¹⁷</p> <p>The AOSIS, also known as Small Island Developing States (SIDS), is a coalition of 40 low-lying developing islands that are particularly vulnerable to sea level rise.</p>	<p>Differentiation</p> <p>The consideration of the compliance committee should, according to AOSIS, take into account national capabilities and circumstance of countries throughout the entire process, including the procedure for consultations with the Party, assistance given to the Party in responding to the requests of the committee and the output/measures and procedures.</p> <p>AOSIS also calls for the recognition of the capacity constraints of the SIDS and LDCs in its considerations.</p>	<ul style="list-style-type: none"> • Self-referral by a Party. • Initiation by another Party. • Referral by the Art. 13 Transparency Process; • Initiation CMA 	<ul style="list-style-type: none"> • AOSIS supported outputs/measures should be a continuum with its function of facilitating implementation and promotion of compliance. The committee may decide on cases that may not need the exhaustion of all procedures. • AOSIS also proposed outputs/measures and procedures to be on the basis of mandatory and non-mandatory provisions of the Paris Agreement. The procedures for the non-mandatory provisions include procedures for dialogues between the Party and the committee; communication with the Party, the types of support available, providing assistance and recommendations, whereas the procedures for individual mandatory provisions should include a statement of concern, potential non-compliance and findings of non-compliance.
<p>European Union (EU)</p>	<p>Article 15 mechanism will support Parties in the implementation of and compliance with the provisions of the Paris Agreement.</p>	<ul style="list-style-type: none"> • Self-referral • Missing information required under Article 13. 	<ul style="list-style-type: none"> • EU proposed a range of outputs/measures to allow the compliance committee to facilitate implementation and compliance as a continuum and without to distinguish between outputs that

⁴¹⁵ AILAC is a group of eight countries that share the same interest and position on climate change, and it includes Chile, Colombia, Costa Rica, Guatemala, Honduras, Panama, Paraguay, and Peru. See < <http://ailac.org/en/sobre/> >

⁴¹⁷Submission by the Republic of Maldives on behalf of the Alliance of Small Island States, APA Agenda Item 7: 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, 12 April 2017, available <https://unfccc.int/sites/default/files/167_325_131367466767372283-AOSIS_Submission_APA%20Agenda%20item%207.pdf>

<p>The EU currently has 28 members who agree on a common negotiating position on climate change. The country that holds the EU Presidency, a position that rotates every six months, speaks for the EU and its member states.⁴¹⁸</p>	<p>Article 13 of the Agreement to have a similar purpose and recommends the modalities and procedures to be tailored to address the specific nature of the Agreement.</p> <p>Differentiation The EU views modalities and procedures of Article 15, including its range of outputs, as equally applicable to all Parties. The compliance committee should take into account the national capabilities and circumstance of Parties for exercising its discretion</p>	<ul style="list-style-type: none"> • Additional triggering procedures proposed are lack of willingness of the Party to an invitation for the review of its report. • Lack of response to questions by the reviewers, and failure to appear for a scheduled facilitative multilateral consideration process under Article 13. 	<p>facilitate implementation and promote compliance.</p> <ul style="list-style-type: none"> • EU proposed a continuum role of the committee to allow a degree of discretion to determine, in consultation with the Party concerned, the appropriate approach for the issue and the Party concerned. • Amongst the EU proposed appropriate outputs are advice to the party concerned, provision of information and guidance to relevant support mechanisms, an action plan with a timeline, exchange of information with other Parties with similar experience, and issuance of a statement of non-compliance to a Party with an individual obligation.
<p>Least Developed Countries (LDCs) The LDCs is a Group of 48 countries with less capacity which are most vulnerable to the impacts of climate change.⁴¹⁹</p>	<p>The LDCs view the compliance committee as having two general functions -facilitating implementation and promoting compliance with the provisions of the Paris Agreement.</p> <p>Differentiation The LDC supported two distinct functions although could be interconnected and complementary.</p>	<ul style="list-style-type: none"> • Self-triggering, • Triggering by the technical expert review and multilateral consideration of progress under Article 13 of the Agreement, • By the compliance committee, and • CMA. 	<ul style="list-style-type: none"> • LDCs proposed the outputs/measures procedures should facilitate implementation and promote compliance by all Parties. • The proposed outputs or measure includes issuing of final findings, statements of non-compliance and reports to the CMA in cases of non-compliance.

⁴¹⁸ EU members pre-Brexit, submission by the Republic of Estonia and the European Commission on behalf of the European Union and its member states, Views on selected aspects of modalities and procedures required for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15 para 2 of the Paris Agreement, 9 November 2017, available at < https://unfccc.int/sites/default/files/783_325_131345691381589078-MT-03-21-EU%20APA%207%20Submission_Art%2015%20Mechanism.pdf >

⁴¹⁹ Submission by the Federal Democratic Republic of Ethiopia on behalf of the Least Developed Countries Group on APA agenda item 7: 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, 28 September 2017, available at < https://www ldc-climate.org/wp-content/uploads/2018/01/ldc-group-submission_apa-agenda-item-7.pdf . >

National Positions on Article 15

Regional Party ⁴²⁰	Group/ Scope	Initiation or trigger	Measure or outcome
Australia ⁴²¹	<p>Australia advocated for a narrower scope for the Article 15 Mechanism focused on the individual obligation under the Paris Agreement, and to avoid common provisions that are qualified, subjective, discretionary, or related to the domestic implementation of the Paris Agreement.</p> <p>Differentiation Article 15 mechanism applies to all Parties equally and pay particular attention to the respective national capabilities and circumstances of Parties. Australia suggested the Committee should have discretion to address non-compliance on a case-by-case basis and determine appropriate measures and outputs accordingly.</p>	<ul style="list-style-type: none"> • Australia supported self-trigger as the main initiation procedure. • Other possible trigger proposed is the use of “automatic” or “objective” triggers to promote compliance of individual and legally binding obligations. • Triggering by the CMA on systemic issues that are repetitive patterns of non-compliance. 	<ul style="list-style-type: none"> • Australia advocated for an understanding of the role of the committee as a continuum, with the dual function of facilitating implementation and promoting compliance. • Consultation with the party on areas of difficulty, provision of technical support, providing a form of experience sharing, referral to existing mechanisms under the Paris Agreement for financial, technical, and capacity-building support. • Request the CMA for assistance, and identification of common causes and frequency of non-compliance.
China	<p>China advocates for a single compliance committee with dual functions, one to facilitate implementation, and the other to promote compliance.</p>	<ul style="list-style-type: none"> • China proposed self-triggering. • Committee trigger. 	<p>China, be in line with the facilitative nature of the committee.</p>

⁴²⁰ See all submission by Parties < <https://unfccc.int/process/bodies/subsidiary-bodies/ad-hoc-working-group-on-the-paris-agreement-apa/information-on-apa-agenda-item-7/submissions-received-on-apa-item-7> >

⁴²¹ Australia is also member of the Umbrella Group which consists of others developed countries such as the USA, Canada, and Japan. Australia First Submission on modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance, 13 April 2017, available at <https://unfccc.int/files/bodies/apa/application/pdf/261_321_131372609748801307-2017-australia-mitigation-part_ii-accounting.pdf>

	<p>Differentiation China had strong view on the issue of differentiation under Article 15. China advocated the interpretation of issues of differentiation as provided under “Article 2(2) of the Paris G that states “[t] his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances” (CBDR-RC). Therefore, applying this to all provisions including Article 15 (2). China argued for different national capabilities and circumstances of Parties should be considered and reflected in both procedural and substantive aspects of the Article 15 mechanism.</p>	<ul style="list-style-type: none"> • CMA trigger the work of the committee with the information collected or received from the UNFCCC secretariat. • China also proposed transparency arrangement, such as the Technical Expert Review and facilitative, multilateral consideration of progress (FMCP) under Article 13 could trigger the work of the compliance committee. 	<ul style="list-style-type: none"> • Measures and outcomes should be informed by the relevant provisions of the PA are legally binding or not. • In the case of non-legally binding obligations, the measures should provide advice on implementation, provisions of support or capacity building. • In the case of legally binding provisions, in addition to the above-mentioned measures, the committee could take further measures such as assisting the Party concerned with the preparation of a compliance plan and follow up with the Party to implement the plan. • China viewed was the measures should also take into account the cause, type, degree, frequency of issues of non-compliance, and the capacity and the national circumstance of developing country Parties.
Norway ⁴²²	<p>Compliance mechanism should facilitate implementation of and promote compliance the provisions of the Agreement.</p> <p>The compliance mechanism should have a continuum role of facilitating and promoting compliance.</p> <p>Differentiation</p>	<p>Triggers for facilitation of compliance should include:</p> <ul style="list-style-type: none"> • Self-triggering. • Secretariat supported by the Party concerned with respect to Parties’ implementation and compliance. <p>Triggers for promoting compliance should include:</p>	<ul style="list-style-type: none"> • Strengthening domestic capacities, expertise, institutions, or regulations. • Possibilities for accessing financial and technical support, including capacity-building and technology transfer. • Access to information on best practices, guidance, or best available technologies, • Joint or cooperative approaches to address the concern.

⁴²² Submission by Norway on 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, 13 April 2017, available at < https://unfccc.int/sites/default/files/114_325_131358991978517143-Submission%20by%20Norway%20on%20APA%207_final.pdf >

	<ul style="list-style-type: none"> Norway argued differentiation is reflected in Article 15 (2) and the committee shall pay particular attention to the respective national capabilities and circumstances of Parties. 	<ul style="list-style-type: none"> Committee itself (self-trigger) (with respect to compliance) Request by CMA (with respect to compliance, and Secretariate. 	<ul style="list-style-type: none"> In the committee's function to promote compliance the Norway proposed (i) a continuum of the work on facilitation implementation, in the case where implementation issues pertained to provisions of the agreement that contain individual, legally-binding obligations and where these issues prevail after facilitation.
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6.3. Paris Agreement Committee to Facilitate Implementation and Promote Compliance

In 2018 after three years since the adoption Paris Agreement, Parties under the CMA reached a decision on the purpose, principles, nature, functions and scope, institutional arrangements for the Committee, initiation process and measure and out puts of the committee. The decision agreed on a procedure to consider systemic issues. The CMA decision also mandates the Compliance Committee to develop its rules of procedure for the consideration of Parties under the CMA by 2020.⁴²³ However, the development of the draft rules of procedures were delayed due to the postponement of COP26,⁴²⁴ and further guiding decision on the Compliance Committee reached in 2021 were limited to the institutional arrangement of the Committee. Decision 24/CMA.3 requested the Committee to work on the remaining rules needed for commencing its work and present the draft rules of procedures for consideration and approval at COP27 in November 2022. The section below presents the decision and identifies the remaining work needed to initiate the work of the Paris Agreement Compliance Committee.

6.3.1. Purpose, Functions, and Scope of the Compliance Committee

As discussed in the table above, Parties have different views on the purpose, function, nature, and scope of the Compliance Committee. Parties' views also differed on the basis of the legal obligations as some developing countries asked for a differentiated compliance system similar to Kyoto Protocol.⁴²⁵ The 20/CMA.1 decision of the Paris Agreement resolved and further clarified the purpose, scope and differentiation of Parties.⁴²⁶ The decision settled that the Article 15 Compliance Mechanism will facilitate implementation of and promote compliance with all the obligations of the Paris Agreement, as some Parties' views were to limit the mandate of the Mechanism.⁴²⁷ It also confirmed the non-adversarial and non-punitive nature of Article 15 by clarifying that the Committee shall not function as an enforcement or dispute

⁴²³ Decision 20/CMA.1 (n357) 59.

⁴²⁴ See <https://unfccc.int/news/cop26-postponed>

⁴²⁵ Yamide Dagnet and Eliza Northrop, 'Facilitating Implementation of and Promoting Compliance (Article 15)', in Daniel Klein et al. (eds.), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017).

⁴²⁶ Gu Zihua, Christina Voigt, and Jacob Werksman, 'Facilitating Implementation and Promoting Compliance with the Paris Agreement Under Article 15: Conceptual Challenges and Pragmatic Choices' (2019) 9 *Climate Law* 67-68 and 99.

⁴²⁷ Decision 20/CMA.1 (n357), Annex, Section I, para 1; see also the submission by Australia (n421).

settlement mechanism, nor impose penalties or sanctions, and shall respect national sovereignty.⁴²⁸

i. Differentiation

Decision 20/CMA.1 resolved the diverse view of Parties on differentiation and requested further work under the CMA. In paragraph 2 of the decision provides that the Committee ‘shall pay particular attention to the respective national capabilities and circumstances of Parties’ and in paragraph 3 the decision provided that ‘Committee’s work shall be guided by the provisions of the Paris Agreement, including its Article 2’.⁴²⁹ This was an important achievement for developing country Parties in particular to the initiation and measure procedures being guided by Article 2 and the Committee process consideration of non-compliance.

The differentiation of Parties is also reflected in the different procedures and support for developing countries. Under paragraph 26 the decision provides the ‘Committee will accord flexibility with regard to timelines of the procedures under Article 15 as may be needed by Parties, paying particular attention to their respective national capabilities and circumstances’. The decision clarifies that the Committee will have more than one ‘timeline’ for considering issues of non-compliance and guided by needs of developing country Parties. It also requested assistance should be provided to developing country Parties to enable their participation in the relevant meetings of the Committee.⁴³⁰

Based on the above decisions and the need for further guidance the CMA requested the Committee to develop further procedures on ‘any additional timelines related to the Committee’s work, procedural stages and timelines for the Committee’s work, and reasoning in decisions of the Committee’ and the development of these timeline to be guided by respective national capabilities and circumstances of Parties.⁴³¹ Developing country Parties call for the differentiated consideration in the different stage of the Committee procedures are anchored in the decision.

⁴²⁸ Decision 20/CMA.1 (n357) Annex, Section I, paras 2 and 4.

⁴²⁹ Ibid, paras 2 and 3.

⁴³⁰ Decision 20/CMA.1 (n357), Annex, Section III, paras 26 and 27.

⁴³¹ Decision 20/CMA.1 (n357), Annex, Section II, paras 17 and 18.

6.3.2. Institutional arrangements

Chapter Five discussed how MEA compliance mechanisms agreed on their institutional arrangements for facilitating the work of their relevant compliance systems. It also outlined how most MEAs have mechanisms and committees for implementation of the work. The Paris Agreement Compliance Mechanism decision similarly confirmed that the Compliance Mechanism will consist of a standing Committee and a Secretariat supporting its work including the Committee's annual report to the CMA on the progress of work.⁴³²

i. Constitution of the Committee

The decision of the Paris Agreement defined the composition of the Compliance Committee and the term of service. The Committee consists of 12 members and 12 alternate members representing five regional groups of the United Nations and one member each from the small island developing States and the least developed countries.⁴³³ It also sets that the members and alternate members should have relevant expertise, including scientific, technical, socioeconomic, or legal fields. Both Committee members and alternates can serve up to a total of six years.⁴³⁴ The role and duties of members and alternate members is defined in the decision adopted at COP26. Decision 24/CMA.3 provides the role of the members and alternate member to be independently, impartially and respect confidentiality of information even of termination of their services, and on decision making process alternate members can participate in the proceeding of the Committee without a right to vote.⁴³⁵

ii. Secretariat

The Secretariat of the Convention and the Kyoto Protocol which was also mandated in Article 17 to serve the Paris Agreement supports the Committee. In decision 24/CMA.3 the Secretariat's support was defined and ranges from supporting the preparation of agenda of the meetings of the committee, making documents available for meetings, maintain meeting records, and sharing documents that are available to the public after the confirmation by the

⁴³²FCCC/APA/2018/6 (n408).

⁴³³ Decision 20/CMA.1 (n357), Annex, Section II, paragraph 5.

⁴³⁴ Ibid, paragraph 7.

⁴³⁵ Decision 24/CMA.3. Rules of procedure of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement (8 March 2022) FCCC/PA/CMA/2021/10/Add.3 paragraph 2 Rule 3.

Committee.⁴³⁶ The Secretariat also supports the Committee in the preparation of its annual report to the CMA that will be considered and approved by Parties at each COP.

6.3.3. Initiation/Triggering

Parties agreed to three main initiation or triggering procedures for launching the work of the Compliance Committee.

i. Self-initiation

The MEA chapter found that most MEAs have a self- initiation procedure as this procedure is deemed to enhance the facilitative function of a compliance mechanism. The first initiation procedure under the CMA decision is also self- initiation.⁴³⁷ The Paris Agreement Compliance Committee will consider a Party's submission of initiation with respect to its own implementation of and/or compliance with any provision of the Paris Agreement. However, the consideration of issues will commence after the preliminary examination by the Committee. The preliminary examination procedures are amongst the remaining rules that will be elaborated by the Committee.⁴³⁸

ii. Initiation by the Committee

The initiation by the Committee is on obligations of communication, reporting and participation requirement of the Party under the transparency framework. The first initiation procedure is based on the communication of obligations and has two procedures – one for NDCs and the other for Article 9. (5) communication. In the first instance the Committee initiates its work after a failure by a Party to communicate or maintain NDCs under Article 4 of the Paris Agreement.⁴³⁹ The second is related to the communicated projected levels of public financial resources by developed country Parties under Article 9(5). The Committee will initiate its consideration if a developed country Parties fails to communicate this information.⁴⁴⁰ The initiation procedures still need to clarify timelines for the consideration of such issues of non-compliance, and CMA 3 mandated the Committee to conclude and forward the draft procedures to CMA 4.

⁴³⁶ Decision 20/CMA.1 (n357), Section VIII, paragraph 37 and Decision 24/CMA3 (n435) Rule 13.

⁴³⁷ Decision 20/CMA.1(n357), Section III, para 21.

⁴³⁸ Ibid, para 20.

⁴³⁹ Decision 20/CMA.1 (n357), Section III, para 21 (i). See also, Gu Zihua, Christina Voigt, and Jacob Werksman (n426).

⁴⁴⁰ Ibid, Section III, para 21 (iv).

The second initiation by the Committee is linked to the transparency arrangement from submitting of reports, to ensure quality of the reports and the participation of the Party in the review process by other Parties. The failure to submit a report under Article 13 of the Paris Agreement will initiate consideration by the Committee.⁴⁴¹ Also, after submitting the transparency reports Parties have an obligation of participate in facilitative, multilateral consideration of progress which was discussed in Chapter Three. The failure to attend the session is another initiation procedure for the Committee if the Party has failed to be present and respond to question from other Parties during the allocated session for the Party at COPs.⁴⁴² The final initiation procedure linked to the transparency arrangement is on the quality of a Party's report and 'in cases of significant and persistent inconsistencies' with the guidance from Article 13. This initiation is, however, different to the above as the Committee requires the consent of the Party for such initiation and consideration.⁴⁴³ As mentioned above, the Committee does not have procedures of seeking consent, nor has it defined which of the reports under Article 13 and transparency arrangement initiate its work. In addition, the decision does not define what counts as 'significant and persistent inconsistencies.'

iii. Initiation of Considerations of Systemic Issues

The decision of the Paris Agreement gave limited guidance on the initiation of consideration of systemic issues. This initiation procedure is different to the above as it deals with questions of implementation or non-compliance as a result of a systemic challenge and faced by a number of Parties rather than individual Parties.⁴⁴⁴ The decision provides the CMA can initiate the consideration of systemic issue and initiation by the Committee on systemic issues is contingent on the approval of the CMA. The decision does not define what is a systemic issue is nor the minimum number of Parties to activate this initiation procedure.

6.3.4. Measure and Outputs of the Committee

Similar to the above, the guidance on measure and outputs by the decision only lists the possible measures the committee could take to address non-compliance. The measures include dialogue with the Party concerned to identify challenges and make recommendations including in

⁴⁴¹ Decision 20/CMA.1 (n357) Section III para 21 (ii).

⁴⁴² *ibid* para 21 (iii).

⁴⁴³ Decision 20/CMA.1 (n357) Section III para 21 (b).

⁴⁴⁴ Decision 20/CMA.1 (n357) Section V paras 32-34.

relation to finance, technology, and capacity-building support, recommend a development of an action plan, and lastly, issuing findings of fact in relation obligations on communication and reporting.⁴⁴⁵ This is also amongst the matters that will be elaborated by the Committee, including to clarify if the measures are sequential or can be applied on a case by case basis.

6.4. Conclusion

The Paris Agreement established a compliance mechanism in Article 15 and defined its function of facilitating implementation and promotion of compliance with the provisions of the Agreement. Article 15(2) also setup a committee as part of the mechanism. The function and nature of the Mechanism, including the Committee, was agreed to be non-adversarial and non-punitive. Decision 20/CMA.1 of the Paris Agreement also clarified that the function of the Committee will neither include enforcement nor a dispute settlement mechanism, nor will it impose penalties or sanctions.

The Paris Agreement and its Decision recognise the differentiation of Parties. Article 15(2) requests the Committee to pay particular attention to the respective national capabilities and circumstances of Parties in its considerations. The Decision of the Agreement further requested that the Committee's work shall be guided by the provisions of the Paris Agreement, and in line with the provisions of Article 2 which references consideration of equity and CBDRRD-NC.

The initiation or triggering and measures of the Compliance Committee were also adopted by the Paris Agreement Decision. Parties have adopted initiation procedures by the Party itself, initiation by the Committee and the CMA. Also, the measures by the Compliance Committee in case of non-compliance were agreed to range from identifying the cause of non-compliance, recommendations on financial, technical, and capacity assistance to the Party and issuing of determinations of fact. The Compliance Committee has not launched its work on considering cases of non-compliance, as the detailed rules for the initiations and measure procedures are yet to be agreed by the Parties of the Paris Agreement. The Decision of the Agreement has mandated the Compliance Committee to develop the remaining rules of procedures for the consideration and adoption by Parties at CMA 5 planned for 2023.

⁴⁴⁵ Decision 20/CMA.1 (n357) Section IV paras 28- 31.

Chapter 7 Equity and Climate Justice in the Paris Agreement

7.1. Equity Assessment in the Paris Agreement through the Compliance Mechanism

In the previous chapter I discussed the Compliance Mechanism of the Paris Agreement. This Mechanism is instrumental in achieving equity and climate justice. Before presenting my models for the Compliance Mechanism, however, this chapter will address what role the principles of equity and climate justice play in the Paris Agreement. The Agreement, with its self-determined contributions and assessments for climate action, raises concerns in terms of how to ensure countries take on their fair share of the efforts needed to fight climate change.⁴⁴⁶ The Agreement requires countries to include in their NDCs how they deem their contributions to be fair and ambitious, including their reflection on equity.⁴⁴⁷ However, the questions of fairness and equity divide most of the countries as they base their assessment of the equity of their contributions on widely varying parameters. Equity parameters used by countries in their NDCs include capabilities (e.g. development and technological capacity), responsibility (historical and current share in global emissions), a general notion of climate justice, level of per capita emissions, vulnerability to the adverse impacts of climate change, mitigation potential, cost of mitigation actions, degree of progression or progression beyond the current level of effort, and link to the objectives of the Paris Agreement and its long-term global goals especially the temperature goal.

Inbuilt mechanisms of the PA are essential to the evaluation of the equity and fairness of countries' contributions based on their NDCs and their own equity parameters. The assessment can take two forms, with one focused on individual contributions made by countries, while the other one measures the collective progress made by all Parties in relation to the Paris goals. As discussed in Chapter Two, the collective instrument is the Global Stocktake (GST), which promises to take account of the contributions made vis-a-vis the PA's long-term goals and in light of equity. It will be argued in this Thesis that the Compliance Mechanism is another avenue that can be utilised to weigh the fairness of contributions made by countries. The question, however, is how the Compliance Mechanism of the PA, currently under development, can assess whether the self-determined obligations fulfil the equity principle either in terms of

⁴⁴⁶ Nicholas Chan, 'Climate contributions and the Paris Agreement: Fairness and equity in a bottom-up Architecture'. (2016), 30 *Ethics & International Affairs* 291.

⁴⁴⁷ Decision 20/CMA.1 (n357).

general expectations or the self-determined parameters countries identify in their NDCs. What role does the Compliance Mechanism - and by extension, the compliance committee - play in determining (non)compliance with the PA's equity requirements?

The PA introduces a complex set of problems for its own Compliance Mechanism as, at its core, the Agreement expects Parties to commit to self-defined obligations that makes assessment by a compliance mechanism trickier. Equity considerations are even more complex due to the fluidity of the concept itself, subjectivity of the understanding of what is meant by equity, and the architecture of the PA that allows parties to define what they consider as equitable in their commitments.

I argue that there are three possible models for the Compliance Mechanism to allow it evaluate the fairness of climate action: 1) a procedural model which will focus on the assessment of equity from the standpoint of fulfilment of mainly procedural requirements of the Paris Agreement and subsequent decisions; 2) a substantive model which envisages the compliance committee assessing how the commitments submitted by Parties and their implementation is in line with the principle of equity based on objective measurable parameters; and 3) integrated model that will develop standards of assessment based on individual country submissions and envisions the Compliance Mechanism assessing equity based on tailor-made parameters adapted for specific Parties. These models will be elaborated in detail in the individual chapters that follow.

By incorporating a study of the architecture of the Paris Agreement's Compliance Mechanism, the substantive provisions of the Agreement and lessons from other treaties, including the Kyoto Protocol compliance mechanism, the overall purpose of this Thesis is to contribute to the understanding of how to measure and assess equity in climate change law. While some current works on equity and justice in climate change agreements have looked at theoretical and methodological issues with assessing fairness of climate action in general, this Thesis aims to provide an analysis of options that deal with institutional, procedural, and legal considerations for equity within the specific framework of the compliance mechanism of the Paris Agreement.

The assessment of equity presented in this Thesis is not limited to ascertaining if the climate action of a certain country is fair or equitable. Although that analysis is essential and will be

pursued in detail under the substantive model of equity compliance, my goal is to produce a mechanism by which any equity standard within the Paris Agreement and similar climate change agreements can be evaluated. This evaluation cannot be limited only to scientific, and data driven calculations as to what the share of a country's burden for climate action is or what amount of finances it should get for adaptation or any other climate action the country needs to undertake. As a living and evolving system with far reaching political, legal, and economic implications, climate change law in general and the assessment of equity in particular should be undertaken very carefully.

The role of the Compliance Mechanism in following up implementation and promoting compliance with the general commitments and obligations emanating from the Paris Agreement as well as specific equity related obligations is essential to this analysis.⁴⁴⁸ In principle, the compliance mechanism of the PA, as discussed in chapter three, is a facilitative expert-based system which is non adversarial and non-punitive. What role does the compliance mechanism and by extension the compliance committee play in making determinations of compliance? Is it analogous to an arbitrator making determinations on international law questions? Or is it closer to an adjudicator with strict rules to apply to a dispute? Will the Committee be able to bring in other aspects of international law to help it with its determination? Can it, for example, recognise commitments emanating from other international obligations in ruling on the equity content of the NDCs submitted by parties? These indicative questions and inquiry into answering them can help in suggesting good design elements as the mechanism develops.

In examining submissions and communications made by parties with regards to their commitments emanating from both the generally agreed obligations as well as nationally determined contributions, the compliance committee is mandated with functions that go beyond the work of a mere clearing house. The mechanism is primarily an accountability tool designed to make sure parties will comply with their obligations. The fact that it is facilitative and non-punitive does not imply that it cannot make determinations on the fulfilment of obligations within the rules agreed to by the Parties.⁴⁴⁹

⁴⁴⁸ Mayer (n345) 115-138.

⁴⁴⁹ Meinhard Doelle, 'Compliance in Transition: Facilitate Compliance Finding its Place in the Paris Climate Regime' (2018) 12 Carbon & Climate Law Review' 229.

The process of determining whether an obligation is complied with or not is what is of interest for the purposes of this thesis. An exploration devoted solely to what is entailed by the principles of equity and CBRDRC does not offer much in terms of interpretation of obligations and how the compliance system of the Paris Agreement can address the question of equity. Different authors have come up with different kinds of theories as to what is equitable and what the individual commitments under the Paris Agreement should look like. These theories can be supported by some countries and rejected by others. Some countries, as will be shown below, have opted to incorporate more than one recognised parameter to justify equity. With the bottom-up approach utilised in the Paris Agreement, countries can even create their own parameters for equity. What matters more, in the context of this research is what the system has designed and what the interpretation of the existing legal obligations could look like. Although general understanding of what is meant by equity or climate justice or fairness is essential for the interpretation of the general meaning of the obligation, the specific context of the state commitments in the international agreement is more relevant.

Any determination of the fulfilment of an obligation in a treaty-based compliance system has some legal components as it requires some consideration of what the obligation is, how compliance can happen, and if in the case being considered, such compliance has indeed occurred. From a legal point of view, justifying one's measures are equitable is very different from assessing the equity of an act after the fact. However, the case can be made that a similar analysis can be done in evaluating how the claimed equity of an act stands against examination. In an adversarial system the trigger for such consideration might be a party or a third party that feels the obligations of the international accord are breached. But in principle, the analysis is comparable at its core.

7.2. Equity in the Paris Agreement

In the Paris Agreement, the normative considerations attached to equity cannot be established separately from the differentiation principles utilised to assign commitments, obligations, and rights in the agreement. In places where equity has been mentioned without being attached to the CBDR, it is in reference to intergenerational equity as in the preamble of the Agreement, and the call for long-term temperature goal commitments to be on the basis equity and efforts

in the context sustainable development and eradication of poverty.⁴⁵⁰ Even in these provisions, the basic starting place is a differentiation in the expectations from different kinds of countries involved in the agreement.⁴⁵¹

The principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC) were central in setting commitments and obligations on Parties, under the UNFCCC⁴⁵² and its Kyoto Protocol.⁴⁵³ As discussed in chapter 1, the UNFCCC establishes climate change as a “common concern to humankind” and provides a basic framework for the climate change regime.⁴⁵⁴ Rajamani notes that the UNFCCC puts in place a long-term, evolutionary process to address climate change by laying down the regime’s ultimate objective (Article 2).

By adopting the Kyoto Protocol international Agreement under UNFCCC, Parties agreed to the setting of internationally binding emission reduction targets. A top-down regulatory approach provided in Article 4.2 of the Kyoto Protocol set quantified emission limitation and reduction objectives (QELROs) on developed country Parties. In contrast, Article 10 of the Kyoto Protocol applied to all Parties and required them to implement measures to mitigate climate change, and measures to facilitate adequate adaptation to climate change and report on their progress.

In 2009, the 15th Conference of Parties (COP) that was mandated to strengthen efforts against climate change under the Convention, however, concluded with an outcome that requested Parties to take note – a language that was not meant to have legally binding effect – of the

⁴⁵⁰ Paris Agreement (n12) emphasis added:

[a]cknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and *intergenerational equity*,

Article 4 , with emphasis added:

[i]n order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, *on the basis of equity*, and in the context of sustainable development and efforts to eradicate poverty.

⁴⁵¹ Voigt C and Ferreira F, “‘Dynamic Differentiation’: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement” (2016) 5 Transnational Environmental Law 285, pp. 58-74.

⁴⁵² The Convention (n4) Articles 3 and 4.

⁴⁵³ Kyoto Protocol (n5) Preamble.

⁴⁵⁴ Lavanya Rajamani (n81).

Copenhagen Accord.⁴⁵⁵ However, it can be argued that the Copenhagen Accord introduced additional bottom-up contributions on the agreed top-down obligations by requesting developed country Parties to further strengthen their QELROs by 2020, and presented a table for providing the information. The Accord also requested developing country parties to communicate mitigation actions, including the communication on additional actions ‘nationally appropriate mitigation action (NAMA)’ consistent with the Article 4.1 And Article 4.7 of the Convention. The decision provided a table in its annex for the communication of the NAMAs by developing country Parties. Bodansky argues the Copenhagen Accord is a real paradigm shift that indicated Parties abandoned the Kyoto Protocol top-down regulatory approach for a more flexible approach.⁴⁵⁶

Furthermore, the decision commits developed country Parties to the delivery of the reductions, and for it to be measured, reported, and verified in accordance with the UNFCCC reporting framework. Meanwhile the reporting of NAMA by developing countries was subjected to the domestic measurement, reporting and verification and reported through their national communications.⁴⁵⁷

In the following years, the lack of political support for the second commitment period of the Kyoto Protocol led to negotiations on a new international agreement on climate change extending beyond 2020. In 2011, the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) was established at the 17th Session of Conference of the Parties (COP 17)⁴⁵⁸ for negotiating and reaching a new, enhanced legally binding agreement “applicable to all Parties” to address climate change. The first milestone of the ADP before it adopted the Paris Agreement 2015, was the agreeing on the basis for commitments in 2013 at the 19th session of the COP. The Warsaw decision was different to the decisions discussed above as it invited all Parties without differentiating to initiate and intensify bottom-up contributions in the form of intended nationally determined contributions (INDCs). However, the information to be provided by Parties with the contributions was agreed in 2014:

⁴⁵⁵ Decision 2. CP/15. Copenhagen Accord, (30 March 2010) FCCC/CP/2009/11/Add/1, 3.

⁴⁵⁶ Daniel Bodansky, ‘The Paris Climate Change Agreement: A New Hope?’ (2016) 110 *American Journal of International Law* 288.

⁴⁵⁷ The Convention (n4) Articles 3 and 4(5)

⁴⁵⁸ Decision 1/CP.17 (n164) paragraph 2.

(b) to invite all Parties to initiate or intensify domestic preparations for their intended nationally determined contributions, without prejudice to the legal nature of the contributions, in the context of adopting a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties towards achieving the objective of the Convention as set out in its Article 2 and to communicate them well in advance of the twenty-first session of the Conference of the Parties (by the first quarter of 2015 by those Parties ready to do so) in a manner that facilitates the clarity, transparency and understanding of the intended contributions, without prejudice to the legal nature of the contributions.⁴⁵⁹

The decision on “intended nationally determined contributions” was agreed in the last hours of the COP19 as there was a strong divide between developed and developing countries on the term “contributions,” and “all Parties.” Furthermore, the use of the term “contribution” instead of “commitment” was another area of divide between developed and developing countries. Many developing countries, in particular, the Group of Like-Minded Developing Countries (LMDCs) argued the decision dilutes the differentiation envisaged in the Convention between developed and developing Parties. In this regard, the LMDCs made a submission to the UNFCCC, arguing that differentiation should be guided by the principles and provisions of the Convention, on the basis of equity and in accordance with CBDR, and that the annexes of the Convention are based on scientific assessments of historical responsibilities that should define commitment in the agreement.⁴⁶⁰

As mandated in the Warsaw decision, Parties continued their discussion on the information to be provided by Parties and shared their views on INDCs in the lead up to COP20. Submission from developing countries,⁴⁶¹ i.e., the African Group, China, LMDC, and the Least Developed Countries called for a differentiation between developed and developing countries, and

⁴⁵⁹ UNFCCC, Decision 1/CP.19, ‘Further advancing the Durban Platform’ FCCC/CP/2013/10/Add.1(2013).

⁴⁶⁰ FCCC/ADP/2013/CRP.1, Implementation of all the elements of decision 1/CP.17 ‘Submission from the Like-minded Developing countries’ (November 2013).

<<https://unfccc.int/sites/default/files/resource/docs/2013/adp2/eng/crp01.pdf> >

⁴⁶¹ See submissions from the Africa Group

<https://unfccc.int/files/bodies/application/pdf/adp_ws1_contr_africangroup.pdf; >China

<https://unfccc.int/files/bodies/application/pdf/20140306-submission_on_adp_by_china_without_cover_page.pdf; >

Like Minded Developing Countries Group (LMDC) <https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_lmhc_ws1_20140309.pdf>; and LDCs

<https://unfccc.int/files/bodies/awg/application/pdf/submission_by_nepal_on_behalf_of_ldc_group_on_views_and_proposals_on_the_work_of_the_adp.pdf >

differentiation on the contribution by Parties in accordance with the Convention. The LMDCs argued that: any enhanced action on the implementation of the Convention, which is applicable to all, should be achieved on the basis of equity and reflecting and implementing the principle of CBDR].

In contrast, developed country Parties submissions,⁴⁶² including Australia, European Union, Norway, and the United States of America, argued that the post 2020 agreement should differentiate between Parties not on the basis of the annex of the Convention, but through the actual difference between Parties due to their respective national circumstances. The EU⁴⁶³ proposed the operationalisation of CBDR and equity to be dynamic and reflective of evolving realities, whereas the US⁴⁶⁴ suggested the use of a range of factors to differentiate between Parties, including national circumstances, level of development, mitigation opportunities, and capabilities.

With these diverging views, Parties considered the different options for reflecting differentiation at COP20 held in Lima, Peru. Similar to the decision in Warsaw, Parties agreed on a compromise in the last minute on the principles of CDBRRRC⁴⁶⁵ with the addition of what Rajamani calls the Lima qualifier:⁴⁶⁶

(3) Underscores its commitment to reaching an ambitious agreement in 2015 that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances.

The choice between the two approaches, the Kyoto Protocol style top down or Copenhagen style bottom-up facilitative process, was a manifestation of the entrenched political backlash against the bifurcated approach under the Kyoto Protocol, and countries were insistent on their positions at opposite extremes of the debate. The resultant treaty language in the form of the

⁴⁶² See for example, submission of Australia

<[https://unfccc.int/files/bodies/application/pdf/australia_s_submission_to_the_ad-hoc_working_group_on_the_durban_platform_for_enhanced_action_\(adp\).pdf](https://unfccc.int/files/bodies/application/pdf/australia_s_submission_to_the_ad-hoc_working_group_on_the_durban_platform_for_enhanced_action_(adp).pdf)>; and submission of Norway <https://unfccc.int/files/bodies/application/pdf/norway_submission_adp_-_mitigation.pdf>

⁴⁶³ Submission by Greece and the European commission on behalf of the European union and its member states, (2014)< https://unfccc.int/files/bodies/awg/application/pdf/el-05-28-adp_ws1_submission.pdf>

⁴⁶⁴ U.S. Submission on Elements of the 2015 Agreement (2014) <https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/u.s._submission_on_elements_of_the_2105_agreement.pdf>

⁴⁶⁵ Decision 1/CP.20 'Lima Call for Climate Action' (2 February 2015) FCCC/CP/2014/10/Add. Para 3.

⁴⁶⁶ Rajamani (n200) 493-514.

Paris Agreement, therefore, is full of political compromises that would inevitably present legal analysts and implementers of the agreement with potentially numerous contentious interpretations. In addition to the Lima qualifier, Parties also agreed to the information to be communicated in their INDCs before the adoption of the Paris Agreement in 2015. Further flexibility is, however, added to the already recognised differentiated responsibilities by allowing for accommodation of temporal circumstances of countries at the time of commitments, or even conceivably at the time of assessment of their submissions.

In the literature and negotiated agreements different terms are used to denote concepts similar to what the idea of equity represents in the Paris Agreement and climate change law in general. The terms that are usually used by academics interchangeably with the term equity are “fairness” and to an extent also “climate justice.” Equity has been a central principle in the UNFCCC following its inclusion as part of the common but differentiated responsibility and respective capabilities (CBDR-RC).⁴⁶⁷ The Paris Agreement also makes a reference to this particular principle.⁴⁶⁸ The preamble of the Agreement also refers to intergenerational equity as part of common concerns of human kind.⁴⁶⁹ Article 2.2 of the PA subjects the Agreement’s *implementation* to reflect equity and the principle of common but differentiated responsibilities, in light of different national circumstances.⁴⁷⁰ The long-term temperature goal is further subjected to equity, sustainable development, and poverty eradication considerations.⁴⁷¹

The concept of fairness is introduced in decision 1/CP.21 in its guidance as to what should be included in the Nationally Determined Contributions (NDC) of countries. In a bid to give effect to the mitigation commitments, the conference of parties agreed:

that the information to be provided by Parties communicating their nationally determined contributions, in order to facilitate clarity, transparency and understanding, may include, as appropriate, inter alia, ... how the Party considers that its nationally determined contribution is fair and ambitious, in the light of its national circumstances,

⁴⁶⁷ The Convention (n4) Article 3(1). The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

⁴⁶⁸ Paris Agreement (n12), Preamble.

⁴⁶⁹ Ibid.

⁴⁷⁰ Paris Agreement (n12) Article 2(2).

⁴⁷¹ Paris Agreement (n12) Article 4(1).

and how it contributes towards achieving the objective of the Convention as set out in its Article 2.⁴⁷²

In further elaboration of the inclusion of how parties consider their NDCs to be fair, parties may include in their NDCs “(a) How the Party considers that its nationally determined contribution is fair and ambitious in the light of its national circumstances; (b) Fairness considerations, including reflecting on equity.”⁴⁷³ In this paragraph, the argument can be made that the decision seems to consider fairness and equity as different concepts.

The Paris Agreement, in a departure from its predecessors, introduces the concept of “climate justice” as a part of climate action although the recognition is with a caveat that it is important only to some parties to the agreement.⁴⁷⁴ Climate change negotiations under the UNFCCC have tried to navigate away from discussions of responsibility and causation which could in turn justify justice-based allocation of responsibility in lieu of something that does not have a blame assignment dimension attached to it.⁴⁷⁵ The inherent association of the concept of justice with “injustices” creates a different category of assessment that is not envisaged in the international climate change regime. The political challenges of reaching agreements that incorporate these terms in their provisions are more pronounced than agreements with more fluid concepts that could be interpreted in a manner that could be acceptable to most parties to the agreements, hence the choice to employ the term “equity” in the substantive provisions of the PA.⁴⁷⁶ The concepts of climate justice and equity within the framework of the UNFCCC should, however, be exposed from the perspective of the relationship between states within the confines of an international treaty agreed between them. They should not be extended to the broader climate justice concerns that emanate from the global environmental and climate activism that encompass wider topics such as racial and social justice connected to a changing climate and the pollution that causes it. From a compliance point of view, the relational and implementation concerns between the Parties will be the focus of this study instead of the larger issues of

⁴⁷² Decision 1/CP.21(n166) para 27.

⁴⁷³ Decision 4/CMA.1(n222) para 28.

⁴⁷⁴ Paris Agreement (n12) Preamble. It should be noted that the language choice made in this paragraph including the usage of the phrase “climate justice” in inverted commas suggests the meaning attached to the phrase is limited to the parties that have chosen to include that in their national actions. The concept of climate justice is different from the conception of environmental justice from which the movement seems to have driven its following.

⁴⁷⁵ Cinnamon P. Carlarne and JD Colavecchio, ‘Balancing equity and effectiveness: The Paris Agreement & the Future of International Climate Change Law’ (2019) 27 New York University Environmental Law Journal 107.

⁴⁷⁶ Huang, J. ‘Climate justice: Climate Justice and the Paris Agreement’ (2017) 9 Journal of Animal and Environmental Law 23.

broader justice implications of the substantive content of the treaties agreed on climate change. However, as will be discussed in the substantive model of equity compliance, there might be some space to accommodate these concerns to an extent.

A more apparent subject of equity discussions tends to be limited to mitigation and how fair emission targets are. However, under Paris, the goals that have gained acceptance are three: mitigation, adaptation, and finance. Focusing on just one of these erodes the essence of the Agreement that aims to streamline the fight against climate change through the recognition of three equally important components. Without the ability to mitigate and also to adapt to the already visible and inevitable adverse impacts of climate change, there will not be effective prevention of such impacts. It is not possible to achieve any of these targets without the appropriate flow of finances. The Paris Agreement goals are inseparable and cumulative. The limiting of the equity debate to the share of mitigation obligations and emission targets only is not supported by the phrasing of the Agreement. Although the Agreement allows for countries to determine their contributions and commitments based on their national circumstances and needs, the overall goal cannot be achieved without working towards all three goals with equal weight. Some countries might have limited needs for adaptation action or finance; however, the achievement of the collective goal will depend on all Parties supporting those that need adaptation actions but have limited resources to fund them.

At any rate, even with limited application to mitigation commitments, the meaning and interpretation of equity considerations as well as the role they play in the understanding of the other goals remains unclear and controversial. In terms of adaptation, whether the issue is presented as redress for damages caused by climate change or the need to build capacity to prevent its impacts, equity considerations are unavoidable. The very existence of the finance goal in the Paris Agreement and the commitments made by developed country Parties to the Agreement to provide annual financing for climate action is based on the principle of equity.

Equity standards and definitions that are designed for a top-down system may not be able to measure equity and fairness in a bottom-up mechanism such as the Paris Agreement.⁴⁷⁷ We have now moved away from prescriptive approaches that tell countries what they should do

⁴⁷⁷ Nicholas Chan (n446).

towards a self-defined allocation of responsibilities. This allows for the equity measurement to be flexible and very necessary- flexible because it will depend on countries' definition of their own equity parameters, and necessary because without a way to assess these, countries might not be held accountable to their equity commitments. As the system is in its formative stage, careful analytical discussions are going to be helpful in creating a mechanism that is amenable to scrutiny and analysis when the time comes for the implementation of the mechanism.

The inclusion of the Lima qualifier to the CBDRRC, although it may appear as a reiteration of the importance of differentiation based on respective capabilities of the countries, has fundamentally changed the notion of differentiation. It is a departure from the annex-based approach followed by the convention which reinforced a grouping of countries with group specific duties. The qualifier means that the equity considerations traditionally construed as allowances for more flexibility for less capable countries can now be utilised by all parties in justifying their climate action. This move also brought the notion of equity into the centre of discussion as, now, it needed to be defined and articulated better. Equity in the Convention and then after the Kyoto Protocol was to a great extent operationalised by the bifurcated approach to the obligations. Following the post-PA decline in importance of the clear bifurcation, the equity standard will need to be defined and assessed individually by state parties based on their own elaboration, which is discussed below.

7.3. Equity – A functional Tool for Interpretation of Obligations in the PA or a Substantive Part of the PA?

The analysis of the concept of equity can involve two ways of looking at the issue. First, it is possible to delve into what is the meaning of equity within a particular scenario to analyse what is an equitable action as applicable in that scenario. Secondly, the concept itself can be studied for the purpose it serves in a particular scenario. The first kind of analysis is reserved for later part of this Thesis where the substantive model of equity compliance is considered. In that model, the compliance committee will be functioning as an evaluator of whether the submissions made by countries fulfils substantive requirements of the general obligations of the Paris Agreement and the nationally determined contribution in light of the national circumstances. This will involve the assessment of different proposals of assigning responsibilities in reaching the Paris long term goals in terms of mitigation, adaptation and finance. Examples of these assessment models include, responsibility based assessments that

take into account the historical emissions and contribution to anthropogenic climate change,⁴⁷⁸ capacity based theories that look into the ability to mitigate, adopt to and finance climate change efforts,⁴⁷⁹ inertia or status quo based approaches that recognise the need for countries to be allowed to continue with their economic paths,⁴⁸⁰ equality-centric methods of calculation utilizing per capita or dynamic per capita, and other similar approaches.

Regarding the second type of equity analysis – looking at the function of equity in the Paris Agreement – we do not find a plain utilitarian or general use of the language of equity. Both in the preambular text, as well as the provisions of the agreement, the term equity is loaded with conceptual connotations. From the idea of intergenerational equity, the wording of article 4 that attaches the issue of equity to sustainable development concerns, and the global stocktake provision, the term equity does not seem to be used in an ordinary meaning. Even in the case that the argument is made that it is used in its ordinary meaning - plausibly in article 14.1 (GST) and article 4 (long term goal and sustainable development)- the role of the phrase can be debated. It is possible that it is employed as a tool for moderation of expected obligations or a choice employed by the drafters to ensure a morally acceptable application of all obligations and members balancing their interest that would be negatively impacted in a moral way.⁴⁸¹ This goes further than the limited normative implication of a “justice” phrasing to the substantive obligations content of distributive concerns; however, “equity” phrasing will allow for inclusion of procedural and implementation issues in application.⁴⁸² But it is also possible that it can create a substantive stand-alone obligation which can only be exposed through a substantive analysis mentioned above. That substantive discussion will be presented in detail in Chapter 9.

From the wording of the decisions passed by the Parties to aid implementation of the agreement, there seems to be an assumption from the Parties that there is a distinction, at least in terms of scope, between “considerations of fairness” particularly on mitigation, and

⁴⁷⁸ Joshua D. McBee, ‘Distributive Justice in the Paris Climate Agreement: Response to Peters et al.’ (2017) 9 *Contemporary Readings in Law and Social Justice* 120.

⁴⁷⁹ Harald Winkler, Niklas Höhne, Guy Cunliffe, et. al. ‘Countries Start to Explain How Their Climate Contributions Are Fair: More Rigour Needed’ (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 99.

⁴⁸⁰ Niklas Hohne, Michel den Elzen, and Donovan Escalante, ‘Regional GHG Reduction Targets Based on Effort Sharing: a Comparison of Studies’(2014) 14 *Climate Policy* 122.

⁴⁸¹ Peter Lawrence and Michael Reder, ‘Equity and the Paris Agreement: Legal and Philosophical Perspectives’ 31 *Journal of Environmental Law* 511.

⁴⁸² *ibid.*

“reflections on equity.” A Party to the Paris Agreement, by stating some theory of equity, fairness, justice it subscribes to in its NDCs might be stating its understanding of that principle. As an analysis tool, a cumulative reading of what parties have said about this matter can be helpful. The equity parameters applied by countries in the NDCs and their assessment of the equitability of their actions as presented by Parties will be presented and analysed in a later section of this chapter.

On the other hand, by operationalizing the concept of equity as fairness, the parties have opened the door for a different justice dimension to equity discussions within the Paris Agreement and the Convention in general. Through the equity analysis framed in terms of fairness- procedural, distributional, and corrective aspects of justice can be brought into the Paris Agreement. The distributional perspective is usually accepted due to the clear formulation of Paris as a mechanism for sharing the burden climate action- or put differently- the distribution of space within which countries can pursue their own climate policies as they deem appropriate.

Procedural fairness, whether in international law or more broadly, is concerned with the process by which a certain agreement is reached. According to Frank, for example, procedural fairness is a question of legitimacy and legitimacy, as discussed in the theories of compliance presented in chapter 4, forms one of the foundations of why states comply with international obligations.⁴⁸³ This analysis is the starting place for the procedural model of equity compliance to be presented in upcoming chapters. This model will measure equity as a form of procedural fairness and the fulfilment of procedural duties related to equity in the Paris agreement. These procedural duties can potentially range from reporting obligations through the transparency framework⁴⁸⁴ to the process through which nationally determined commitments are negotiated.

Corrective conceptions of justice are also arguably important in the Paris Agreement. Substantively, differentiated obligations and the specific obligation on developed countries to take the lead on emission reductions and financing of climate change can be seen as measures aimed at correcting past allocations that were inequitable. However, the resistance to the phrase “climate justice” and the limited application it has received in the preambular text of the Agreement point to the limited likelihood of any corrective framing of equity in the strict sense

⁴⁸³ Thomas Frank (290) 4-24.

⁴⁸⁴ Paris Agreement (n12) Article 15.

of corrective justice. At least, for the purpose of the compliance mechanism, the application of equity in the corrective sense will be problematic from an institutional and constitutive standpoint. As the Agreement stands now and with the political stance of parties to the agreement, corrective justice formulations remain more within the realm of moral principles that do not have a legal form and cannot be applied by mechanisms that would make determinations as to legal obligations. However, with the potentially quasi-legal nature of the compliance mechanism there is a possibility to be less legalistic about how to frame equity and accommodate corrective justice considerations.

As a legal concept, equity has an important role to play in the interpretation and application of laws, and obligations with a legal nature such as contractual or treaty commitments. In the domestic system and internationally, equity is recognised as a general principle of law applicable and is applied in situations such as what Dworkin calls hard cases where there is no clear law given by the law giver, or in rare circumstances when the application of law as is will result in absurd decisions.⁴⁸⁵

Pertinent to the function of the compliance committee, equity can serve three purposes in addition to what the rules of the agreement concerned dictate specifically. Tribunals and different bodies tasked with making determinations in international law have used equity in this regard to help them resolve cases.⁴⁸⁶ First equity can be used '*infra legem*' which means that the principle can be used to apply some general law to the specific circumstances of an individual case. Equity '*praeter legem*', the second application of equity refers to the gap filling role of equity in situations where arbitrators or other legal interpreters have used equity in the absence of clear law applicable to the matter. Third, equity '*contra legem*' is the application of equity as a justification for a choice made by the legal interpreter to refuse applying a law she considers unjust or other justified reservation on applying the appropriate law that may otherwise result in an unjust or inequitable conclusion.⁴⁸⁷

Oscar Schachter, cited by Lapidoth, identified some five uses of equity in the interpretation of international obligations. The first use, closely related to equity *infra legem*, is when equity

⁴⁸⁵ Ronald Dworkin, 'Hard Cases' (1974) 88 Harvard Law Review 1057.

⁴⁸⁶ M. W Janis, 'The Ambiguity of Equity in International Law' (1983) 9 Brooklyn Journal of International Law 7.

⁴⁸⁷ Michael Akehurst, 'Equity and General Principles of Law' (1976) 25 The International and Comparative Law Quarterly 801.

serves as a tool to adapt or individualise some aspects of justice to apply strict legal rules. Second, equity can be used as a proxy for fairness, reasonableness, and good faith. Third equity can be “a basis for certain specific principles of legal reasoning associated with fairness and reasonableness: to wit, estoppel, unjust enrichment and abuse of rights.”⁴⁸⁸ The fourth use of equity is as a designation of “equitable standards for allocation and sharing of resources and benefits.” Finally, equity can also be used as “a broad synonym for distributive justice used to justify demands for economic and social arrangements and redistribution of wealth.”⁴⁸⁹

7.4. Conclusion

This chapter has looked at the role of the principle of equity and climate justice in the Paris Agreement and explored initial legal questions regarding equity assessment through the Compliance Mechanism. The equity questions the Thesis is concerned with are not about a mere calculation of a country’s share in the global efforts. The goal is to contribute to the creation of a framework of analysis and a mechanism that could utilise such framework to assess if the equity and climate justice are being achieved regardless of the criteria on which the assessments are based.

The Paris Agreement and its equity considerations fall within different possibilities from the list of uses of equity. The considerations of general fairness in the assessment of the climate action obligations on parties to the Paris Agreement, allocation and sharing of the atmospheric space, and the general possibility of broader consideration of distributional issues are all encompassed in the equity phrasing apparent in the Paris Agreement. While the procedural and substantive content of what will be considered equitable and how it can be applied through the Compliance Mechanism will follow in upcoming chapters, this chapter has attempted to chart a conceptual and analytical course within which some initial legal analysis can be done on issues of equity within the Compliance Mechanism of the Paris Agreement.

⁴⁸⁸ Ruth Lapidot, ‘Equity in International Law’ (1988) American Society of International Law Proceedings of the Annual Meeting 145, citing Oscar Schachter.

⁴⁸⁹ *ibid.*

Chapter 8 Procedural Model of the Paris Agreement Compliance Mechanism

In this chapter, I will present a ‘Procedural Model’ for the Compliance Mechanism of the Paris Agreement for achieving equity and climate justice. To explain this model of mine, the best starting place is to map its differences with my other proposed models. As discussed below, there might be some overlap and questions related to the demarcation between the ‘substantive’ and ‘procedural’ models. However, the analytical starting point and the underlying assumptions of these models regarding the role of the Compliance Mechanism provide some clarity as to the vital distinction between them.

In previous chapters the Thesis has presented how the Compliance Mechanism of the Paris Agreement works and what role the principle of equity can play in the Mechanism. As the aim of the Thesis is to explore ways the Mechanism can contribute to the operationalisation and achievement of equity and climate justice, my proposed models will help clarify what roles the Mechanism could in principle play and what procedural, legal and institutional arrangements are necessary in these scenarios. As the Mechanism is under development, my models present possible routes it could take. In this chapter, the first of these possible models, the Procedural Model, is going to be discussed.

It must be noted from the outset that the equity discussion within the framework of the ‘procedural model’ of compliance should not be taken as part of a more comprehensive and wide-ranging procedural justice analysis, although they might share some common grounds.⁴⁹⁰ This model does not purport to address procedural equity and climate justice issues in the compliance mechanism. Instead, it will present a potential Procedural Model for the Compliance Mechanism's work and apply the Model to investigate how compliance with the overall obligations and specific equity obligations in the Paris Agreement will work. However, this does not mean that methodologies and concepts from procedural justice discussions will not be significantly relied upon. The foundation for particularly the national level analysis of

⁴⁹⁰ Peter Newell, Shilpi Srivastava, Lars Otto Naess, et.al. ‘Toward Transformative Climate Justice: An emerging research agenda (2021) 12 *Wiley Interdisciplinary Reviews: Climate Change* e733; Rosemary Lyster, ‘The idea of (Climate) Justice, Neoliberalism and the Talanoa Dialogue’ (2019) 10 *Journal of Human Rights and the Environment* 35. Morey Burnham, Claudia Radel, Zhao Ma, et.al. ‘Extending a Geographic Lens towards Climate Justice, part 1: Climate Change Characterisation and impacts’ (2013) 7 *Geography Compass* 239.

equity considerations will rely on work done on specific questions such as transparency, participation and administrative policy-making.⁴⁹¹ Notably, some elements of the “pure procedural” theory of climate justice as described by Brandstedt and Brulde that emphasises the role of a fundamentally procedural appraisal of climate justice (that brings in the concepts of procedural fairness such as transparency and participation) have enriched the Model.

It is also outside of the scope of the chapter to consider the equity and justice dimensions of the process of negotiating the Agreement. The power politics and institutional issues that plague the multilateral process, especially in terms of limited participation of poorer countries due to limited human capacity or financial burdens associated with following multiple avenues of negotiations, although essential for the general understanding of procedural equity, will not be discussed, at least directly, as part of the Procedural Model. The departure point for the model is the Paris Agreement as it currently stands, with the subsequent decisions of the Conferences of Parties of the Framework Convention (COPs) and the Conferences of Parties of the Paris Agreement (CMAs). For the purposes of this analysis, the Paris Agreement as it stands now will be assumed to have been reached through a just and fair process.

The role played by the Compliance Committee in promoting equity in the overall multilateral process, and local level policymaking, needs to be acknowledged. As a mechanism entrusted with promoting compliance and resolving non-compliance with obligations emanating from the Paris Agreement, the Compliance Mechanism is one of the ways the achievement of the principle of equity is ensured. The role of the Mechanism can be as general as encouraging *general* compliance, which in turn means better equity insofar as the overall NDC of a country reflects equity in the first place; or it can in principle also relate to the specific arrangements in the Agreement that allow the Mechanism to follow up compliance with *specifically* equity-related obligations within NDCs.

The Paris Agreement is the embodiment of the global consensus that Parties should take on the obligations of dealing with climate change through a joint effort with equity at the heart of the guiding principles of the Agreement.⁴⁹² In addition, the Agreement allowed Parties to decide what contributions they will make through their NDCs. This, in an ideal world, will increase

⁴⁹¹ Eric Brandstedt and Bengt Brülde, ‘Towards a Theory of Pure Procedural Climate Justice’ (2019) 36 *Journal of Applied Philosophy* 785.

the potential for general compliance, as parties have, after all, only agreed to what they're happy to deliver. Parties' compliance with these differentiated responsibilities towards addressing the adverse impacts of climate change is at the core of the principle of equity. These responsibilities are reflected in mitigation, adaptation and finance obligations that are also based on the principle of equity. The best way to ensure equity, as manifested by the Agreement and by the NDCs countries submit based on their fair share of the burden, would be to have full general compliance. However, there will inevitably be non-compliance. As Caney puts it aptly, "the existence of non-compliance implies a shortfall of justice."⁴⁹³ Hence, by ensuring general compliance is achieved, the compliance mechanism works directly towards the enhancement of equity.

Equity is also included in the Paris Agreement as an obligation of the Parties, at least in the sense that Parties need to communicate their reflection on how they think their contributions are fair and appropriately evidence their self-determined equity parameters. This obligation clearly opens the door for the compliance mechanism to consider whether Parties have fulfilled their obligation to provide such communication. In the Procedural Model, the mere act of the Parties to include a reflection on equity or how they consider their contributions to be fair can satisfy the assessment. This is essential in operationalising equity in the Paris Agreement and for subsequent NDCs. The fact that equity considerations are articulated will provide a starting place for more challenging substantive discussions on the content of those submissions including the equity claims and the alignment of the general submissions with the said equity parameters. Furthermore, the absence of such communication being submitted can serve as a threshold that will allow the compliance mechanism to utilise its processes to facilitate compliance, including through assisting the Party. In this scenario, the Compliance Mechanism is engaged in specific compliance with the equity related obligations in the Paris Agreement and the subsequent decisions and the level of engagement of Mechanism and how deep its consideration goes is determined by its design. The models being proposed in this Thesis envisage different depths of examination with the Procedural Model presented in this chapter representing the shallowest assessment limited to testing the fulfilment of procedural obligations.

⁴⁹³ Simon Caney, 'The Struggle for Climate Justice in a Non-Ideal World' (2016) 40 *Midwest Studies in Philosophy* 12; Simon Caney, 'Climate Change and Non-Ideal Theory: Six Ways of Responding to Non-Compliance' in Clare Heyward and Dominic Roser (Eds), *Climate Justice in a Non-ideal World* (Oxford University Press, 2016) 21.

The other role of the Compliance Mechanism in ensuring equity compliance could be by potentially considering procedural fairness and upholding the principles that guard the integrity of systems used to develop individual commitments in national settings. The national process is integral to the global effort to combat climate change. By encouraging the national process to observe the principles of procedural fairness, the compliance mechanism can assist Parties to create NDCs that are legitimate, fair, and implementable in line with the specific context of the Party. For example, procedural safeguards such as participation and engagement of stakeholder groups can contribute to the refinement of equity considerations to be communicated as part of a country's NDCs. Furthermore, as discussed below in this chapter, Parties are encouraged to communicate in their NDCs information on their national processes. A procedural model of compliance is a good entry point for the assessment of the processes by which the NDCs are designed. Compliance will be improved when the legitimacy and acceptability of an NDC within the country itself providing the necessary political push are improved. As discussed in Chapter Four on theories of compliance, in cooperative scenarios such as climate action the possibility for compliance is boosted by legitimacy and what Frank called the "compliance pull" that comes from the fitness of process followed in the making of the rules- in this case NDCs. This dimension of equity, although beyond the remit of CBDR, can help improve the design and implementation of the differentiated contributions of countries.

The Compliance Mechanism can also play a vital role in informing the collective assessment of the contribution Parties are making towards the global effort to mitigate and respond to the impacts of climate change. This can be through the Global Stocktake process, which might benefit from the findings of the Compliance Mechanism from individual assessment of the contribution of Parties. As the work of the GST is limited to collective assessment of where parties are in comparison to what has to be achieved to meet the temperature, adaptation and finance goals, an individual accountability mechanism needs to be in place to follow through recommendations supported by the findings the collective assessment.

8.1. What are Obligations of a Procedural Nature?

The architecture of the Paris Agreement envisages two layers of obligations for Parties. The first layer consists of the general obligations as discussed in detail below, while in the second

layer, individual Parties take up country-specific obligations through their NDCs. Both sets of obligations are subject to the compliance mechanism. The NDCs side of the legal obligation involves a national design process and an obligation to communicate the NDCs on the other hand emanates from the general obligations applicable to all Parties.

At the COP21, Parties agreed that nationally determined contributions (NDCs) will be the basis for the global response to climate change by adopting the Paris Agreement, and that agreed Parties communicated ‘intended nationally determined contributions’ would be their first NDCs.⁴⁹⁴ Bodansky refers to Article 3 of the Paris Agreement calling for NDCs to the global response to climate change and to undertake and communicate ambitious efforts, as crosscutting of provisions of the agreement on mitigation, adaptation, finance, technology, capacity building and transparency, and provides that parties have an obligation to undertake and communicate ambitious efforts through NDCs.⁴⁹⁵

Mayer argues that NDCs are international law obligations that arise from two sources.⁴⁹⁶ NDCs are treaty obligations that arise under the Paris Agreement, which impose an *obligation of conduct* on Parties. The communication of NDCs itself may constitute unilateral declarations that also create legal obligations. In addition, Article 3 recognises the need to provide support for developing country Parties for the effective implementation of the Agreement, that upholds the differentiation of obligations of Parties.

Following the adoption of the Paris Agreement, Parties through their NDCs satisfied their obligation of submitting their first NDCs through submitting their respective instrument of ratification, acceptance, approval, or accession. The decision that requested Parties to submit their INDCs mandated the UNFCCC Secretariat to prepare a synthesis report on the aggregate effect of the INDCs towards achieving the objective of the Convention as set out in its article 2 that sets the temperature goal, the adaptation and the need to make financial flows consistent with low emission development pathways.⁴⁹⁷ The UNFCCC aggregate report compiled and synthesised 161 INDCs of 187 Parties in 2016. Its report highlighted the methodological challenges for aggregating the effects the INDCs, as Parties chose to express their INDCs in

⁴⁹⁴ Decision 1/CP.21 (n166).

⁴⁹⁵ Mayer (n48)147.

⁴⁹⁶ Benoit Mayer (n198) 251.

⁴⁹⁷ Decision 1/CP.20 (n465) para 16(b).

different ways, including for example in relation to fairness, time frames and reference years, and sectors and greenhouse gas (GHG) emissions coverage.⁴⁹⁸

Parties negotiated to further provide guidance and clarity on the information to be provided for NDCs, and reached a decision in 2018 at COP 24 through the governing body of the Paris Agreement, the Conference of the Parties of the Paris Agreement (CMA), to provide the information necessary for clarity, transparency and understanding applicable to their NDCs.⁴⁹⁹ The decision 4/CMA.1 on further guidance in relation to the mitigation section of decision 1/CP.21, annexed detailed information to be provided by Parties when communicating their NDCs to facilitate clarity, transparency and understanding of their NDCs. The decision provided that Parties should use as appropriate and applicable information including, quantifiable information, time frames, scope and coverage, planning process and methodological information in their mitigation component of NDCs.

The general obligations under the Paris Agreement can be classified as obligations of a substantive nature and those of a procedural nature. This classification is based on the type of action they elicit from the Parties. Obligations that require Parties to perform a certain task will be procedural, while substantive obligations dictate the content of the obligation to be performed. Under this classification, the obligation to submit a certain document will be procedural, while guidance as to the content of such a submission will be considered a substantive obligation.

Therefore, obligations of a procedural nature are met in part with a performative action regardless of the contents of the action. What qualifies these obligations as procedural is that their fulfilment or satisfaction will depend only on the action required being done or not. However, procedural obligations might also superficially overlap with a substantive obligation that dictates the content of the action that needs to be taken. A pertinent example of this in the Paris Agreement is the obligation on what needs to be included in an NDC submitted by a Party. The Parties' decision following the adoption of the Paris Agreement has provided that NDCs submitted by Parties need to include some listed elements.⁵⁰⁰ Although the content of NDCs in this regard is a substantive matter, it can be argued that it is a procedural obligation

⁴⁹⁸ Decision COP22, “Aggregate effect of the intended nationally determined contributions” (2016). FCCC/CP/2016/2 paragraph 108.

⁴⁹⁹ decision 4/CMA.1 (n222).

⁵⁰⁰ *ibid.*

that prescribed elements are included in the submission made regardless of the content of the individual elements. For example, NDCs submitted by Parties need to include seven elements which will be presented below.⁵⁰¹ It is a procedural obligation to include all these elements, and a determination as to compliance is possible on this issue without assessing the quality of the content of the individual element. The distinction, it can also be argued, is a matter of degrees – meaning the checking of the content of the NDCs for the inclusion of the seven elements can be considered a ‘thin’/ ‘shallow’ substantive assessment while scrutiny of the quality of the content of the submission would be a ‘proper’/ thick substantive assessment.

This peculiar situation can also be explained from the perspective of the body assigned to assess compliance with obligations - in this case, the compliance mechanism of the Paris Agreement. To assess compliance with procedural obligations, the compliance mechanism will ask if the action required has been taken or not. A positive response will mean the Party has complied, while the opposite will mean non-compliance. For instance, the obligation to submit NDCs will be satisfied by submitting an NDC without consideration of the substantive contents. However, the task of the compliance mechanism can be considered procedural if it involves a thin/shallow assessment and what it is checking is limited to the inclusion of the elements that are required by the decision. This can be done through, for example, a checklist which will have a list of required elements in the submission. This process is analogous to a court registrar checking for the fulfilment of mandatory elements in legal documents before the merits of the case could be brought before a court for what would resemble a substantive consideration.

8.1.1. Suitability of the Compliance Mechanism of the Paris Agreement for a Procedural Model of Compliance

The nature of the Paris Agreement itself, as a bottom-up arrangement that adds up the self-assessed contribution of individual Parties to create the required collective, global action on climate change, limits what the compliance mechanism can resemble and its role in the implementation of the Agreement. Climate change is a highly politicised topic affecting countries' policies, such as international relations, trade, international assistance and aid, employment, energy, poverty reduction, and economic growth. Due to these far-reaching impacts, countries are cautious in committing to intrusive compliance arrangements when they agree to a compliance mechanism for such a treaty. Complicating matters more, fluid concepts

⁵⁰¹ Decision 4 /CMA.1 (n222) para 7.

such as equity considerations that impose restrictions on the policy space countries have in enacting their chosen national contributions to the global effort might put off governments from agreeing to a stringent compliance mechanism empowered to render determinations on the specific fairness of their climate action.

The compliance mechanism of the Paris Agreement is a facilitative process that tries to strike a delicate balance between the need to address the fundamental issue of climate change while working within the established political, legal, and institutional framework that resulted from numerous compromises and protracted negotiations. Article 15 of the Paris agreement in relevant parts reads:

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.⁵⁰²

Its primary purpose is not to decide who has complied or not but to facilitate the compliance of all Parties to the agreement.

One of the roles of the Compliance Mechanism is to ensure the procedural integrity of the justice/equity consideration in assigning obligations and implementing them. However, these procedural considerations do not prejudge the fairness of the substitutive allocations that emanate from the arrangement. Particularly in the absence of generally accepted standards of equity in assessing the fairness of individual climate action by Parties, the assessment from a procedural justice point of view is an essential tool to promote fairness in the climate change regime. The goal of such a tool would be to decide the "rules of the game" to assign one's own burden and contribution to the global effort to fight climate change. These procedural considerations do not prejudge the fairness of the substitutive allocations that emanate from the arrangement. In its current form, the Paris Agreement only requires Parties show their self-reflection on equity and communicate it. While countries are allowed to decide their "fair" share, there is a requirement attached to that right in the form of an obligation to communicate their considerations and the principles on which they base their determination of the fairness

⁵⁰² Paris Agreement (n12) Article 15.

of their contributions. Annex I, Section 6 of the information to facilitate clarity, transparency and understanding of nationally determined contributions referred to in decision 1/CP.21, Paragraph 28 states Parties should include information on:

[h]ow the Party considers that its nationally determined contribution is fair and ambitious in the light of its national circumstances: (a) How the Party considers that its nationally determined contribution is fair and ambitious in the light of its national circumstances; (b) Fairness considerations, including reflecting on equity;⁵⁰³

Furthermore, outcome-based reflections on how their commitments contribute to the general achievement of the goals of the agreement are expected from Parties. The process followed to arrive at these commitments is essential to the eventual probability of compliance. Whether the Compliance Mechanism only makes a declaratory determination on the (non)compliance by a Party or gives guidance as to how to bring a particular Party into compliance with its commitments, the parameters by which it performs its duties are essential. A fair process or at least the fulfilment of the procedural obligations can safeguard the attainment of certain minimum standards for an acceptable/fair distribution of duties and rights.

In my proposed ‘Procedural Model’, the work of the compliance mechanism has three distinct and yet interdependent components. The main task of the mechanism will be to assess if the procedural commitments and obligations agreed to in the Agreement and its subsequent decisions have been met by all Parties. As an extension of this, the second aspect of the work will be to investigate procedural issues in the process of design and implementation of NDCs as national commitments emanating from the obligations of the Paris Agreement. Thirdly, the model considers procedural issues arising within the internal process of the compliance mechanism itself, particularly related to the differentiated responsibility-based procedural flexibilities in assessing the submissions made under the agreement.

8.2. Procedural Obligations on the Communication of Climate Action

As introduced in Chapter Seven on Equity Assessment in the Paris Agreement through the Compliance Mechanism, the Paris Agreement⁵⁰⁴ and its decisions under the Conference of the

⁵⁰³ Paris Agreement (n12) Article 4; and Decision 4/CMA.1 (n222).

⁵⁰⁴ Decision 1/CP.21 (n166) para 27.

Parties serving as the meeting of the Parties to the Paris Agreement (CMA)⁵⁰⁵ provides guidance in relation to the communication of NDCs by Parties. These communication guidelines make up the majority of the legal obligation of a procedural nature in the Paris Agreement.

The Paris Agreement sets general obligations that apply to all Parties, groups of Parties, i.e. developed and developing countries Parties, and it further guides how individual Parties should communicate and implement these obligations. In Chapter Three on the Paris Agreement negotiation and mapping of the obligations, I have discussed the legal nature of the Parties' obligations. This section will only identify and examine general obligations of a procedural nature that are relevant to the Procedural Model. These obligations provide the basis for how the Parties will fulfil the substantive commitments discussed in chapter 3.

The first general procedural obligation on all Parties is Article 3 of the Paris Agreement. It provides nationally determined contributions (NDCs) as a global response to climate change and sets obligations on all Parties to 'undertake and communicate' efforts on mitigation, adaptation, finance, technology, capacity building and transparency. Article 3 brings together the different provisions of the Paris Agreement while creating a substantive obligation on the communications to be progressive over time.⁵⁰⁶ Rajamani argues that Article 3 has the potential to link efforts under the Paris Agreement, i.e., mitigation, adaptation, and support with progression; however, she states that it is unclear how progression will be determined and assessed.⁵⁰⁷

Article 3 provides the possibility for the compliance mechanism in the Procedural Model to assess first if all Parties have indeed communicated their efforts in accordance with Article 4, 7, 9, 10, 11 and 13 of the Paris Agreement, while in the Substantive Model the Mechanism could assess the substantive obligations on the progression of efforts. This will be further discussed in the Substantive Model chapter. Even in the current state of the development of rules for the Compliance Mechanism, the argument can be made that there is enough basis to

⁵⁰⁵ Decision 4/CMA.1 (n222)

⁵⁰⁶ Daniel Bodansky, 'The Legal Character of the Paris Agreement (2016) 25 Review of European Community and International Environmental Law 142.

⁵⁰⁷ Lavanya Rajamani, 'Guiding Principles and General Obligation (Article 2 (3) and Article 3)', in Klein Daniel et al., (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (2017) Oxford University Press 132.

assess whether the procedural obligation of communication by all Parties have been met generally. Beyond the mandate of the Compliance Mechanism related to individual Party compliance assessment, it is given the mandate to consider issues of systemic nature as discussed in Chapter Six. In the systemic consideration role of the Compliance Mechanism provides could identify issues faced by several Parties and bring the issues for consideration by the Parties of the Paris Agreement.⁵⁰⁸

Article 4.2 of the Paris Agreement places another clear procedural obligation on Parties to prepare, communicate and maintain successive NDCs.⁵⁰⁹ This procedural obligation extends to the information Parties provide in their NDC that is needed for clarity, transparency and understanding of their contributions.⁵¹⁰ The information Parties provide will also be as applicable to their NDCs and thus shall include: quantifiable information on reference point or base year; time frame for implementation; scope and coverage; planning process; estimation of greenhouse gas emission; the Party's consideration of fairness and equity; and contribution towards achieving Article 2 of the Convention.⁵¹¹ For the purpose of the Procedural Model, the inclusion of all this information is essential, in particular, the planning process and how the Party considers the NDCs to be fair, including reflecting equity are fundamental for the model as these will be the legal basis for the consideration by the Compliance Mechanism to check whether the procedural obligations have been met.

The UNFCCC synthesis report of 48 NDCs by 75 Parties has found that almost all Parties, i.e., more than 90 per cent of the Parties, have provided the information necessary to facilitate clarity, transparency and understanding of their NDCs.⁵¹² In such cases, in the Procedural Model the Compliance Mechanism could facilitate implementation and promote compliance with these obligations by following up on the remaining 10 per cent of the Parties.

As discussed in the introduction of this chapter, the Procedural Model will have a role in achieving equity and the implementation of the Paris Agreement by assessing if all the procedural obligations on communication and reporting are met. This section will identify

⁵⁰⁸ Decision 20/CMA.1 (n357), para 32.

⁵⁰⁹ (n164) Article 4 (2) of, and (n165) Decision 1/CP.21.

⁵¹⁰ the Paris Agreement (n12) Article 4(8); and Decision 4 /CMA.1. (n222).

⁵¹¹ Ibid, Decision 4/CMA.1. Annex, I.

⁵¹² UNFCCC, Synthesis report by the Secretariat, Nationally Determined Contributions under the Paris Agreement, (2021) paragraph 5. https://unfccc.int/sites/default/files/resource/cma2021_02E.pdf

these remaining obligations to develop a comprehensive checklist for the ‘procedural model’ for the compliance mechanism.

Amongst these procedural obligations, adaptation communications are mandatory for all Parties.⁵¹³ The Paris Agreement also sets a ‘shall’ obligation on Parties on submitting, maintaining, and communicating adaptation communications while providing flexibility on the type of documents used for the communication.⁵¹⁴ The documents include national adaptation plans (NAPs), NDCs as referred to in Article 4.2 and national communication referred to in the Convention. Further decisions on adaptation communication also provide Parties can communicate their adaptation action with their reports on impacts and adaptation as stipulated in Article 13, paragraph 8 of the Paris Agreement, which will be discussed later in this section.⁵¹⁵

Following these procedural obligations, Parties have provided their adaptation communication in accordance with Article 7, 10 and 11, and the further guidance provided in decision 9/CMA.1. The UNFCCC synthesis report of 2021 states that many Parties, i.e., from 40 to 70 per cent, communicated their adaptation component in their NDCs⁵¹⁶ the initial UNFCCC synthesis report of the INDCs in 2016 states a total of 137 Parties (54 African States, 42 Asia-Pacific States, 30 Latin American and Caribbean States, 7 Eastern European States and 2 Western European and other states) have included adaptation communication in their NDCs.⁵¹⁷ Parties that have communicated a standalone adaptation communication include Canada, Norway, the United Kingdom of Great Britain and Northern Ireland, whereas New Zealand’s communication on adaptation is contained in its national communication.⁵¹⁸ The evidently missing adaptation communication from the NDC registry includes the European Union (EU) Commission and the US.

⁵¹³ Paris Agreement (n12) Article 7(10).

⁵¹⁴ Paris Agreement (n12) Article 7(11).

⁵¹⁵ Decision 9/CMA 1, Further guidance in relation to the adaptation communication, including, inter alia, as a component of nationally determined contributions, referred to in Article 7, paragraphs 10 and 11 of the Paris Agreement, Page 23, paragraph 4, (19 March 2019) FCCC/PA/CMA/2018/3/Add.2.

⁵¹⁶ UNFCCC, Synthesis report by the Secretariat, Nationally Determined Contributions under the Paris Agreement, Page 23, paragraph 141, (2021). < https://unfccc.int/sites/default/files/resource/cma2021_02E.pdf >

⁵¹⁷ Decision FCCC/CP/2016/2, ‘Synthesis report by the Secretariat, Aggregate effects of the intended nationally determined contributions: update’ paragraph 59 (2016).

⁵¹⁸ UNFCCC Adaptation communication submitted by Parties, See < <https://unfccc.int/topics/adaptation-and-resilience/workstreams/adaptation-communications> >

As discussed above, the procedural obligation on adaptation communication is mandatory. However, the decision 9/CMA.1, only 'invites' Parties in accordance with their national circumstances and capacities, to provide information on the elements agreed by the decision rather than a 'shall' provide information on elements for mitigation NDCs under 4/CMA., paragraph 7. More detail on mitigation is crucial to ensure NDCs can be added up to check if they will collectively meet the temperature targets. For adaptation, because of the lack of a common measured goal, there is no similar need for uniformity of approach and data communication. The decision, by using non mandatory language for the exact content of the specific elements to be included in the adaptation related communications, has limited the role of the Compliance Mechanism to a thin/shallow consideration of the fact that a communication is made or not. Thus, the current Compliance Mechanism under Article 15 and its modalities and procedures under decision 20/CMA.1 do not provide procedures to check if the procedural obligations on adaptation communication have been met. The Procedural Model builds the current understanding of the legal basis and procedures to assess if the adaptation communication has been submitted and maintained. The Substantive Model that will be discussed in the next chapter will explore the possibility of assessing the substantive obligations on adaptation.

Article 9 of the Paris Agreement, climate finance is a central piece of the climate change regime and its implementation.⁵¹⁹ For the first time in the international climate regime, this Article sets a mandatory procedural obligation on developed country Parties to biennially communicate indicative quantitative and qualitative information on climate finance to be provided to developing countries. At the same time, it encourages other Parties that provide resources to communicate the information voluntarily.⁵²⁰ The decision under the Paris Agreement sets further procedural obligation on the types of information to be communicated by developed countries Parties, as available, when submitting their biennial communication on finance starting in 2020 and established a dedicated portal for posting these communications.⁵²¹

⁵¹⁹ Gastelumendi and Gnittlke, (n234).

⁵²⁰ *ibid*, and the Paris Agreement (n12) Article 9(5).

⁵²¹ UNFCCC, Decision 12/CMA.1. Identification of the information to be provided by Parties in accordance with Article, (19 March 2019) FCCC/PA/CMA/2018/3/Add.2, and its annex provides the different types of information to be provided, as available, Enhanced information to increase clarity on the projected levels of public financial resources to be provided to developing countries, Indicative quantitative and qualitative information on programmes, including projected levels, channels and instruments, Information on policies and priorities, including regions and geography, recipient countries, beneficiaries, targeted groups, sectors and gender responsiveness, Information on purposes and types of support: mitigation, adaptation, cross-cutting activities,

Following this decision, nine developed country Parties have communicated their biennial communications on climate finance, while two developed country Parties have not yet submitted their communication.⁵²²

The present Compliance Mechanism has initiation procedures in cases where a Party has not submitted a mandatory communication under Article 9.5 on finance. The proposed Procedural Model further proposes the initiation of the compliance mechanism on the basis of the type of information that has not been communicated, and the Substantive Model will propose the substantive assessment of the information.

The Paris Agreement also sets a procedural obligation on Parties to submit reports on their efforts and implementation of climate action and support under its Article 13. The Decision on transparency framework for action and support⁵²³ agreed on the modalities, procedures, and guidelines for reporting, and the first biennial transparency report, including the national inventory report to be submitted by 2024.⁵²⁴ The Parties to the Paris Agreement are currently further elaborating rules for reporting under transparency framework which was discussed in Chapter Three. The Procedural Model proposes the consideration of the communication of the biennial transparency report, including the national inventory report in accordance with the decisions.

technology transfer and capacity-building, Information on the factors that providers of climate finance look for in evaluating proposals, in order to help to inform developing countries, Information on the factors that providers of climate finance look for in evaluating proposals, in order to help to inform developing countries, Information on national circumstances and limitations relevant to the provision of ex ante information; Information on relevant methodologies and assumptions used to project levels of climate finance; Information on challenges and barriers encountered in the past, lessons learned, and measures taken to overcome them; Information on how Parties are aiming to ensure a balance between adaptation and mitigation, Information on action and plans to mobilise additional climate finance, Information on how financial support effectively addresses the needs and priorities of developing country Parties, Information on how support provided and mobilised is targeted at helping developing countries in their efforts to meet the long-term goals of the Paris Agreement, Information on efforts to integrate climate change considerations, including resilience, into their development support; and Information on how support to be provided to developing country Parties enhances their capacities.

⁵²² Biennial communications are in accordance with Article 9, paragraph 5, of the Paris Agreement, whereas Iceland and the USA have not yet submitted. < <https://unfccc.int/topics/climate-finance/workstreams/ex-ante-climate-finance-information-post-2020-article-95-of-the-paris-agreement> >

⁵²³ UNFCCC, Decision 18/CMA.1. Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement, para 3, (19 March 2019)

FCCC/PA/CMA/2018/3/Add.2.

⁵²⁴ *ibid*

8.2.1. Procedural Compliance in the National Process

Procedural issues in the process of design and implementation of NDCs as national commitments emanating from the obligations of the Paris Agreement are the other component of my proposed Procedural Model of compliance.⁵²⁵ This concerns a fundamentally national process of designing and communicating NDCs. This is also the entry point for the assessment of specific equity-related communication obligations. The Procedural Model proposes the consideration of compliance of parties regarding their national processes in accordance with Paragraph 4 of the 4/CMA.1 Decision which requires Parties to consider procedural issues in the national planning process and preparation of NDCs, as appropriate. The paragraph states Parties should provide:

- (a) Information on the planning processes that the Party undertook to prepare its nationally determined contribution and, if available, on the Party's implementation plans, including, as appropriate:
 - i. Domestic institutional arrangements, public participation and engagement with local communities and indigenous peoples, in a gender-responsive manner;
 - ii. Contextual matters, including, inter alia, as appropriate:
 - a. National circumstances, such as geography, climate, economy, sustainable development and poverty eradication;
 - b. Best practices and experience related to the preparation of the nationally determined contribution;
 - c. Other contextual aspirations and priorities were acknowledged when joining the Paris Agreement.⁵²⁶

Similar to the communication of the information, the UNFCCC synthesis report states that almost all Parties have provided information on their NDC planning process, institutional arrangements, stakeholder engagement and policies for implementation.⁵²⁷ Furthermore, the empirical work of this research has found particular cases, such as the NDC of Angola, where a Party states that the planning and preparation process was all-inclusive through the

⁵²⁵ For general discussion on differentiated obligations and procedural justice, see, Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 2011). For example, in adaptation-related policy decisions taken at local levels, the importance of procedural considerations such as participation and inclusiveness of decision making is informed by the need to ensure strong procedural justice. Harriet Bulkeley, Gareth AS Edwards, and Sara Fuller, 'Contesting Climate Justice in the City: Examining Politics and Practice in Urban Climate Change Experiments' (2014) 25 *Global Environmental Change* 31. See also Jouni Paavola, 'Science and social justice in the governance of adaptation to climate change' (2008) 17 *Environmental Politics* 644.

⁵²⁶ Decision 4/CMA.1(n222) Annex I, information to facilitate clarity, transparency and understanding of nationally determined contributions, referred to in decision 1/CP.21 (n166).

⁵²⁷ Synthesis report by the Secretariat, (n516) para 16.

engagement of stakeholders, including bilateral consultations.⁵²⁸ The Angolan NDC, in addition to information on the process, also included information on national institutional arrangements. In contrast, Australia's NDC provides information on policies and best practices, but it does not include information on the planning process, particularly on public participation and engagement with stakeholders.⁵²⁹ The existing modalities and procedures of the compliance mechanism do not have procedures to address such cases where Parties communicate only some of the information on their procedural obligations. The 'procedural model' proposes possible procedures to follow up on Parties communications to make sure all information requested is included accordingly.

Also, in accordance with paragraphs 6 and 7 of the decision 4/CMA.1, the Parties should communicate how they consider their NDCs to be fair and reflect on equity. This is another component of the Procedural Model. The paragraphs below give the legal basis for the possibility for the compliance mechanism to assess if the Party has communicated information on fairness and ambition of its NDC. It further provides that Parties should include a reflection on equity in their reporting of their fairness considerations. While in paragraph a Parties are asked to assess their own contributions, in the paragraph b they are invited to present their assessments in terms of parameters that could be applied generally. However, one mandatory parameter-equity-must be reflected. Decision 4/CMA.1 guides Parties on what information should be included in the NDCs such as:

- (6) [h]ow the Party considers that its nationally determined contribution is fair and ambitious in the light of its national circumstances:
 - (a) how the Party considers that its nationally determined contribution is fair and ambitious in the light of its national circumstances;
 - (b) fairness considerations, including reflecting on equity;

- (7) [h]ow the nationally determined contribution contributes towards achieving the objective of the Convention as set out in its Article 2:
 - (a) how the nationally determined contribution contributes towards achieving the objective of the Convention as set out in its Article 2;
 - (b) how the nationally determined contribution contributes towards Article 2, paragraph 1(a), and Article 4, paragraph 1, of the Paris Agreement.

The UNFCCC synthesis report states that almost all Parties have communicated information on fairness and ambition in the light of national circumstances, though they have utilised

⁵²⁸ Nationally Determined Contribution of Angola, Republic of Angola, Section 3, NDC revision process, May (2021) < <https://unfccc.int/NDCREG>. >

⁵²⁹ Australia's Nationally Determined Contribution, Communication (2020) < <https://unfccc.int/NDCREG>.>

different metrics. The metrics range from capabilities, historical and current responsibility, climate justice, share of global emissions, level of per capita emissions, vulnerability to the adverse impacts of climate change, development, technology capacity, mitigation potential, cost of mitigation actions, degree of progression and links to the global goals of the Paris Agreement.⁵³⁰

In the NDCs communicated in 2015, communication on fairness also included common but differentiated responsibilities and respective capabilities (CBDR), poverty eradication, and sustainable development (India's NDC).⁵³¹ Brazil's updated NDC submitted in 2022 provided communication on consideration of the fairness and ambition of its NDC while also reflecting on equity by including information on the historical responsibility of developed countries, reconstruction of the historical series of net anthropogenic emissions, CBDR and information on ambition as equivalent to the contributions by developed countries with both greater historical and current responsibilities.⁵³² The NDC of the United States of America has limited information on fairness and ambition, as it only states the 'NDC exceeds a straight-line path to achieve net-zero emission by 2050 and keeping within reach the 1.5 degree Celsius limit on global average temperature'⁵³³. Though the communication on information under Paragraph 6(b) requires further information on fairness consideration, reflecting on equity, the information in US communication is the same as the information on fairness and ambition, without any reference to equity.⁵³⁴ As discussed in this chapter and the chapter on equity for the implementation of the Paris Agreement, in a Procedural Model for the Compliance Mechanism this could be a potential case for consideration. A potential assessment could involve the examination of the inclusion of the components identified in Decision 4/CMA.1 without going into the content of the submission. A deeper assessment of the contents of the submission would be something better suited for a Substantive Model.

⁵³⁰ UNFCCC Synthesis Report (n517) paragraph 118.

⁵³¹ Ulrike Will, *The Specification of Rules of Differentiation in the NDCs to the Paris Agreement*, (2020) Discussion Paper Series RECAP15, 31. Available at < https://www.europa-uni.de/de/forschung/institut/recap15/downloads/recap15_DP031.pdf. >Accessed 27 May 2022.

⁵³² Brazil's National Determined Contribution (NDC), December (2020) 7.< <https://unfccc.int/NDCREG> >

⁵³³ Nationally Determined Contribution of the United States of America (2021) 21-22.

<<https://unfccc.int/NDCREG> >

⁵³⁴ The empirical research on the submission and communication of NDCs is the basis for this analysis.

8.3. Procedural Equity in the Compliance Process

The next question regarding the Procedural Model would be to explore what kind of set-up the Mechanism will have and how it will go about considering compliance matters. To assess the fulfilment of procedural obligations under the general rules of the agreement or the national process in the NDC design, the Compliance Mechanism needs to have its own process in place. This involves developing the rules of procedure based on the guidance provided by the COP and CMA.⁵³⁵ The compliance committee of the Paris Agreement is currently engaged in drafting these rules and procedures to be submitted to the CMA for endorsement and enactment. These detailed rules and procedures will deal with, inter alia, the issues of what triggers the compliance process, the process by which the committee deliberates and arrives at decisions, and the measures and outcomes expected out of this process.

Procedural issues within the functioning of the Compliance Mechanism itself are essential for the achievement of equity in the overall implementation of the Paris Agreement. Discussion in terms of procedural flexibilities in the process of assessment of the implementation of the agreement, for example, will be one of the areas where the Committee needs to consider the principle of equity. The guidance given to the committee to operationalise the compliance mechanism provides that the work of the committee, including the process of agreeing on the modalities and procedures for its work, shall be guided by the provisions of the Paris Agreement including Article 2.⁵³⁶

Further detail is also being negotiated on contentious matters that need the guidance of the Parties to the Paris Agreement. Important issues include the source of information to be considered in the deliberations of the committee, concerns on how to ensure completeness of the information received, the nature of the analysis and assessment the committee will be able to do, what the determination of factual and legal questions will be based on, and decisions on systemic issues.

⁵³⁵ UNFCCC, Decision 20/CMA.1 Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, (19 March 2019) FCCC/PA/CMA/2018/3/Add.2.

⁵³⁶ *ibid* paragraph 3.

8.4. Conclusion

In this chapter I have discussed my proposed Procedural Model for the Compliance Mechanism of the Paris Agreement. The introductory section of the chapter introduced how the framework created by the models I propose could help in operationalising the principle of equity and climate justice. The Compliance Mechanism of the Paris Agreement can facilitate the achievement of equity and climate justice in two major aspects. The first is through its role in promoting overall compliance with the obligations of the Agreement. With differentiation and equity built into the allocation of obligations in the Agreement, overall compliance will help to facilitate the achievement of equity. The second aspect relates to the specific issue of compliance with equity-related obligations in the Agreement. The Compliance Mechanism in the Procedural Model would check the fulfilment of the equity related communication requirements and if the Party has included in its NDC its reflection on equity and how it considers its contributions to be fair. The role of the Mechanism, in this model, is limited to ascertaining if such procedural obligations are met without going into the assessment of the quality of the submissions. The Procedural Model benefits from being compatible with the current understanding of the Agreement and the subsequent decisions. It is also easier to envisage being implemented due to the restraint it has when assessing the contribution of Parties.

In this chapter, we have also considered related procedural aspects of compliance that are useful in the Procedural Model. Procedural compliance of the national processes in the design and implementation of NDCs is an important part of equity compliance both in terms of promotion of overall compliance and the compliance of Parties with equity related obligations. Furthermore, the equity principle is necessary in ensuring the Compliance Mechanism itself, in its consideration through its processes and measures, is cognisant of the differentiation between Parties and their respective national circumstances.

In the next chapter my proposed Substantive Model for the Compliance Mechanism will be presented. The Model will look at the substantive obligations emanating from the Paris Agreement and how their fulfilment can be assessed through the Compliance Mechanism. Furthermore, it will argue that the equity and fairness claims of Parties can be assessed through objective criteria.

Possible checklist of the ‘procedural model’ for the compliance committee

No.	Paris Agreement Procedural Obligation	Legal basis	Source of information	Frequency	Tiggering by the compliance mechanism where a Party has not	Measures and outcomes
1.	Communication of efforts	Article 3	<ul style="list-style-type: none"> • NDC registry Article 4.12 of the Paris Agreement, • 10/CMA.1., Modalities and procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement • UNFCCC synthesis report of NDCs 	Every five years Article 4.9	Communicated efforts	Follow up and engage with the Party to request the communication of efforts
2.	Communication and maintaining of NDCs <ul style="list-style-type: none"> • Quantifiable information on the reference point • Timeframes and/or periods for implementation • Scope and coverage • Planning process 	Article 4.2 4/CMA.1.	<ul style="list-style-type: none"> • NDC registry Article 4.12 of the Paris Agreement, • 10/CMA.1., Modalities and procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement • UNFCCC synthesis report of NDCs 	Every five years Article 4.9	Communicated or maintained	Engage with the Party concerned 20/CMA.1, paragraph 30

	<ul style="list-style-type: none"> • Methodological approaches • Fairness and ambitions • NDCs contribution towards the objective of Article 2 					
3.	<p>Adaptation Communication, as</p> <p>3.1. component or in conjunction with NDCs, or</p> <p>3.2. national adaptation plan, or</p> <p>3.3. other communications or documents, including national communication.</p>	<ul style="list-style-type: none"> • Article 7, paragraphs 10 and 11 • 9/CMA.1, paragraph 5 	<ul style="list-style-type: none"> • NDCs registry, Article 12 of the Paris Agreement, and 9/CMA.1, paragraph 5. • UNFCCC synthesis report of NDCs 	<p>Every five years Article 4.9,</p> <p>9/CMA.1 paragraph 6 (in time to inform the global stocktake in 2023, and every five years thereafter)</p>		<ul style="list-style-type: none"> • Request for clarification of why the information have not been provided • Engage with the Party, and recommend the information to be included • Assist the Party to identify the challenge and possible solution (i.e., provisions of finance and capacity support in accordance with the PA)
4.	Finance communication	<ul style="list-style-type: none"> • Article 9 	<ul style="list-style-type: none"> • Biennial communication portal, 12/CMA.1.paragrah 6 • UNFCCC compilations and syntheses of the biennial communication, 12/CMA.1.paragrah 9 	<p>Every two years, 12/CMA.1.paragrah 5</p>		<ul style="list-style-type: none"> • Engage with the Party concerned 20/CMA.1, paragraph 30

5.	Transparency of Action and Support	<ul style="list-style-type: none"> • Article 13 • 18/CMA.1, paragraph, 3 	<ul style="list-style-type: none"> • UNFCCC website 18/CMA.1, paragraph, 6 	<ul style="list-style-type: none"> • 2024, thereafter biennially 	<ul style="list-style-type: none"> • Submitted Biennial transparency report, or • Inventory reports 	<ul style="list-style-type: none"> • Request for clarification of why the report have not been provided • Engage with the Party, and recommend the information to be included • Assist the Party, if it is a developing country Party to identify the challenge and possible solution (i.e., provisions of finance and capacity support in accordance with the PA)

Chapter 9 Substantive Model for the Compliance Mechanism the Paris Agreement

In previous chapters, the Thesis identified how the Paris Agreement obligations can be divided up into those of a substantive nature and those of a procedural one. It highlighted that certain obligations that require Parties to perform a certain task will be procedural, for example preparation, communication and maintaining of nationally determined contributions (NDCs),⁵³⁷ or the communication of biennial transparency reports, by at the latest 31 December 2024.⁵³⁸ The decisions on what needs to be included in these submissions entail substantive obligations.

These different obligation types can then be mapped onto models that I have established. The Thesis has discussed the need of operationalising the concepts of equity and climate justice, and the considerable role of the Compliance Mechanism of the Paris Agreement in achieving this. The substantive model aims to assess if the substantive obligations of the Paris Agreement and their implementation could contribute to achieving these concepts, and the procedures needed for that.

This chapter focuses on what I have called the substantive model for the Compliance Mechanism of the Paris Agreement.⁵³⁹ The previous chapter, Chapter Eight discussed the Procedural Model, which examined the potential role of the Compliance Mechanism – in particular the committee’s role in achieving equity and the implementation of the Paris Agreement by assessing if all the procedural obligations on communication and reporting are met. The Chapter also presented a comprehensive checklist for assessing the compliance of Parties in the Procedural Model.

This current chapter identifies both the source of the substantive obligations and guidance for implementation of these obligations under the Paris Agreement. It will review and further examine the substantive obligations of the Agreement initially presented in Chapter Three of the Thesis, and subsequently present the three layers a substantive model assessment: level I

⁵³⁷ Paris Agreement (n12) Article 4(2).

⁵³⁸ Paris Agreement (n12) Article 13(7); and decision 18/CMA.1, report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, FCCC/PA/CMA/2018/Add.2.

⁵³⁹ Paris Agreement (n12) Article 15.

narrow assessment; level II assessment of content and implementation; and level III consideration assessing the fairness of the commitments taken by countries against standards outside the parameters set by countries themselves.

Before setting out to discuss my proposed substantive model for the Compliance Mechanism, it is important to understand the nature of the role expected from the Mechanism in the Paris Agreement and the subsequent decisions as they stand now. To start with, misgivings as to the need or relevance of the Mechanism is an issue some have raised. Alexander Zahar, for example, argues that a well-developed reporting and review process suffices for promoting implementation rather than a separate compliance mechanism provision with a duplicative role.⁵⁴⁰ Zahar's premise for his argument is discussed in Chapter Six, dealing with the Compliance Mechanism's facilitative nature and its function as non-adversarial and non-punitive. He further examined the Compliance Mechanism's potential enforcement role, arguing that an enforcement function for the Mechanism is completely excluded. Zahar outlines the binding obligations of the Paris Agreement as being procedural, not substantive, and the fact that some procedural obligations are collective makes the Compliance Mechanism an incapable body of sanctioning a Party for non-compliance. He argues without such an enforcement role, the Compliance Mechanism would be 'duplicative and wasteful' with a similar role to the transparency mechanism. However, Zahar disregards the important role played by the Compliance Mechanism in the Paris Agreement as a distinct processes without the need for enforcement features. Harro van Asselt and Thomas Hale argue that a three-step review process: implementation review through a reporting and review process (Article 13), collective review (Article 14), and compliance review (Article 15) offer 'a much-needed framework for reviewing how Parties' efforts fare in meeting and increasing their commitments under the Paris Agreement.'⁵⁴¹

The Compliance Mechanism is not a substitute for the report and review system put in place to be implemented through the transparency framework nor does it replace the role of the Global Stocktake in Article 14 of the Agreement. The question here is, therefore, what will distinguish the compliance process from the other processes in the three-pronged review process of the

⁵⁴⁰ Zahar, Alexander, 'A Bottom- Up Compliance Mechanism for the Paris Agreement' (2017) 1 Chinese Journal of Environmental Law 69.

⁵⁴¹ Harro van Asselt and Thomas Hale, 'Reviewing Implementation and Compliance under the Paris Agreement', (2016) Workshop Background Note, Arizona State University.

Paris Agreement? To answer this question this Thesis has developed three models for the Compliance Mechanism. In the previous chapter, I presented the procedural model, which proposes that the Compliance Mechanism would have the assessment of fulfilment mainly procedural obligations as its main function. In terms of equity considerations, it would check whether parties have included in their NDCs their fairness considerations and reflections on equity. This might involve an assessment of different degrees – with the shallowest level checking whether communications are submitted and the stronger level looking into the submissions to examine the inclusion of mandatory elements – albeit still being procedural.

To the credit of some of the arguments presented above with regards to the overlap of the Mechanism with the report and review process in the transparency framework, the Compliance Mechanism in a narrow procedural model would add little value to the overall review system of the Paris Agreement. However, the specific facilitative role of the Mechanism would still be important in helping Parties comply with their obligations. In this chapter I present my second model. In this model, the Compliance Mechanism would have a broader role than merely checking the fulfilment of procedural obligations. I will show, in this Model that there are three possible levels of assessment that the Mechanism could conduct to facilitate compliance in general and the achievement of equity and climate justice in particular. This chapter, by presenting the three possible levels of assessment of substantive implementation of the Paris Agreement for achieving equity and climate justice, will consider the potential for an additional role for the Compliance Mechanism and argue against Zaher’s conclusion.

9.1. Substantive Obligations under the Paris Agreement

The Paris Agreement is the second legal instrument adopted under the United Nations Framework Convention on Climate Change (UNFCCC). The other major international treaty that under the UNFCCC is the Kyoto Protocol (KP) adopted in 1997. It was established in Chapter One and Chapter Three that the legal nature and obligations of the Paris Agreement differs from that of the KP. The KP had a defined top- down obligation as mandated in Article 4 of the KP and developed country Parties agreed to quantified emission limitation and reduction objectives (QELROs).⁵⁴² It also had clearly bifurcated obligations and placed a heavier burden on developed country Parties guided by the principles of equity and CBDR. For

⁵⁴² Kyoto Protocol (n5).

example, under the KP, developed country Parties had a substantive ‘top-down’ legal obligation of reducing emissions by at least 5% below the 1990 levels between 2008 to 2012.⁵⁴³ In contrast, the Paris Agreement sets general obligations on all Parties to the Agreement, with only a few obligations that are bifurcated to groups of Parties, developed, and developing. Another important difference as highlighted in Chapter Three is that the Paris Agreement offers a different approach to the top-down setting of obligations whereby Parties will define and communicate their contributions or targets, leading some scholars to refer to the new agreement as ‘soft law’ and ‘bottom-up’. As Lavanya Rajamani argues, the Paris Agreement is a calibrated mix of hard, soft, and non-obligations, with each type of obligation playing a distinct role to achieving its objective.⁵⁴⁴ However, Depledge argues that ‘top-down’ and ‘bottom-up’ framing of obligations under the KP and PA is false dichotomy and pledging processes for the KP’s emission targets and PA’s NDCs were similar.⁵⁴⁵

This section will further highlight the substantive obligations with mandatory language and substantive expectations and support the argument that the Paris Agreement comprises hard obligations and present why these obligations can serve as the legal basis for proposing a Substantive Model and the need for procedures for the assessment of substantive obligations and consideration by the Compliance Mechanism.

In the following sections the key substantive obligations will be presented. The obligations include mitigation, adaptation, finance, and transparency related actions. The first substantive obligation on all Parties of the Paris Agreement is provided in the temperature goal of Article 2. Scholars have argued that Article 2 is an inspirational goal with a substantive obligation that needs to be matched by individual Party contribution to collectively achieve its goals.⁵⁴⁶ It sets a collective substantive obligation on all Parties to enhance the implementation of the Convention by holding the increase in the global average temperature to well below 2 degrees above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees.

⁵⁴³ Sebastian Oberthur and Hermann E. Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century* (Springer, 1999) Chapter 4.

⁵⁴⁴ Rajamani (n168) 338.

⁵⁴⁵ Joanna Depledge, ‘The “top-down” Kyoto Protocol? Exploring Caricature and Misrepresentation in Literature on Global Climate Change Governance’ (2022) *International Environmental Agreements: Politics, Law and Economics* 1.

⁵⁴⁶ See, Lavanya Rajamani, ‘Guiding Principles and General Obligation (Article 2.2 and Article 3)’, in Klein Daniel et al. (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (2017) Oxford University Press 132-140; and Meinhard Doelle, ‘The Paris Agreement: Historic Breakthrough or High Stakes Experiment?’ (2015) 6 *Climate Law* 1.

This substantive obligation was strengthened through a supplementary decision by the Paris Agreement that requires individual Parties when communicating their nationally determined contribution (NDCs) to provide information on ‘how’ their NDCs contribute towards Article 2, paragraph 1(a).⁵⁴⁷

i. Mitigation

Article 4(1) of the Paris Agreement, the second substantive obligation (peaking and net zero), is also collective with defined individual efforts. It sets out the obligations on group of Parties, efforts required from these Parties and a timeframe for achieving the obligation. It provides that to achieve the long- term temperature goal set out in Article 2, all Parties should aim for a global peaking of greenhouse gas emissions as soon as possible, by undertaking rapid reductions efforts to achieve balance between anthropogenic emission by sources and removals by the second half of this century. However, it recognises that peaking of greenhouse gas emissions for developing country Parties will take longer than developed country Parties ‘on the basis of equity and in the context of sustainable development and efforts to eradicate poverty.’⁵⁴⁸ This substantive obligation is particularly relevant for Parties’ procedural obligation under Article 4(19). The later sets an obligation to formulate and communicate Parties’ long-term efforts toward Article 2 by submitting long-term strategies for low greenhouse gas emission development. The Glasgow-based decision of the Paris Agreement further requests the content of such submission to include progress towards just transitions to zero emissions by or around mid-century and for Parties to regularly update the strategies in line with the best available science.⁵⁴⁹

In addition, Parties, when communicating their NDCs are required to provide information on their efforts towards Article 4(1) of the Paris Agreement. Also, Parties have an obligation to report on the progress of their implementation of the obligations. The enhanced transparency framework of the Paris Agreement sets an obligation on all Parties to report on the progress of their efforts biennially for a clear understanding of climate action in the light of the objective of Article 2 and the overall achievement towards their climate efforts.⁵⁵⁰ The ex-ante communication of Parties’ efforts and ex-post reporting on progress and achievement is a

⁵⁴⁷ Decision 4 /CMA.1 (n222).

⁵⁴⁸ Paris Agreement (n12) Article 4(19).

⁵⁴⁹ Decision 1/CMA.3. Glasgow Climate Pact, paragraph 32 and 33 (8 March 2022)

FCCC/PA/CMA/2021/10/Add/1/.

⁵⁵⁰ Paris Agreement (n12) Article 13(5).

procedural obligation; nonetheless, the substantive obligation is the nationally defined contribution towards achievement of Article 2(1) and Article 4(1) and the achievement of these efforts. Pauw and Klein, for example argue that transparency information, in which the progress of implementation and achievement is presented, can lead to enhanced implementation and verification.⁵⁵¹ The Substantive Model will propose two options for verifying if these substantive obligations were met by the Party or not under the sections below on what I have called narrow assessment and assessment of content and implementation. I will argue that through this it contributes to the achievement of equity and climate justice.

The collective procedural obligations of communication of NDCs under Article 3 of the Paris Agreement is accompanied by an individually mandated substantive obligation on Parties requiring the content of their NDC to ‘progress over time’ as defined in Articles 4, 7, 9, 10, 11 and 13 of the Agreement. Furthermore, the individual obligation on ‘progress over time’ is described in terms of the content of the successive NDCs’ contribution reflecting progression and highest possible ambition on its contribution, target, or efforts in the current NDCs of the Party.⁵⁵² Harald Winker also argues progression needs to be reflected both in content of the mitigation NDCs, as well as its numerical targets.⁵⁵³ The Paris Agreement and its decisions could be cited to clarify the timeline for progression over time, and making this substantive obligation’s content comprehensible, implementable, and verifiable. The first relevant provision to help understand progression is the procedural obligation of communicating NDCs as mandated in Article 4(2), and every five years in line with Article 4(9) of the Paris Agreement. Whether the established clear timeline is complied with, and the substantive obligation of progression of contributions are met can be established by comparing the successive NDCs with the current NDCs of the Party. The Substantive Model presents a possible comparison procedure for the compliance mechanism both the level I narrow assessment which can be used to assess the completeness of information and fulfilment of requirements of content in the submissions, and level II assessment of content and implementation which would involve the assessment of the fulfilment of substantive obligations such as progression over time. The sources of information for both assessments will be presented in the respective sections below.

⁵⁵¹ W. Pieter Pauw and Richard JT Klein, ‘Beyond Ambition: Increasing the Transparency, Coherence and Implementability of Nationally Determined Contributions’ (2020) 20 Climate Policy 405.

⁵⁵² Paris Agreement (n12) Article 4(3).

⁵⁵³ Winkler (n207) 148.

Furthermore, the implementation of the NDCs, including efforts or contribution for progression is tracked and the Substantive Model in its level I can contribute to the assessment of such implementation. This will be based on upfront communication of information by Parties on methods and plans to track progress on implementation of efforts at the time of submitting NDCs,⁵⁵⁴ and the reporting by Parties on tracking of progress of implementing and achieving NDCs under the transparency framework of the Paris Agreement.⁵⁵⁵ The level II assessment of content implementation by the Substantive Model will propose procedures for the Compliance Mechanisms. Level III involves a more in-depth assessment of the substantive content of the fairness and equity claims of a Party.

Article 4 (4) of the Paris Agreement is among the bifurcated substantive obligations under the Agreement. The substantive obligation differs between developed country Parties and developing country Parties. Winker refers to the differentiation of obligation on the form of mitigation NDCs in Article 4, (4) as a nuanced form of differentiation,⁵⁵⁶ and Rajamani says the Article sets a normative expectation in relation to the types of actions the groups of Parties take through successive cycles of contributions.⁵⁵⁷ The Article sets an obligation on developed country Parties to take economy-wide absolute emission reduction targets, whereas developing country Parties should enhance their mitigation actions and progress towards emission reduction or limitation targets in light of the different national circumstances. The decision 4/CMA.1 requires all Parties to provide upfront information on the scope and coverage of their NDCs, including the general description of the target.⁵⁵⁸ The level I narrow assessment by the Substantive Model could assess if the groups of Parties have communicated information on the targets or contributions following Article 4, paragraph 4 of the Paris Agreement, and the level II assessment of the model will assess if targets are economy-wide absolute targets for developed country Parties and enhanced mitigation efforts for developing country Parties, respectively. The Substantive Model in its level III assessment on fairness will examine the fairness of the NDCs in line with Article 4, paragraph 4 and contribute to the consideration of equity and climate justice by the compliance mechanism of the Paris Agreement.

⁵⁵⁴ Decision 4 /CMA.1(n223) Annex II paragraph 1(e).

⁵⁵⁵ Decision 18/CMA.1, Annex I, Section B and Decision 5/CMA.3, paragraph 1 (c), Guidance for operationalizing the modalities, procedures and guidelines for the enhanced transparency framework referred to in Article 13 of the Paris Agreement, (8 March 2022), FCCC/PA/CMA/2021/10/Add.2

⁵⁵⁶ Lavanya Rajamani (n546).

⁵⁵⁷ Lavanya Rajamani (n200).

⁵⁵⁸ Decision 4 /CMA.1(n222).

The Paris Agreement obligations on the upfront communication of information (Article 4, paragraph 8) and accounting (Article 4, paragraph 13) on NDCs have significant importance to the effectiveness of my proposed ‘substantive model’ of the compliance mechanism. All Parties providing information necessary for clarity, transparency and understanding of the NDCs is a strong mandatory requirement under Article 4, Paragraph 8, and the substantive content of the information was agreed in Katowice in 2018.⁵⁵⁹ As highlighted above, the upfront communication of information by Parties on NDCs is important for specifying the substantive obligation as the information provides the required content in the different NDCs. As Rajamani argues, the text of the Article 4, paragraph 8, further develops the content of the information necessary for clarity, transparency and understanding in the decisions of the Paris Agreement, incorporating such decisions into the treaty and making them binding.⁵⁶⁰ Indeed, the Katowice decision 4/CMA.1, paragraph 7, sets a mandatory requirement with a ‘shall’ provision that all Parties in communicating their second and subsequent NDCs must provide the information necessary for clarity, transparency and understanding as contained in the decision. There are seven main types of upfront information of NDCs: quantifiable information on the reference point, time frames and/or periods for implementation, scope and coverage, planning process, assumptions and methodologies for estimating and accounting of anthropogenic greenhouse gas emissions, the Party’s consideration of fairness and ambition of its NDCs, and the NDCs’ contributions towards achieving the objective of Article 2 of the Convention with further headings under each of these main requirements.⁵⁶¹ The Substantive Model, in level I narrow assessment, the compliance mechanism can evaluate if the Party has submitted all the required information including all the details in accordance with 4/CMA.1. The section below on the level I narrow assessment will discuss the procedures needed, including the sources of information on the communication of such information and description of the content of the mandatory information. The level II assessment of my substantive model will go beyond examining the required information and analyses the content of the information by comparing the current and subsequent NDCs of the Party. In accordance with Article 4, paragraph 3 and Article 4, paragraph 4, the ‘substantive model’ level III assessment of fairness could scrutinise the Party’s information on the selection of a base year, scope, and coverage of the NDC, as will discussed in section 3.

⁵⁵⁹ Ibid.

⁵⁶⁰ Harald Winkler (n207) 148.

⁵⁶¹ Decision 4 /CMA.1 (n222) paragraphs 1-7.

The Paris Agreement sets a mandatory obligation on all Parties to account for anthropogenic emissions and removals in their NDCs.⁵⁶² Article 4, paragraph 13 sets this ‘shall’ obligation on all Parties to account their NDCs with the principles of promoting environmental integrity, transparency, accuracy, completeness, comparability, and consistency, and to avoid double counting of emission reductions.⁵⁶³ In 2018, further decisions of the Paris Agreement provided binding guidance to Parties on how to account for their NDCs.⁵⁶⁴ The guidance has four main elements with detailed information for each respectively: (i) accounting for anthropogenic emissions and removals in accordance with methodologies and common metrics assessed by the Intergovernmental Panel on Climate Change (IPCC); (ii) ensuring methodological consistency, including on baselines, between the communication and implementation of NDCs; (iii) striving to include all categories of anthropogenic emissions or removals in the NDCs; and (iv) information on the exclusion of the anthropogenic emissions or removals. The above obligations provide the need for upfront information for accounting in line with the principles of Article 4, paragraph 13; and the transparency obligations in Article 13 of the Paris Agreement, which will be discussed below, require Parties to account for the progress of implementation and achievement of the NDCs. However, scholars have argued that, even with the granular guidance from the decisions of the Paris Agreement, the ‘nationally determined’ nature of Parties’ NDCs continues to give discretion, and could make NDCs assessment, aggregation, and comparison of NDCs challenging.⁵⁶⁵ The ‘substantive model’ could be a possible option for assessment and comparison of NDCs by the compliance mechanism which would help to alleviate this issue.

The obligations to account for NDCs targets and report on their progress, taking into account the principles of promoting transparency, accuracy, completeness, consistency, and comparability are pertinent for the ‘substantive model’. The narrow assessment of the model-level I can assess the completeness of all the required information, whereas the level II assessment of content and implementation will examine the consistency of the upfront information with the reporting and the comparability of the current NDCs with subsequent NDCs can provide information on achievement of substantive obligations of progression, and

⁵⁶² Paris Agreement (n12) Article 4(13).

⁵⁶³ *ibid.*

⁵⁶⁴ Decision 4/CMA.1 (n222) para 13.

⁵⁶⁵ Lavanya Rajamani and Daniel Bodansky, ‘The Paris Rulebook: Balancing International Prescriptiveness with National Discretion’ (2019). 68 *International and Comparative Law Quarterly* 1023.

ambition. The level III fairness assessment of the model will also scrutinise the completeness of information relevant to differentiated obligations under the Paris Agreement, including in Article 4, paragraph 4, and its decision under the Paris Agreement.⁵⁶⁶

ii. Adaptation

The Paris Agreement sets substantive obligation on all Parties to engage in adaptation planning and implementation of adaptation action to strengthen resilience and reduce vulnerability.⁵⁶⁷

The Agreement established a global goal on adaptation for enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change. The adaptation goal will ensure adequate adaptation response in the context of the temperature goal referred to in Article 2.⁵⁶⁸ As discussed above, Article 2 of the Paris Agreement has set an obligation on Parties to pursue efforts to limit the temperature increase to 1.5 degrees, and it recognised that limiting the temperature increase will significantly reduce the risks and impacts of climate change.⁵⁶⁹

Article 7, paragraph 2, recognised adaptation as a global challenge, and that it is a key component to the long-term global response to climate change for protecting people, livelihoods, and ecosystems. The first individual substantive obligation to address this challenge is set out in Article 7, paragraph 9. The obligation with a ‘shall’ requirement provides all Parties must engage in adaptation planning and the implementation of adaptation action. The substantive obligation of Article 7, paragraph 9 includes: Parties’ implementation of their adaptation actions or efforts; the process for formulating national adaptation plans; assessment of climate change impacts and vulnerability; and monitoring and evaluation of the adaptation plans and actions. Such substantive obligations are communicated as adaptation communications in accordance with Article 7, paragraph 10. It states that Parties have an obligation to ‘submit and update periodically’ their adaptation communication on priorities, plans, needs and implementation efforts. However, Parties can choose their preferred medium for adaptation communication, to submit as a component of or in conjunction with national adaptation plans, NDCs or national communications.⁵⁷⁰ It should be noted that a total of 137 Parties (83 percent) included adaptation components in their intended NDCs in 2015,⁵⁷¹ and

⁵⁶⁶ Decision 4/CMA.1 (n222) Annexes I and II.

⁵⁶⁷ Paris Agreement (n12) Articles 7(1) and 7(7).

⁵⁶⁸ Ibid.

⁵⁶⁹ Paris Agreement (n12) Article 2.1(b).

⁵⁷⁰ Paris Agreement (n12) Article 7(1).

⁵⁷¹ UNFCCC, Synthesis Report by the Secretariat, Aggregate Effect of Intended Nationally Determined Contributions (October 2015) FCCC/CP/2015/7 paragraph 55.

the figure has remained the same for NDCs submitted after the adoption of the Paris Agreement.⁵⁷² The UNFCCC synthesis report found that more Parties communicated an adaptation component in their NDCs compared to the INDCs.⁵⁷³ Other Parties have communicated their adaptation efforts as a standalone document: an adaptation communication, national adaptation plans and national communication in accordance with the different medium of submission provided in Article 7 paragraph 11.

The decision of the Paris Agreement, decision 9/CMA.1 gave further guidance on the content of the upfront information for adaptation communication.⁵⁷⁴ The decision sets a less binding obligation compared to the ‘shall’ requirements for NDCs upfront information – it ‘invites’ all Parties to provide information on four main elements, including information on: (i) national circumstances and institutional arrangements; (ii) impacts, risks and vulnerabilities; (iii) national adaptation priorities and strategies; and (iv) implementation and support needs of, and provision of support to, developing country Parties in accordance with their national circumstances and capacities.⁵⁷⁵ The decision also sets out elements for additional upfront information for Parties to provide information on as appropriate to their adaptation efforts.⁵⁷⁶

Another key provision on adaptation, in particular for developing countries Parties is contained in Article 7 paragraph 3 and Article 7 paragraph 14 (a) of the Paris Agreement.⁵⁷⁷ The provisions stipulate that adaptation efforts of developing countries shall be recognised, and a decision of the Agreement further specifies modalities for recognising these efforts during the Global Stocktake process of Article 14.⁵⁷⁸ This provision is relevant for the Substantive Model, in particular for assessing the substantive obligation of ‘progression of contribution’ set by Article 3 of the Paris Agreement. The NDCs synthesis report of the UNFCCC highlights that many Parties have described the elaboration of their adaptation action as reflecting progression

⁵⁷² UNFCCC, Synthesis Report by the Secretariat, Nationally Determined Contributions Under the Paris Agreement (September 2021) FCCC/PA/CMA/2021/8 para 24.

⁵⁷³ *ibid.*, para 25.

⁵⁷⁴ Decision 9/CMA.1 (n515).

⁵⁷⁵ Decision 9/CMA.1 (n515) para 7, and Annex Elements of an adaptation communication.

⁵⁷⁶ *ibid.*, information on the elements referred to the paragraph (e-i) of the annex of the decision.

⁵⁷⁷ Irene Suarez Perez and Angela Churie Kallhauge, ‘Adaptation’ (Article 7) in Daniel Klein et al (eds), *The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press, 2017) 207.

⁵⁷⁸ Decision 11/CMA.1, Matters referred to in Paragraphs 41,42 and 45 of decision 1/CP.21, Section II Modalities for recognising the adaptation efforts of developing countries Parties (19 March 2019) FCCC/PA/CMA/2018/3/Add.2. para 10.

and some Parties that have submitted new or updated NDCs highlighted that ambition has been enhanced in their adaptation contribution.⁵⁷⁹

The ‘substantive model’ will assess and review the compliance of Parties with their adaptation obligations under the Paris Agreement. As set out in Article 2, the objective of the Agreement, its aim is to strengthen the global response to climate change on mitigation, adaptation and finance, and Article 15 on the compliance mechanism aims to facilitate implementation of and promote compliance with the provisions of the Agreement. The level I narrow assessment of the ‘substantive model’ will assess if Parties have communicated their adaptation efforts in accordance with Article 7, and the assessment of content and implementation in level II of the model will further examine if the communication provides the required information. The ‘substantive model’ level III assessment of fairness will consider fairness ‘progression and ambition’ on adaptation.

iii. Finance

Climate finance is a cornerstone and means to enhance the level of ambition and implementation of mitigation and adaptation actions in developing countries.⁵⁸⁰ Article 9 of the Paris Agreement is the other provision that is bifurcated to groups of Parties with a ‘shall’ binding obligation on developed country Parties to provide financial resources to developing country Parties.⁵⁸¹ Article 9 paragraph 1 of Paris Agreement also states that developed country Parties’ obligations to provide finance is ‘in continuation of their existing obligations under the Convention’. As Yamineva suggests, climate finance provisions of the Paris Agreement need to be interpreted in the light of the Convention that established the mandatory obligations of some Parties in relation to providing support.⁵⁸² It also provides other Parties are encouraged to provide support under the Agreement.⁵⁸³ Further, the decisions of the Paris Agreement provide, for example, that the new collective quantified finance goal will be quantified and from the floor of USD 100 billion per year.⁵⁸⁴ Parties initiated the elaboration of the new

⁵⁷⁹ (n571) paragraph 129 and 132.

⁵⁸⁰ Jorge Gastelumendi and Inka Gnittke (n234).

⁵⁸¹ *ibid*; and Paris Agreement (n12) Article 9(1).

⁵⁸² Yulia Yamineva, ‘Climate Finance in the Paris Outcome: Why Do Today What You Can Put Off till Tomorrow?’ (2016) 25 *Review of European, Comparative & International Environmental Law* 174.

⁵⁸³ Paris Agreement (n12) Article 9(3).

⁵⁸⁴ Decision 14/CMA.1.Setting a new collective quantified goal on finance in accordance with decision 1/CP.21, paragraph 53 (19 March 2019) FCCC/PA/CMA/2018/3/Add.2.

collective quantified goal on climate finance at the 26th session of the Conference of the Parties (COP26) and agreed to conclude it prior to 2025.⁵⁸⁵

In Article 9 (5), developed country Parties have a mandatory procedural obligation on ex-ante biennial communication of indicative quantitative and qualitative information of public financial resources. The provision also encourages voluntary biennial communication from other Parties. The decision of the Paris Agreement requests developed country Parties to submit the ex-ante communication on public finance biennially from 2020 and identified the types of information to be provided by Parties.⁵⁸⁶ The types of information that should be provided include: indicative quantitative and qualitative information on programmes, channels and instruments, information on new and additional climate finance, and information on methodologies and assumption used to project levels of climate finance.⁵⁸⁷ Article 9 paragraph 7 sets an obligation on developed country Parties to report on the support provided to developing countries under the transparency framework of the Agreement, as discussed below.

The potential Substantive Model will have a role of assessing the compliance of the obligations on climate finance as it contributes to the achievement of the goal of the Paris Agreement, and achievement of equity and climate justice as discussed in Chapter Five. The role of the model can range from the level I narrow assessment whereby the compliance mechanism can confirm the communication on all types of ex-ante communication by developed country Parties, and the level II assessment of content and implementation can evaluate the ex-ante information with the report under Article 13. Further, the fairness assessment level III will assess the fairness of the finance contributions for achieving equity and climate justice.

iv. Transparency of action and support

The transparency framework for action and support of the Paris Agreement established by Article 13, paragraph 1 is vital for building trust and promoting the effective implementation of the Agreement.⁵⁸⁸ Scholars have argued that a ‘bottom-up’ approach to climate action,

⁵⁸⁵ Ibid.

⁵⁸⁶ Decision 12/CMA.1. Identification of the information to be provided by Parties in accordance with Article 9, Paragraph 5, of the Paris Agreement (19 March 2019) FCCC/PA/CMA/2018/3/Add.2

⁵⁸⁷ Ibid, decision 12.CMA.1 Annex on types of information to be provided.

⁵⁸⁸ Pauw and Klein (n551).

coupled with the international transparency framework, will facilitate tracking of progress in the implementation and achievement of climate action.⁵⁸⁹

As set out in Article 13(5) and (6) of the Agreement, the purpose of the transparency framework is to track progress towards the achievement of Parties' NDCs and adaptation efforts. It will also provide clarity on the support provided and received in terms of finance, technology, and capacity building in the context of climate actions.

All Parties have a procedural obligation to submit a biennial transparency report (BTR) from 2024, and decisions of the Paris Agreement specify the content and outline of the transparency reports.⁵⁹⁰ The fulfilment of both the procedural obligation and the substantive obligations of these reports are critical for the 'substantive model'. Chapter Eight has recommended procedures for the compliance mechanism to consider the communication of the reports by Parties. The 'substantive model' will focus on the content of the report, and assessment of the BTR taking account of the above discussed guiding principles of the transparency framework of promoting transparency, accuracy, completeness, consistency, and comparability.⁵⁹¹

The reporting requirements set in Article 13, paragraph 7 (a) provide all Parties shall provide national inventory reports of anthropogenic emissions by sources and removals and sinks of greenhouse gases, and the decision on guidance of the inventory report stipulates Parties should use the 2006 IPCC Guidelines and agreed on a common reporting table for the electronic reporting of the information in the national inventory report.⁵⁹² In addition, Article 13 paragraph 7 (b) of the Paris Agreement requires Parties to provide information necessary to track progress of implementation and achievement of their NDC under Article 4. The substantive obligations for the information to be provided for Article 7 paragraph (b) include: (i) description of the Party's NDC containing information on targets, scope and coverage, time frame for implementation; and (ii) qualitative or quantitative indicators of net greenhouse gas emissions and removals, or percentage reduction of GHG intensity to track progress.⁵⁹³ Parties will also submit the above information in common tabular formats describing their selected

⁵⁸⁹ See Harro van Asselt and Thomas Hale (n541); Harald Winkler (n207); Rajamani and Bodansky (n565); and Pauw and Klein (n551).

⁵⁹⁰ Decision 18/CMA.1 (n555) paragraph 3, and Decision 5/CMA.3 Annex IV.

⁵⁹¹ Decision 18/CMA.1 (n555) Annex I, Section B, Guiding Principles and Decision 5/CMA.3, para 1 (c), Guidance for operationalizing the modalities, procedures, and guidelines for the enhanced transparency framework.

⁵⁹² Decision 18/CMA.1 (n555) Annex I, Section C Methods, paragraph 20, and Decision 5/CMA.3, Annex I.

⁵⁹³ Decision 18/CMA.1 (n555) paras 17 to 65.

indicators, definition needed to understand each of the indicators and its progress of implementation. The common tabular formats provide columns on reference points for base year, progress of implementation of the NDC target in each of the NDCs implementation period, information on previous reporting years and progress made towards the NDCs implementation and achievement.⁵⁹⁴ The discussed obligations will be the source of information for the ‘substantive model’ level II assessment of content and implementation to assess the completeness and comparability of the previous or current NDCs with new or subsequent NDCs for achieving equity and climate justice by the compliance mechanism.

Article 13 paragraph 9 of the Paris Agreement provides that Parties should report on their adaptation efforts and action, and the guidance decision for reporting of adaptation specifies the report should include information on national circumstances and adaptation priorities, impacts, risks and vulnerabilities and progress on implementation of adaptation.⁵⁹⁵ In addition, developed country Parties are required to report on financial, technology transfer and capacity building support provided to developing countries.⁵⁹⁶ The decisions of the Paris Agreement set out the content of the required information and have approved a common tabular format for the electronic reporting of the information.⁵⁹⁷ On climate finance, the reporting obligations require developed country Parties to provide information on climate finance for the reporting year, conversion between domestic currency and United States dollar, channel (bilateral, regional, or multilateral), funding source, finance instruments (grants, concession loan, equity, guarantee or insurance) and type of support (adaptation or mitigation).⁵⁹⁸ Further, the decisions require quantitative or quantitative or both information on support to developing countries for technology development and transfer support and capacity building.⁵⁹⁹ These substantive obligations on finance, technology development and transfer and capacity building will be the source of information for the ‘substantive model’ assessment of the compliance with the obligation and the fairness of the content and implementation.

⁵⁹⁴ Decision 5/CMA.3, Annex II, 8- 16.

⁵⁹⁵ Decision 18/CMA.1(n555) Section IV Information related to climate change impacts and adaptation under Article 7, paras 104, 106,107 and 110.

⁵⁹⁶ Paris Agreement (n12) Article 13(9).

⁵⁹⁷ Decision 5/CMA.3, paragraph 1 (a) to (c).

⁵⁹⁸ Decision 18/CMA.1 (n555) Section IV (c) Information on financial support provided and mobilized under Article 9 of the Paris Agreement, paras 121- 125.

⁵⁹⁹ *ibid*, paras 126- 129.

The technical expert review (TER) and the facilitative, multilateral consideration of progress (FMCP) are important processes under Article 13. The TER reviews the consistency of the information submitted by the Party under Article, paragraph 7 and 9, and FMCP provides a multilateral consideration of the BTR by other Parties through written questions and during the session of the Subsidiary Body of Implementation of the UNFCCC.⁶⁰⁰ The report of both the TER and FMCP will be sources of information for the ‘substantive model’.

9.2. Source of Information and Additional Procedure

The section above has discussed the substantive obligations, and for some of the obligations where the Paris Agreement was clear, the sources of information were mentioned. As discussed in Chapter Four (Compliance Mechanisms of MEAs) sources of information are essential for the effectiveness and success of compliance procedures. These sources are where the Compliance Mechanism looks for the information it uses for its consideration. Mitchell and Werksman indicate that treaties have developed different transparency frameworks to maximise the amount and quality of information collected on compliance and non-compliance with provisions of treaties as well as degrees of analysis of the information submitted.⁶⁰¹ This section will present the existing sources of information under the Paris Agreement, and recommend additional source of information and procedures for the effective functioning of the compliance mechanism of the Agreement, and its potential role in achieving equity and climate justice.

9.2.2. Existing Sources of Information under the Paris Agreement

i. NDC Registries

Article 4, paragraph 12 and Article 7, paragraph 12 of the Paris Agreement provide that NDCs of Parties, and adaptation communications as a component or in conjunction with NDCs, including national adaptation plans, will be recorded in a public registry maintained the UNFCCC secretariat. The Agreement and its decision have set out the modalities and procedures for the operation and use of the public registries to ensure user-friendly navigation of the registries, maintaining and archiving of NDCs for public record and defining the role of

⁶⁰⁰ Decision 18/CMA.1(n555) Annex VII and VIII.

⁶⁰¹ See, Mitchell (n328)17.

the government representatives of Parties for submitting and managing the Parties' content in the public registry⁶⁰².

ii. Transparency Framework Reports

Parties' obligations to submit BTRs and national inventory reports commence from 2024,⁶⁰³ while the least developed country Parties (LDCs) and small island developing states (SIDs) can submit these reports at their discretion. As discussed under the transparency section, all Parties have an obligation to report in tabular format and as per the decided outline of the BTR. The UNFCCC secretariat is mandated to develop reporting tools based on the information in the BTRs⁶⁰⁴. The decisions of the Paris Agreement also requested the secretariat to produce synthesis reports on Parties' BTRs and national inventory reports, and annual reports on the technical expert reviews.

iii. NDC Synthesis Reports

The synthesis report of NDCs by the secretariat is another important source of information for the work of the Compliance Mechanism. Decisions of the Paris Agreement requested the secretariat to annually update the synthesis report of NDCs under the Paris Agreement, and for this to be available at the Conference of the Parties.⁶⁰⁵ These reports provide information on the contribution of Parties and progress towards achieving the objective of the Agreement, as set out in Article 2.

9.3. Proposed Additional Source of Information

In this section I propose new sources of information to be included to aid the work of the Compliance Mechanism in facilitating compliance and contributing to the achievement of equity and climate justice.

i. Status of Submission of Mandatory Communications

In addition to the above discussed sources of information, for the purpose of facilitating the work of the compliance mechanism of the Paris Agreement, including the proposed

⁶⁰² See Decision 5/CMA.1, Modalities and Procedures for the operation and use of a public registry referred to in Article 4, paragraph 12, of the Paris Agreement, and Decision 10/CMA.1 Modalities and Procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement.

⁶⁰³ Decision 18/CMA.1 (n555) para 3.

⁶⁰⁴ Decision 5/CMA.3 para 8.

⁶⁰⁵ See Decision 1/CP.21(n166) para 25; Decision 1/CMA.2 para 10.

Substantive Model there is a need to mandate the secretariat to provide the status of submission of mandatory communications under the Agreement. The mandate for the secretariat would include a request to prepare a document on the status of submissions corresponding to the relevant obligations by parties as discussed above, including the name of the Parties and the date of the submission. The fulfilment of the obligation of Parties can only be ascertained in the presence of a report as to what the status of mandatory communications.

ii. Information by non-Parties

The information by non-Parties can also contribute and facilitate the work of the compliance mechanism. As discussed below in the section on the assessment of fairness, the information provided by non-Parties is critical in the consideration of equity and climate justice. Furthermore, a process for reviewing the implementation of NDCs, similar to the Universal Periodic Review of the UNHRC,⁶⁰⁶ can enrich the information for the consideration by the compliance mechanism.

9.4. New Procedures and Guidance under the Paris Agreement

The Paris Agreement has continued to be elaborated through decisions for facilitating the implementation of its provisions, as discussed in this chapter. The ‘substantive model’ can be elaborated further to account for the guidance on features of NDCs referred to in decision 1/CP.26, paragraph 26. The decision of the Paris Agreement agreed to continue the consideration of features of NDCs in 2024.⁶⁰⁷ Guidance on common features of NDCs, on quantifiable information, target year, and use of methodologies of estimation of greenhouse gases and rules for accounting could enhance the comparability of NDCs amongst Parties for considering equity and climate justice by the compliance mechanism. Parties, by defining the common elements through further negotiation and providing guidance on the precision of the individual targets, can create better comparability and help the Compliance Mechanism in being more effective.

9.5 Substantive Model for the Compliance Mechanism of the Paris Agreement

Following the discussion above, this section will present in tabular format of the Substantive Model for the compliance mechanism of the Paris Agreement, and the proposed three layers of

⁶⁰⁶ UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251.

⁶⁰⁷ Decision 4/CMA.1(n222) paragraph 20.

a substantive assessment: level I narrow assessment, and the level II assessment of content and implementation.

9.5.1. Substantive Model: Level I Narrow Assessment

The first table below deals with the narrow level I assessment that would assess the fulfilment of the party's communication and reporting obligations under the Paris Agreement in line with the above discussed mandatory requirements. The assessment would focus on ensuring that all the guidance on the communication and reports are complied with, including different sections of upfront information, and required information on the progress of implementation of the obligations.

No.	Paris Agreement Procedural Obligations	Legal basis	Source of information	Frequency	Initiation by the compliance mechanism where a Party has not:	Measures and outcomes
1.	Communication of efforts	Article 3	<ul style="list-style-type: none"> • NDC registry Article 4.12 of the Paris Agreement, • 10/CMA.1., Modalities and procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement • UNFCCC synthesis report of NDCs 	Every five years Article 4.9	Communicated efforts	Follow up and engage with the Party to recommend the communication of efforts
2.	Submission of NDCs	Article 4.2	<ul style="list-style-type: none"> • NDC registry Article 4.12 of the Paris Agreement, • 10/CMA.1., Modalities and procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement • UNFCCC synthesis report of NDCs 	Every five years Article 4.9	Communicated or maintained and included all the information required by the Party	Engage with the Party concerned 20/CMA.1, paragraph 30
3.	NDCs information	<ul style="list-style-type: none"> • Article 4.8 of the Paris 	<ul style="list-style-type: none"> • NDC registry Article 4.12 of the Paris Agreement, 	Every five years Article 4.9	Communicated all information on the NDCs	<ul style="list-style-type: none"> • Request for clarification of why the

	<p>3.1. Quantifiable information on the reference point</p> <p>3.2. Timeframes and/or periods for implementation</p> <p>3.3. Scope and coverage</p> <p>3.4. Planning process</p> <p>3.5. Methodological approaches</p> <p>3.6. Fairness and ambitions</p> <p>3.7. NDCs contribution towards the objective of Article 2</p>	<p>Agreement</p> <ul style="list-style-type: none"> • 4/CMA.1, paragraph 7 	<ul style="list-style-type: none"> • 10/CMA.1., Modalities and procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement • UNFCCC synthesis report of NDCs 			<p>information has not been provided</p> <ul style="list-style-type: none"> • Engage with the Party, and recommend the information to be included • Assist the Party to identify the challenge and possible solution (i.e., provisions of finance and capacity support in accordance with the PA)
4.	<p>Adaptation Communication, as:</p> <p>4.1. component or in conjunction with NDCs; or</p> <p>4.2. national adaptation plan; or</p> <p>4.3. other communications or documents, including national communication.</p>	<ul style="list-style-type: none"> • Article 7, paragraphs 10 and 11 • 9/CMA.1, paragraph 5 	<ul style="list-style-type: none"> • NDCs registry, Article 12 of the Paris Agreement, and 9/CMA.1, paragraph 5. • UNFCCC synthesis report of NDCs 	<p>Every five years Article 4.9,</p> <p>9/CMA.1 paragraph 6 (in time to inform the global stocktake in 2023, and every five years thereafter)</p>		<ul style="list-style-type: none"> • Request for clarification of why the information has not been provided • Engage with the Party, and recommend the information to be included • Assist the Party to identify the challenge and possible solution (i.e., provision of finance and capacity

						support in accordance with the PA)
5.	<p>Finance communication</p> <p>5.1. Enhanced information to increase clarity on the projected levels of public financial resources to be provided to developing countries,</p> <p>5.2. Indicative quantitative and qualitative information on programmes, including projected levels, channels and instruments,</p> <p>5.3. Information on policies and priorities, including regions and geography, recipient countries, beneficiaries, targeted groups, sectors and gender responsiveness,</p> <p>5.4. Information on purposes and types of support: mitigation, adaptation, cross-cutting activities, technology transfer and capacity-building,</p> <p>5.5. Information on the factors that providers of climate finance look for in evaluating proposals, in order to help to inform developing countries,</p>	<ul style="list-style-type: none"> • Article 9 • 12/CMA.1. types of information as provided in its annex 	<ul style="list-style-type: none"> • Biennial communication portal, 12/CMA.1.paragrah 6 • UNFCCC compilations and syntheses of the biennial communication, 12/CMA.1.paragrah 9 	Every two years, 12/CMA.1.paragrah 5		<ul style="list-style-type: none"> • Engage with the Party concerned 20/CMA.1, paragraph 30

<p>5.6.Information on the factors that providers of climate finance look for in evaluating proposals, in order to help to inform developing countries,</p> <p>5.7.Information on national circumstances and limitations relevant to the provision of ex ante information;</p> <p>5.8. Information on relevant methodologies and assumptions used to project levels of climate finance;</p> <p>5.9. Information on challenges and barriers encountered in the past, lessons learned, and measures taken to overcome them;</p> <p>5.10 . Information on how Parties are aiming to ensure a balance between adaptation and mitigation,</p> <p>5.11 . Information on action and plans to mobilise additional climate finance,</p> <p>5.12 . Information on how financial support effectively addresses the needs and priorities of developing country Parties</p>					
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	<p>5.13 Information on how support provided and mobilised is targeted at helping developing countries in their efforts to meet the long-term goals of the PA,</p> <p>5.14 . Information on efforts to integrate climate change considerations, including resilience, into their development support; and</p> <p>5.15 . Information on how support to be provided to developing country Parties enhances their capacities</p>					
6.	<p>Transparency of Action and Support</p> <p>6.1. Biennial transparency report,</p> <p>6.2. National Inventory report</p> <ul style="list-style-type: none"> • Description of national circumstances and institutional arrangements • General description of methodologies • Trends in greenhouse gas emissions and removals • Sectoral report- energy industrial process and product use, agriculture, land use land use change, waste and Other 	<ul style="list-style-type: none"> • Article 13 • 18/CMA.1, paragraph , 3 	<ul style="list-style-type: none"> • UNFCCC website 18/CMA.1, paragraph, 6 	<ul style="list-style-type: none"> • 2024, thereafter biennially 	<ul style="list-style-type: none"> • Submitted Biennial transparency report, or • Inventory reports, including all the mandatory requirements 	<ul style="list-style-type: none"> • Request for clarification of why the information has not been provided • Engage with the Party, and recommend the information to be included • Assist the Party to identify the challenge and possible solution (i.e., provision of finance and capacity support in accordance with the PA)

	<ul style="list-style-type: none"> • Common reporting tables for the electronic reporting of the information inventory • Common tabular formats for the electronic reporting of the information necessary to track progress made in implementing and achieving nationally determined contributions under Article 4 of the Paris Agreement- • Description of selected indicators, definitions needed to understand NDC, • Methodologies and accounting approaches, • Tracking progress made in implementing and achieving the NDC under Art 4 of the PA, and • Common tabular formats for the electronic reporting of the information on financial, technology development and transfer and capacity-building support provided and mobilised, as well as support needed and received, under Arts 9–11 of the PA. 					
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Table 8 Substantive Model: Level I Narrow Assessment

9.6 Substantive Model: Level II Assessment of Content and Implementation

The table above presented the level one assessment of the identified substantive obligations. The next step, level II assessment considers the content and implementation of the substantive obligations. The assessment involves a deeper examination of the fulfilment of obligations to include certain commitments and communications with information to track and measure implementation. It also compares the content of the NDCs with prior submissions made to check for the fulfilment of the obligation on progression. The assessment could also examine if specific parties with specific group obligations have complied with those specific obligations. The table below presents the six categories of substantive obligation.

	Paris Agreement Substantive Obligation	Legal basis	Source of information	Frequency	Comparison of the current NDCS with the subsequent NDCs	Initiation by the compliance mechanism where:	Measures and outcomes
1.	Communication of efforts	Article 3	<ul style="list-style-type: none"> • NDC registry Article 4.12 of the Paris Agreement, • 10/CMA.1., Modalities and procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement • UNFCCC synthesis report of NDCs 	Every five years Article 4.9	Progression over time on Article 4,7, 9, 10, 11, and 13	the progression is not reflected	Follow up and engage with the Party to recommend the communication of efforts
2.	Submission of NDCs	Article 4.2	<ul style="list-style-type: none"> • NDC registry Article 4.12 of the Paris Agreement, • 10/CMA.1., Modalities and procedures for the operation and use of a public registry referred to in 	Every five years Article 4.9	Progression and possible highest ambition reflecting common but differentiated responsibilities and respective capabilities	the progression and ambition is not reflected	Engage with the Party concerned 20/CMA.1, paragraph 30

			Article 7, paragraph 12, of the Paris Agreement				
			<ul style="list-style-type: none"> • UNFCCC synthesis report of NDCs 				
3.	<p>NDCs information</p> <p>3.1. Quantifiable information on the reference point</p> <p>3.2. Timeframes and/or periods for implementation</p> <p>3.3. Scope and coverage</p> <p>3.4. Planning process</p> <p>3.5. Methodological approaches</p> <p>3.6. Fairness and ambitions</p>	<ul style="list-style-type: none"> • Article 4.8 of the Paris Agreement • 4/CMA.1, paragraph 7 	<ul style="list-style-type: none"> • NDC registry Article 4.12 of the Paris Agreement, • 10/CMA.1., Modalities and procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement • UNFCCC synthesis report of NDCs 	Every five years Article 4.9	Information provided on all required information	Missing information or information that was excluded	<ul style="list-style-type: none"> • Request for clarification of why the information has not been provided • Engage with the Party, and recommend the information to be included • Assist the Party to identify the challenge and possible solution (i.e., provisions of finance and capacity support in accordance with the PA)

	3.7.NDCs contribution towards the objective of Article 2						
4.	Adaptation Communication, as 4.1. component or in conjunction with NDCs, or 4.2. national adaptation plan, or 4.3.other communications or documents, including national communication .	<ul style="list-style-type: none"> Article 7, paragraphs 10 and 11 9/CMA.1, paragraph 5 	<ul style="list-style-type: none"> NDCs registry, Article 12 of the Paris Agreement, and 9/CMA.1, paragraph 5. UNFCCC synthesis report of NDCs 	Every five years Article 4.9, 9/CMA.1 paragraph 6 (in time to inform the global stocktake in 2023, and every five years thereafter)			<ul style="list-style-type: none"> Request for clarification of why the information has not been provided Engage with the Party, and recommend the information to be included Assist the Party to identify the challenge and possible solution (i.e., provision of finance and capacity support in accordance with the PA)
5.	Finance communication 5.1.Enhanced information to increase clarity	<ul style="list-style-type: none"> Article 9 12/CMA.1. types of information 	<ul style="list-style-type: none"> Biennial communication portal, 12/CMA.1.paragraph 6 	Every two years, 12/CMA.1.paragraph 5	Progression by developed country Parties on climate finance	the progression is not reflected	<ul style="list-style-type: none"> Engage with the Party concerned 20/CMA.1, paragraph 30

	<p>on the projected levels of public financial resources to be provided to developing countries,</p> <p>5.2. Indicative quantitative and qualitative information on programmes, including projected levels, channels and instruments,</p> <p>5.3. Information on policies and priorities, including regions and geography, recipient countries, beneficiaries, targeted groups, sectors and gender responsiveness,</p>	<p>as provided in its annex</p>	<ul style="list-style-type: none"> • UNFCCC compilations and syntheses of the biennial communication, 12/CMA.1.paragrah 9 				
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	<p>5.4.Information on purposes and types of support: mitigation, adaptation, cross-cutting activities, technology transfer and capacity-building,</p> <p>5.5.Information on the factors that providers of climate finance look for in evaluating proposals, in order to help to inform developing countries,</p> <p>5.6.Information on the factors that providers of climate finance look for in evaluating proposals, in order to help to inform</p>						
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	<p>developing countries,</p> <p>5.7.Information on national circumstances and limitations relevant to the provision of ex ante information;</p> <p>5.8.Information on relevant methodologies and assumptions used to project levels of climate finance;</p> <p>5.9.Information on challenges and barriers encountered in the past, lessons learned, and measures taken to overcome them;</p> <p>5.10. Information on how Parties are aiming to ensure a</p>						
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	<p>balance between adaptation and mitigation,</p> <p>5.11. Information on action and plans to mobilise additional climate finance,</p> <p>5.12. Information on how financial support effectively addresses the needs and priorities of developing country Parties,</p> <p>5.13. Information on how support provided and mobilised is targeted at helping developing countries in their efforts to meet the long-term goals of</p>						
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	<p>the Paris Agreement,</p> <p>5.14. Information on efforts to integrate climate change considerations, including resilience, into their development support; and</p> <p>5.15. Information on how support to be provided to developing country Parties enhances their capacities</p>						
6.	<p>Transparency of Action and Support</p> <p>6.1. Biennial transparency report,</p> <p>6.2. National Inventory report</p> <ul style="list-style-type: none"> • Description of national circumstances and 	<ul style="list-style-type: none"> • Article 13 • 18/CMA.1, paragraph, 3 	<ul style="list-style-type: none"> • UNFCCC website 18/CMA.1, paragraph, 6 	<ul style="list-style-type: none"> • 2024, thereafter biennially 	<ul style="list-style-type: none"> • Assessment of the implementation of the NDCs • tracking of progress towards the NDC 	<ul style="list-style-type: none"> • If NDC of the Party was not implemented 	<ul style="list-style-type: none"> • Request for clarification of why the obligations was not met and recommend plan of action. • Assist the Party to identify the challenge and possible solution (i.e., provisions of

	<p>institutional arrangements</p> <ul style="list-style-type: none"> • General description of methodologies • Trends in greenhouse gas emissions and removals • Sectoral report-energy industrial process and product use, agriculture, land use land use change, waste and Other • Common reporting tables for the electronic reporting of the information inventory • Common tabular formats for the electronic reporting of the information 						<p>finance and capacity support in accordance with the PA)</p>
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	<p>necessary to track progress made in implementing and achieving nationally determined contributions under Article 4 of the Paris Agreement-</p> <ul style="list-style-type: none"> • Description of selected indicators, definitions needed to understand NDC, • Methodologies and accounting approaches, • Tracking progress made in implementing and achieving the NDC under Article 4 of the Paris Agreement, and • Common tabular formats 						
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	<p>for the electronic reporting of the information on financial, technology development and transfer and capacity-building support provided and mobilised, as well as support needed and received, under Articles 9–11 of the Paris Agreement.</p>						
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Table 9 Substantive Model: Level II Assessment of Content and Implementation

9.7. Substantive Model: Level III Assessment of Fairness

The previous section examined level II assessment which looks at the substantive obligations of Parties and their fulfilment in their NDCs. We have also considered the obligation related to progression and how it can be assessed in the Substantive Model. In this section, we consider level III, which takes us further to explore the submission of Parties related to the fairness of their contributions and their reflections on equity.

The fairness assessment under the Paris Agreement, as outlined in my Substantive Model, is likely to prove the most contentious. It seeks to measure whether a Party has taken the appropriate share of the climate action burden. In the negotiations in the years leading up to the conclusion of the Paris Agreement, disagreement on the fair share of developed and developing countries was one of the main reasons for the delay in reaching a new agreement.⁶⁰⁸

The fairness question is important because there is no clear formula to assign obligations to specific parties. The path chosen by the Paris Agreement is to allow countries to define their obligations based on a set of principles. The fairness criteria, in the end, are the accountability mechanism by which Parties can assess their own adherence to the principles set for the distribution of burdens. For example, principles such as historic responsibility, allowances for the developmental needs of developing countries, and capacity to take measures needed are all disciplines imposed on the self-assessment of what the duty of a party is in terms of its share of the global action.

The IPCC, in its AR5, introduced two potential frameworks for equitable burden-sharing that built on what is recognised as equity principles, i.e., responsibility, capacity, equality, and the right to development. The frameworks answer the question as to what the basic assumptions behind the distributional considerations are as applied to the contributions of climate action. What are we distributing? There are two answers to this question: a resources sharing framework that distributes a shared resource – in this case, a carbon budget or atmospheric space for emissions – or an effort sharing approach that distributes the obligation to reduce

⁶⁰⁸ Harald Winkler, Shaun Vorster, and Andrew Marquard, 'Who picks up the remainder? Mitigation in developed and developing countries' (2009) 9 *Climate Policy* 634.

emissions and respond to climate change among all Parties.⁶⁰⁹ When AR5 was written, the Paris Agreement was being negotiated, and the final outcomes of deliberations were not clear. The Paris Agreement fits better with the effort sharing framework in its final form. The nature of climate action incorporated in the Paris Agreement has increased in scope beyond what could be considered a distribution of a carbon budget. It includes adaptation action and provision of means of implementation as part of climate action required to address the problem of climate change. Particularly, considering the addition of finance in the obligations enshrined in the Agreement, the potential applicability of a climate resources sharing framework loses its appeal due to the absence of common resource that can be apportioned to prevent a race to the bottom depletion in the shape of a limited carbon space.

Fair share considerations for adaptation action present even more complicated challenges as the justice dimensions of adaptation are less understood and addressed in the fair share literature. The initial challenge with adaptation shares allocation is the lack of a goal, in the shape of, for example, the temperature goal, that can be used as a framework for efforts. This issue is being addressed in the negotiations through the Glasgow Sharm El Sheik Work Programme on the Global Goal on Adaptation.⁶¹⁰ Secondly, the indeterminacy of what adaptation needs there would be and when and where they would materialise, makes it difficult to assign fair shares to countries.⁶¹¹ The uncertainty involved, and the level of sacrifices expected from countries being high will be challenging. Thirdly, there is the nature of adaptation as a localised concern, as opposed to mitigation which needs to be addressed globally, and that will affect the engagement of parties in contributing to these efforts.⁶¹²

Donald Brown et al, for example propose a four-step process for governments to consider in ensuring NDCs comply with the legal requirements of the Paris Agreement: select a global warming target, identify a global carbon budget consistent with the warming target, determine the national fair share based on equity and CDDRRC, and specify the rate of their national

⁶⁰⁹ IPCC, Climate Change 2014: Synthesis Report, Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (R.K. Pachauri and L.A. Meyer (eds.) IPCC, 2014); (n33) 319.

⁶¹⁰ Decision 1/CMA.3 (n549).

⁶¹¹ Stephen H. Schneider and Janica Lane, 'Dangers and Thresholds in Climate Change and the Implications for Justice' in W. Neil Adger, Jouni Paavola, Saleemul Huq et.al. *Fairness in Adaptation to Climate Change* (MIT Press, 2006) 23.

⁶¹² Sverker C Jagers and Göran Duus-Otterström, 'Dual Climate Change Responsibility: on Moral Divergences between Mitigation and Adaptation' (2008) 17 *Environmental Politics* 576.

reduction on a net zero trajectory.⁶¹³ In this approach, it is implied that the equity principle tames the open-ended allowance for self-determining the content of the commitments in the NDCs (which they limit to mitigation action). It should be noted that this does not exclude other climate action including adaptation and provision of means of implementation for others. In any case, regardless of the nature of distribution – resources or efforts – determination of the fairness of such distribution needs to be considered. Equity principles can assist in providing the basis for which parties should take what share of the efforts towards addressing climate change.

The IPCC and the general literature on distribution of burdens recognise different principles and approaches to determine fair shares. Some are stand-alone principles that dictate the main consideration to determine fair share while others look at the aggregate result of multiple variables. Some approaches are rooted in distributive justice principles while others are pragmatic in their assessment looking at what would politically be expedient and acceptable. Some principles involve broader temporal and geographic considerations while others assume countries to be homogenous and can be assigned shares without such specific considerations. The main principles include responsibility, capacity, equality, and sustainable development or needs based principles. The following section will discuss these principles and their importance to the proposed Substantive Model of the Role of the Compliance Mechanism in promoting the achievement of equity and climate justice. These principles provide a conceptual framing for the understanding of parameters included in the different choices made by countries in terms of how they consider their contributions are fair and their reflections on equity.

The first principle to guide what the share of countries in the efforts against climate change is related to responsibility for the climate change problem. A legalistic approach links responsibility with the existence of a duty to act, in this case duty to reduce emissions, that was established under the 1992 FCCC. The essence of this argument is that without the obligation to act there could be no responsibility.⁶¹⁴ Here, a clear distinction must be made between moral responsibility and causal responsibility. The equity considerations and allocation of fair shares limit the responsibility debate to the level to which the country in question contributed to harmful emissions. The goal is not to assign moral culpability for climate change but to

⁶¹³ Donald A Brown, Hugh Breakey, Peter Burdon et. al. ‘A Four-Step Process for Formulating and Evaluating Legal Commitments under the Paris Agreement’ (2018) 2 Carbon and Climate Law Review 98.

⁶¹⁴ IPCC (n609) Report of WGI chapters 3 and 6.

acknowledge the contribution of emissions from countries to climate change and its consequences. This is a political point settled in the UNFCCC negotiations. The responsibility assessment considers the cumulative stock of historical, current, and projected emissions in line with the trajectory justified by the commitments undertaken by the country.

In establishing fair shares based on the responsibility principle, how far back the historic considerations go will alter the outcome of the calculation. One option could be to take the base years the party has chosen as a starting place. The other option is to consider when the issue of climate change started to be acknowledged as a problem. This puts the 1960s and 1970s as potential starting places.⁶¹⁵ Based on other criteria related to the impact of emissions, the time frame can even be pushed further back as current science has established that impacts of past emissions have continued to affect present and future climate. A point of concern related to time frames and establishment general historical responsibility, and specific responsibility of countries for emissions is whether a common reference period should be used for all Parties, or a custom reference point needs to be tailored for individual assessments. Due to the uniqueness of the historical emissions profiles of countries, it might be useful to assess overall contribution of Parties to global emissions as far back as possible.

The next principle, capacity, refers to the economic ability to provide the necessary resources for climate action. It takes into account the specific circumstances of the country in terms of economic and social development needs. A fair share distribution of efforts based on the capacity principle expects more capable countries to take more of the burden to reduce emissions and support adaptation as well as providing means of implementation for others that require the assistance. The ability indicators are multidimensional, and besides the financial and economic resources, they include technological, institutional, and human capacity for climate action.⁶¹⁶

The capacity principle provides a normative basis for allocating obligations that is different from the economic consideration -in a Pareto sense- of where the best opportunities for climate action are available. The latter relates more to the concept of mitigation potential – cost effectiveness in determining where mitigation action should take place and the availability of

⁶¹⁵ Eric A Posner, and Cass R. Sunstein 'Climate Change Justice.' (2007) 96 Georgetown Law Journal 1565.

⁶¹⁶Harald Winkler, Thapelo Letete, and Andrew Marquard, 'Equitable Access to Sustainable Development: Operationalising Key Criteria' (2007)13 Climate Policy 411.

techno economic opportunities for reducing emissions afforded by the resources made available.⁶¹⁷

Thirdly, equality is the other guiding principle for allocation of fair shares of climate action. It is based in the basic assumption that all countries have an equal claim in the global carbon budget described in terms of the right to emit or right to benefit from the right to emit. This principle can also serve as a starting point for sustainable development claims by countries that have low historical emission contributions but want to keep their options open to pursue development pathways that may lead them to increase their emissions. However, it does not follow from the equality principle that all countries have equal rights to emit in real terms.⁶¹⁸ The equality principle requires equal sacrifices by Parties and differences in the level of sacrifices will be based on, other dimensions being equal, the level of responsibility and capacity. This means that more responsibility or more capacity would result in more obligation.⁶¹⁹

Fourthly, a general needs-focused principle mainly presented as part of the right to development is the other approach to establish fair shares. This principle is built on the assumption of supremacy of some basic needs and concerns over the obligation to take climate related measures. Some countries face current crises that leave them without basic necessities and asking them to prioritise climate action is unjust. Further extended right to development arguments can also be used to allow for more carbon budget for poorer countries that need to develop and hence less or no climate action burden taken by these countries.

Finally, Jagers and Duud-Otterstrom argue that due to the dissimilarity in the nature of the justice concerns in adaptation and mitigation action, the responsibility-based Polluter Pays Principle should be applied to allocation of mitigation shares while the capacity-based Ability to Pay principle should be used for adaptation action burden allocation.⁶²⁰

The principles discussed here are not the only ones used for justification of allocation of efforts for climate change. An important note here is the role of the application and role of the principle

⁶¹⁷ IPCC (n609) 319.

⁶¹⁸ Simon Caney, 'Justice and the Distribution of Greenhouse Gas Emissions' (2009) 5 *Journal of Global Ethics* 125.

⁶¹⁹ IPCC (n609)

⁶²⁰ Jagers and Duus-Otterström (n612).

of equity itself in the Paris Agreement. The potential legal and interpretational implications of the general equity principle has been discussed in Chapter Seven above. Other principles, particularly those relied on by Parties in their NDCs will be discussed in the next chapter on the Integrated Model. It is necessary to note that the principles above are usually applied together in different frameworks. The prominent ones are presented in the section below. These frameworks have tried to apply the principles in practical assessment of fairness and equity considerations in countries' climate action.

9.7.1. Previous Attempts to Systematically Assess Fair Shares

Prior to the coming into effect of the Paris Agreement, the distribution of obligations among Parties was generally addressed by the bifurcation created by the UNFCCC and then continued with strengthened clear differentiation criteria and lists in the Kyoto Protocol. Developed and developing countries had group targets to work towards and their share was arguably supported by the responsibility and ability to act principles which have long been part of international environmental law.⁶²¹ However, Parties, particularly Annex I countries, had grown wary of the one-sided burden created by the Protocol and wanted to negotiate other ways of allocating burdens, which led to the negotiation and coming in to effect of the bottom-up, self-assessed, contributions-based Paris Agreement. In the process of negotiation, nonetheless, the issue of allocation of fair shares was a key area of disagreement.⁶²² In COP13 negotiations in Bali, developed countries argued that some non-Annex I parties have become more responsible and that they need to take more contributions towards the global efforts. In this debate, a fact box from the IPCC's Fourth Assessment Report, also called the 'Bali Box' became important.⁶²³ Another attempt outside the negotiation process of the UNFCCC to assess the fairness of shares of climate action is the work of the Climate Equity Reference Project (CERP).⁶²⁴

The IPCC, in its attempt to illustrate what the responsibility of countries for mitigation action to keep temperature increase to 2 degrees Celsius would look like, quantified the group shares of Annex I and Non-Annex I for the period up to 2020. These numbers stated that developed

⁶²¹ Lavanya Rajamani, Louise Jeffery, Niklas Hohne et. al., 'National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law' (2021) 21 *Climate Policy* 985.

⁶²² Harald Winkler, Shaun Vorster, and Andrew Marquard (n608).

⁶²³ IPCC Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (Pachauri, R.K and Reisinger, A. (eds.) IPCC, 2007) 776

⁶²⁴ See <https://climateequityreference.org/>

countries needed to reduce emissions by 25-40% while developing countries should reduce emissions from a baseline of their choosing but with no specific percentage rate.⁶²⁵ The Bali Box provided a science-based reference and a fixed point from which specific commitments could be established for Annex I Parties.⁶²⁶ The Bali Box should be considered with the recognition of its hybrid nature as an “assemblage of science, political considerations and moral judgement.”⁶²⁷ In a follow up to the Bali Box, a paper by the IPCC authors elaborated on the substantive deviation required from baseline required from Non Annex I countries which stood at reduction rates between 15-30% with deviations among countries.⁶²⁸ This quantification, however, resulted in the withdrawal of support from developing country groups, including the G77, for the Bali Box as a fixed point.⁶²⁹

The CERP and the Civil Society Equity Review which utilised the methodology and assessment of the CERP, examine the equity and fairness implications of the self-assessed contributions of Parties to the Paris Agreement. The CERP assessment goes further than looking at the submitted reflections of Parties on the equity and fairness of their climate action. The Civil Society Equity Review report was published in the lead up to COP21 in Paris.⁶³⁰ This report added to the politicization of the fair share allocation of climate action, with developing country groups welcoming the finding of the report that adjudged the contribution of developed country Parties in the INDCs as unfair while generally viewing the contributions from developing countries including large emitters as fair.⁶³¹ Developed country groups were not happy that the report solely laid the duty to take ambitious commitments at their feet.

⁶²⁵ *ibid.*

⁶²⁶ Winkler, Vorster, and Marquard (n608).

⁶²⁷ Bård Lahn, and Göran Sundqvist, ‘Science as a “Fixed Point”? Quantification and Boundary Objects in International Climate Politics’ (2017) 67 *Environmental Science and Policy* 8.

⁶²⁸ Michel Den Elzen and Niklas Höhne, ‘Reductions of Greenhouse Gas Emissions in Annex I and non-Annex I Countries for Meeting Concentration Stabilisation Targets’ (2008) 91 *Climatic Change* 249.

⁶²⁹ Bård Lahn, ‘In the Light of Equity and Science: Scientific Expertise and Climate Justice After Paris’ (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 29.

⁶³⁰ ActionAid, APMDD, CAN South Asia et al., ‘Fair Shares: A Civil Society Equity Review of INDCs Report (November 2015), available at

<https://static1.squarespace.com/static/620ef5326bbf2d7627553dbf/t/622827f61f2e1746062ebec6/16467988566/16/CSO.Equity.Review--2015--Fair.Shares.A.Civil.Society.Equity.Review.of.INDCs.pdf> accessed on 7 May 2022.

⁶³¹ *ibid.*

The methodology for the assessment is what is called the Climate Equity Reference Framework which develops the work of the Greenhouse Development Rights equity framework.⁶³² The framework constructs what it calls the responsibility-capacity-indicator (RCI) from the combined responsibility and capacity assessment expressed as a percentage of the global total.⁶³³ Three of the four principles identified by the IPCC, responsibility, capacity, and sustainable development are included expressly in this framework while the fourth, equity, is relied upon in its application requiring equal sacrifices.

For the calculation of responsibility, the framework historical emission contributions from the country are considered. For capacity, the choice is made to rely on GDP as a proxy for capacity as it is correlated to other indicators for capacity and the data for it is readily available in most cases. The assessment in this framework also accounts for inequality levels between and within countries in their responsibility and capacity calculations. Countries with similar average per-capita income and emissions might have different capacity and responsibility levels depending on the level of inequality in the countries. Countries with high inequality would assume lesser responsibility and are going to have lesser capacity.⁶³⁴

The Climate Action Tracker (CAT) fair share analysis is based on a “fair share range” constructed from the fairness estimates from literature utilizing different parameters broadly in line with the IPCC principles or a combination of them.⁶³⁵ The studies that form the basis for the constructed estimates can be categorised in clusters that rely on different principles of fair share distribution including: responsibility determined by the level of the country’s historical emissions; capability/need expressed by GDP/capita or Human Development Index; equality expressed as convergence of per capita emissions for all countries; equal cumulative per capita emissions; responsibility/capability/need, capability/cost which measures mitigation potential and capability; and staged approaches where countries take differentiated commitments in

⁶³² Christian Holz, Sivan Kartha, and Tom Athanasiou, ‘Fairly Sharing 1.5: National Fair Shares of a 1.5 C-Compliant Global Mitigation Effort’ (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 117; See also, Paul Baer, Sivan Kartha, Tom Athanasiou, et.al., ‘the Greenhouse Development Rights Framework: Drawing Attention to Inequality within Nations in the Global Climate Policy Debate’ (2009) 40 *Development and Change* 1121; Tom Athanasiou, Sivan Kartha, and Paul Baer, “National Fair Shares.” *The Mitigation Gap—Domestic Action and International Support*. (2014) available at <http://www.ecoequity.org/wp-content/uploads/2014/11/National-fair-shares.pdf>

⁶³³ Holz, Kartha, and Athanasiou (n632) 121; Christian Holz, Eric Kemp-Benedict, Tom Athanasiou et. al., ‘The Climate Equity Reference Calculator’ (2019) 4 *Journal of Open Source Software* 1273.

⁶³⁴ Holz, Kartha, and Athanasiou (n632) 122-123.

⁶³⁵ <https://climateactiontracker.org/methodology/cat-rating-methodology/fair-share/>.

various stages.⁶³⁶ The model uses the results found on the fair share of a particular country based on the different principles and constructs a range of fair share contributions of the country. Countries are then scored on their commitments on the scale.

9.7.2. What Role can the Compliance Mechanism Play in this Model?

In the previous section I have examined a range of practical approaches to determining fair shares and application of the equity principle adopted by a range of organizations, both formal institutional and civil society groups like Climate Action Tracker. We now consider what role the Compliance Mechanism of the Paris Agreement can play in performing a similar assessment. I propose a Substantive Model for the Mechanism can accommodate such a role. The Substantive Model of the Compliance Mechanism considers fairness based on an objective set of principles to assess the fairness of climate action. This model presents a different approach to assessment based on the criteria the parties identified for themselves – the latter will be presented in the next chapter on the Integrated Model. In the Substantive model the fact that a particular Party, in its NDC, has identified any principle, principles or no principles, for its fairness considerations would not preclude the work of the Compliance Mechanism. However, the choice by Parties to recognise a principle or principles might strengthen the case of the Mechanism in determining compliance with fairness obligations by providing a sort of *Opinio Juris*.⁶³⁷ A principle's status as an objective criteria of equity, fairness and climate justice would be helped if Parties tend to coalesce around some version of the said principle more than others. The utilization of a particular principle in NDCs can also lend legitimacy to the acceptance of the principle as a parameter for assessment of fairness.

It is possible to make the case here that the procedural requirements discussed in the previous chapter could help in internalising the accountability for ensuring fairness of climate actions into the domestic system through the process of NDC design. However, the assertion that distributional issues at the core of differences of party positions in climate negotiations have been handled sufficiently by a bottom-up mechanism which allows parties to determine their fair share neglects the importance of the obligation that asks Parties to include fairness and equity considerations for their share of climate action.⁶³⁸ The Paris Agreement, by demanding

⁶³⁶ *ibid.*

⁶³⁷ Rajamani, Jeffery, Hohne et. al. (n621) 986.

⁶³⁸ Decision4/CMA.1 (n222).

that parties account for the fairness of their actions flips the burden of ensuring equity to the Party offering its commitments. The general framework of international law, specific treaty developments including the UNFCCC, its Kyoto Protocol and the Paris Agreement are all essential in the understanding of Parties as to what their obligations are in terms of ensuring such fairness.

There is a basic set of shared ethical premises and precedents that apply to the climate problem that can facilitate impartial reasoning that can help put bounds on the plausible interpretations of 'equity' in the burden sharing context. Even in the absence of a formal, globally agreed burden sharing framework, such principles are important in establishing expectations of what may be reasonably required of different actors.⁶³⁹

Because of the existence of such basic principles that have been developed in general international law, international environmental law and the climate change regime itself, the case can be made that there is a minimum standard that needs to be met by any fairness claim in communications submitted as part of the PA commitments. The importance of these principles as explanatory tools and as the basis for the organizing principle of international cooperative action on environmental issues needs to be understood. The cumulative consideration of these fundamental principles lays the foundation of the internal logic of the climate change regime as a subset of international environmental law.

As discussed above, through the examples of the CERP assessment, CAT, and the Civil Society Equity Review, it is possible to make quantified assessments in a practical manner that can produce at least indicative determinations as to the fairness of a country's climate action. However, these determinations have contributed to the heating up of contestation in the negotiation as well as implementation of climate related measures. These assessments are done to an extent, outside process that involves the countries themselves, and their political viability is limited in garnering more support. Although these kinds of exercises are useful in building narratives around the essential role of fairness considerations and serving as advocacy tools to push laggard countries to make their fair share contributions, they cannot replace a formal mechanism of comprehensive accountability built around well-defined institutional and

⁶³⁹ IPCC 2014 (n609) WGI, Chapter 4, 317-318.

normative parameters. The compliance mechanism of the Paris Agreement and the committee can provide such a framework in the substantive model.

It is important to recall here the nature of the Mechanism as a facilitative process that aims to encourage compliance and not to punish non-compliance. In this role, the compliance mechanism functions, in part, as an adjudicative body dealing with constitutional matters in generality as opposed to granular consideration of nuances in specific theories. The more worthwhile and productive contribution of the compliance mechanism will be to identify some guiding principles Parties can use to make sure they are complying with the fairness expectations of the Agreement. In the substantive model, therefore, the Compliance Committee could develop a set of minimum set of standards that the Parties need to take into account, without deciding which particular principle needs to be applied. These minimum standards should go beyond the general equity principle, and consideration of the national circumstances of countries. A check list of considerations that includes the main principles of assigning fair shares – responsibility, capacity and needs expressed in terms of the right of development for countries can serve such a purpose. A principle-based reference framework for assessment of fairness of climate action based on accepted core principles can facilitate compliance of parties with their overall climate action responsibilities and specific equity obligations.

In its assessment in the substantive model, the Compliance Committee would engage further with a country that submits its commitments including its reflections on the fairness of the commitments relying on the general principle of equity. The equity principle itself does not have a clear meaning to dictate what content is fair or not. Since the system is not adversarial, there is an opportunity for an iterative process of engagement on compliance with fairness clarifications requested from the Party concerned. Such an engagement could only be possible in a model that would assume the compliance mechanism can engage in substantive assessment of the content of the commitments submitted by Parties. The Procedural model for example will stop at checking whether a reflection on equity and fairness considerations are communicated without going into the content of the submission. There are, however, minimum standards of what is meant by a fair share of climate action inferred from the different principles recognised by the founding principles of cooperation on climate change and, at minimum, Parties should account for a general consideration of these principles in determining their shares.

The compliance mechanism can also host a Facilitative Multilateral Consultation Process (FMCP)⁶⁴⁰ type approach where countries can engage with each other on the fairness of their climate action. Such a FMCP would create an accountability mechanism and a space for exploring ways to improve burden sharing arrangements in the Agreement.

A larger consideration for the assessment of fairness is to what extent a Party is contributing to the fulfilment of the overall objective of the treaty in question. The failure to meet the collective target of the Agreement, which seeks to limit the global temperature rise to under 1.5 degrees Celsius will nullify any claim that the share assumed by the party is fair or not. Fairness is also a function of what is negotiated in the Agreement. The differentiations settled in the creation of different obligations for countries should be upheld in their compliance and implementation. By not fulfilling its full range obligation, a party fails to achieve its fairness duties under the Agreement.

9.7. Conclusion

In this chapter, the Thesis has presented a potential substantive model of compliance to promote equity and climate justice. In the model, three levels of assessment are suggested for the different types of substantive obligations envisaged by the Paris Agreement. The initial consideration of the Compliance Mechanism in its level I assessment under the model should focus on what closely resembles a procedural check of the inclusion of information on the elements required in NDCs. In the Substantive Model, however, the role of the Mechanism will need to go beyond checking procedural requirements with the first level serving as the entry level process. It could utilise a check list tailored to the specific type of the Party under consideration, the nature of the obligation associated with that particular Party, and source of information required. The assessment will consider whether the Party has included the specifically required content in its NDCs. The next consideration follows in level II assessment that assesses the content and implementation of the obligations identified. The assessment involves a deeper examination of the fulfilment of obligations to include certain commitments and communications with information to track and measure implementation. In the third level, the Compliance Mechanism will engage in an even deeper consideration of the content of commitments under the Paris Agreement in the form of assessment of the fairness of the contribution measured against objective standards. I have argued in Chapter Eight, that the

⁶⁴⁰ Decision 18/CMA.1 para 189.

achievement of equity and climate justice through the Compliance Mechanism should consider both the role of the Mechanism in overall compliance and the specific compliance with equity requirements of the Paris Agreement. Level III assessment presented what the specific equity compliance would look like in my proposed substantive model.

The proposed model has presented a role for the Compliance Mechanism that could help it contribute to the achievement of equity and climate justice in the regime. However, there may be some reservations as to the political feasibility and institutional and procedural accommodativeness of the Mechanism to such a model. The challenge will be particularly stronger in connection with the third level assessment that attempts to make the case for an objective assessment of fairness and equity although lighter touch versions limited to levels I and II should be less objectionable. It is also important to note the level of flexibility negotiated into the Paris Agreement that allows Parties to define the parameters and assessment of the fairness of their contributions. It is possible to argue that it is this bottom-up approach of equity and fairness assessment which has to be promoted as consistent with the overall architecture of the Paris Agreement based on self-determined set of obligations. The idea of assessing equity based on the criteria created by the Party itself may solve the objections associated with utilising objective criteria, as proposed in level III of the substantive model, to assess equity and fairness. The following chapter will explore the integrated model which will be adaptive in its application and emphasise the parameters for equity assessment set by the Parties themselves.

Chapter 10 Integrated Model for the Compliance Mechanism of the Paris Agreement

The Compliance Mechanism, in its mandated task to facilitate and promote compliance, is one of the ways the Paris Agreement ensures Parties take the appropriate action in pursuit of its overall goals. In the preceding two chapters, this Thesis has presented two proposed alternatives for the role of the Compliance Mechanism of the Paris Agreement. In the procedural model, the case was made that the Paris Agreement imposes primarily procedural obligations which require the Compliance Mechanism to assess these accordingly. The communication of NDCs encompassing the pledges of Parties for climate action is at the core of these procedural obligations emanating from the Paris Agreement. In the substantive model, the role of the Compliance Mechanism is expanded to build a more comprehensive assessment in three levels. While the first level resembles the checks in the ‘procedural model’, the second level involves a deeper consideration of the content of the communications made in response to the legal mandates of the Paris Agreement. The third level takes a closer look at the specific issue of substantive equity and fairness and proposes an assessment based on *objective* standards.

In this chapter I will present the third and final ‘Integrated Model’ for the Compliance Mechanism of the Paris Agreement. The model will present an integrated approach for the role of the Compliance Mechanism in assessing fairness and equity. The model will continue with the framework created in the ‘substantive model’ that envisaged three levels of assessment to ensure Parties are complying with their obligations under the Paris Agreement, including of course the third level objective equity and fairness assessment mentioned above. What differentiates this integrated model from the previous ones is that it combines the roles described in the two previous models with an equity/fairness assessment based on *subjective* equity criteria that are set by the Party concerned in its NDCs and other mandatory communications. The integrated model is adaptive in its application and allows for differentiated procedural and substantive considerations based on the criteria and parameters set by the Party under assessment.

This Chapter has three main sections. The first section starts by setting the scene for what the bottom-up architecture of the Paris Agreement means for compliance, equity, and fairness considerations. It argues that the integrated model, with both procedural and substantive components coupled with a subjective equity and fairness assessment based on parameters set

by the Parties themselves, has merits in ensuring compliance and contributing to the achievement of equity and climate justice. The second section will present the three levels of assessments in the integrated model. The final section deals with the role of the Compliance Mechanism in handling systemic issues arising from large scale noncompliance.

10.1. Compliance, Equity and Fairness in a Bottom-Up Architecture

Since fairness and equity are designed into the architecture of the Agreement, the implementation of the Agreement and compliance of Parties will itself contribute to the achievement of equity and climate justice.⁶⁴¹ There are two layers of fairness and equity considerations in the Paris Agreement. The first layer is built into the general rules that dictate the framework within which Parties commit and implement their own contributions to climate action. The second layer is found in the individual commitments that are expected to conform to the principles of equity and fairness as defined by Parties themselves. The overall approach of the Agreement to differentiate between Parties in their obligations and how they need to implement them is an indicator of equity and fairness. These general differentiations are expressed in terms of different communication requirements, different contents for the communications submitted, different time frames, and other flexibilities in favor of developing countries.⁶⁴² In the second layer of equity and fairness considerations, Parties are asked to reflect on the fairness of their contributions to the global effort in their NDCs.

The models being proposed in this Thesis present options as to how the Compliance Mechanism can check for compliance with the general expectations of the Agreement including equity and justice-based ones. The procedural and substantive models have shown how the Compliance Mechanism can perform checks to ensure Parties are complying with the overall differentiated obligations as well as their own commitments communicated through their NDCs and other mandatory communications. The strength of the Procedural Model lies in its compatibility with current expectations of the role of the Compliance Mechanism and its political feasibility, given the less intrusive nature of the scrutiny to be applied by the Compliance Committee under that model. However, this restraint may come at the expense of better compliance, the effectiveness of the regime, and a fairer and more equitable handling of

⁶⁴¹ See Nicholas Chan (n446).

⁶⁴² Paris Agreement (n12) Articles 4(4), 9, and 13; see also Christina Voigt and Felipe Ferreira 'Differentiation in the Paris agreement' (2016) 6 *Climate Law* 58.

the climate change problem. The nature of the Compliance Mechanism as a facilitative and non-punitive system might compound the weakness of the assessment it performs on the compliance of Parties. At the other end of the spectrum, a substantive assessment in the Substantive Model of compliance in terms of equity and fairness might be too intrusive to garner the political support it needs to be accepted. However, by introducing minimum standards of equity and fairness considerations in its level III assessment as well as by ensuring the strict substantive application of the differentiated obligations in the Agreement, the Substantive Model would do more to ensure equity and fairness in the regime. The additional contribution of the Substantive Model is its suitability for checking if differentiated obligations in terms of the reporting and communication obligations are met properly, thereby promoting equity and fairness.

The Integrated Model proposes an approach that builds on the strengths of the two models to allow the Compliance Mechanism to contribute to the achievement of equity and climate justice. The Integrated Model picks up the assessment of equity and fairness of contribution of Parties by scrutinizing their own claims as opposed to objective criteria of minimum standards of equity and fairness proposed by the ‘substantive model’. This approach would alleviate some of the political misgivings associated with imposition of criteria that might not be in line with the self-determined parameters of equity and fairness.

The focus on the criteria for equity and fairness set by the Party itself is consistent with the bottom-up logic of the Agreement, and it means that this thinking would carry through to the work of the Compliance Committee. In essence, this model proposes a Compliance Mechanism that would shape its assessment on a case-by-case basis depending on which Party it is considering and what that Party has identified as fairness and equity parameters. This is also in line with the thinking of the Compliance Mechanism as a facilitative process to help countries comply with the Agreement. The Compliance Mechanism adapts itself to the circumstances of the Party under consideration and establishes how it should facilitate compliance depending on the precise nature of the commitments spelled out in the relevant NDC and their expressed consideration of equity and fairness. The assessments that follow will depend on the equity and fairness criteria employed by the Party. For example, a party that has claimed fairness on the ground of the volume of its emissions will open the door to be challenged on its emissions claims. Similarly, arguments based on progression will call for scrutiny of progression claims by the Party.

The effectiveness of the Compliance Mechanism and success in overall compliance with the Agreement will depend on different factors, among which legitimacy is an important one. As discussed in Chapter 5 the potential of compliance increases with an increased sense of legitimacy of the system. The legitimacy of the climate change regime can be helped by the bottom-up definition of equity and fairness parameters which in turn can cultivate a fairness perception by Parties and the wider stakeholders in climate action.⁶⁴³ Similarly, the centrality of Parties' own fairness standards addresses the problem identified by the managerial theory of compliance that suggests noncompliance comes from lack of clarity of the rules and availability of resources for implementation. Although resources for implementation is a systemic matter and is a substantive part of the obligations under the climate change regime, the clarity issue will be served better by self-definition of commitments and parameters for measuring equity and fairness.

By shifting the burden to prove fairness to the Party claiming to have contributed a fair amount, the Paris Agreement created an accountability system that pits the Party against its own perceptions of equity and fairness. In an ideal world, the parameters of equity and fairness set by Parties will be subject to domestic scrutiny by different constituencies in the process of designing and planning the NDC. International benchmarking and comparability would be enhanced in a scenario where participatory processes produce the equity and fairness standards. This process might create a space for solidarity and further enhancement of equity considerations in subsequent NDCs. The possibility and guidance given from the Parties for such a domestic process is also discussed in the Procedural Model in Chapter Eight.

For clearly stipulated actions and obligations, there are procedures for the Compliance Committee to work towards. However, fluid concepts and obligations such as equity can be difficult to assess through the normal process. The question here is: what is the role of the Compliance Committee in ensuring equity and climate justice within a bottom-up definition of fairness and equity? If the Agreement only mandates information on how the Party considers its action to be fair, is there a place for challenging the assumptions and parameters set by the

⁶⁴³ Carlarne and Colavecchio (n475)107.

country? How can we ensure countries make their fair share contribution to all the goals of the Paris Agreement within a system that lets them decide what it means to be fair?

10.2. Three Levels of Compliance Assessments in the ‘Integrated Model’

The ‘integrated model’ for the Compliance Mechanism of the Paris Agreement sees the role of the Mechanism as requiring assessments that involves both procedural and substantive elements. The assessment needs to also reflect the bottom-up architecture of the Agreement and the importance of self-defined commitments and parameters of assessment. Therefore, continuing with the framework of three levels of assessment presented in the ‘substantive model’, the ‘integrated model’ will propose a similar three-tiered analysis. The first level will be a procedural assessment exercise followed by the second level which looks at compliance with the substantive elements of the legal requirements. This section will recap the findings of Chapter Eight and Chapter Nine, related to the proposed Procedural Model and Substantive Model respectively. It will also summarise the findings of the Chapters, including the legal obligations under the Paris Agreement, the proposed procedures for the models and their possible measures and outcomes for contributing to the achievement of equity and climate justice. The third level is dedicated to an assessment of equity and fairness of the contributions made by the Party. This assessment will be based on the equity and fairness parameters identified by the Party itself in its NDC.

10.2.1. Level One: Procedural Assessment of Compliance

Chapter Eight discussed the ‘procedural model’ for the Compliance Mechanism and its role for achieving equity and climate justice. It presented the procedural obligations under the Paris Agreement and argued that the Parties’ compliance with the procedural obligations contributes at a basic level to the achievement of equity and climate justice. In addition, the Chapter proposed a checklist for the ‘procedural model’ and described the initiation procedure and the possible measures of the model for non-compliance with a view to contributing to the achievement of equity and climate justice.

The Chapter concluded the non-compliance with one or all of the procedural obligations of the Paris Agreement could lead to ineffective implementation, thereby challenging the achievement of equity and climate justice. The Procedural Model is designed to enable the

Compliance Mechanism to assess the procedural communication of efforts on mitigation, adaptation, finance, and transparency action and support in accordance with the Paris Agreement and its decisions and thereby avoid the ineffective implementation and equity and climate justice issues that it creates.

As noted in Chapter Eight, the procedural obligations in the Paris Agreement include Article 3, which sets an obligation on all Parties to undertake and communicate their efforts in accordance with Article 4, 7, 9, 10, 11 and 13 of the Agreement. The ‘procedural model’ would assess if all Parties have communicated their efforts as obligated through the defined procedure for triggering of the Compliance Mechanism and would engage with the Party to identify measures to address the non-compliance. The second main procedural obligation identified in Chapter Eight was the obligation on all Parties to prepare, communicate and maintain successive NDC as provided in Article 4(2) of the Agreement. On the basis of this procedural obligation and the requirements of communicating NDC every five years,⁶⁴⁴ the ‘Procedural model’ proposed the Compliance Mechanism would go through the NDC registry to check if all Parties have submitted their NDCs in accordance with the timeline agreed by the Agreement and its decisions.⁶⁴⁵

The other procedural obligation is set by Article 7(10) of the Agreement on adaptation communications. It sets out that all Parties should submit and shall update their communication periodically in line with the flexibility provided on the type of document used for the communication. The flexibilities cater for the differentiated responsibilities and capabilities of Parties. As discussed in Chapter Eight, the adaptation communication can be submitted as a component of NDCs as referred to in Article 4 (2), national adaptation plan, national communication and adaptation undertaking.⁶⁴⁶ The Procedural Model would assess if all Parties have communicated their adaptation efforts in accordance with the timeline decisions of their communication document.⁶⁴⁷ As discussed, if the adaptation communication is provided as a component of NDCs, then it should be submitted every five years or, if the

⁶⁴⁴ Paris Agreement (n12) Article 4(9).

⁶⁴⁵ <<https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>> NDC registry 194 Parties have submitted their first NDCs, and 14 have submitted their second NDCs

⁶⁴⁶ Paris Agreement (n12) Article 4(11).

⁶⁴⁷ <<https://unfccc.int/topics/adaptation-and-resilience/workstreams/adaptation-communications>> (adaptation communication).

communication is a national communication, every four years.⁶⁴⁸ The Compliance Mechanism and its Committee, as presented in Chapter Six, has four triggering and initiation processes, and the Compliance Committee under its current mandate does not assess submissions of adaptation communications.⁶⁴⁹ The Procedural Model, using the proposed procedures in Chapter Eight for the process of triggering of the consideration of the Compliance Mechanism and the measures it can take, will address the cause of non-compliance if a Party has not submitted its adaptation communication, and contribute to the achievement of equity and justice by ensuring the fulfilment of the procedural obligation of the Agreement.

Article 9 (5) of the Paris Agreement, sets a procedural obligation on developed country Parties of communicating climate finance that has been provided to developing countries. It requires developed country Parties to submit a biennial communication of indicative quantitative and qualitative information on climate finance, and the decision of the Paris Agreement requested the submission of the finance communication starting in 2020 and every two years thereafter.⁶⁵⁰ The sources of information for the Procedural Model is the finance communications registry,⁶⁵¹ and through its procedure will assess and follow up on non-compliance by a developed country Party.

Lastly, the report requirements under Article 13 of the Paris Agreement also set procedural obligations on Parties. It requires Parties to submit their national inventory reports of anthropogenic emission by sources and removals by sinks of greenhouse gases, and information to track progress made in implementing and achieving of their NDCs.⁶⁵² The Paris Agreement decision on the implementation of Article 13, as discussed in Chapter Eight, requires Parties to submit their first biennial transparency report, including the above required report and information, by December 2024.⁶⁵³ The Procedural Model proposed will assess if all Parties have submitted their biennial transparency report in accordance with the flexibility provided to developing countries on scope, frequency, and level of detail of reporting. The model proposed procedures and measures in case of non-compliance, from requesting the

⁶⁴⁸ Decision 9/CP.16. National communication from Parties included in Annex I to the Convention, (March 2011). FCCC/CP/2010/7/Add.2

⁶⁴⁹ Decision 20/CMA.1, para 22 (a) (i) – (iv).

⁶⁵⁰ Decision 12/CMA.1, para 4.

⁶⁵¹ <https://unfccc.int/Art.9.5-biennial-communications>.

⁶⁵² Paris Agreement (n12) Article 13(7).

⁶⁵³ Decision 18/CMA.1, para 3.

communication of the reports to assisting developing country Parties to fulfil the procedural obligation set in Article 13.

10.2.2. Level Two: Substantive Assessment of Compliance

The substantive obligations of the Paris Agreement are discussed in detail in Chapter Nine. As the ‘integrated model’ proposes combining the ‘substantive model’ with the ‘procedural model’, this section will present a summary of the findings of Chapter Nine. The proposed ‘substantive model’ assesses and reviews the substantive content of the communications, including the implementation of the communications. The ‘substantive model’ proposes three levels of assessment that I have called narrow assessment, assessment of content and implementation and assessment of fairness.

As discussed in Chapter Nine, the Substantive Model goes beyond the procedural check of the Procedural Model and assesses the inclusion of the required information when communicating NDCs as mandated in Article 4(2); and in the narrow assessment I have presented all the required information when communicating NDCs in accordance with the Paris Agreement and its decisions. Furthermore, the substantive progression in the successive NDCs communication as required to ‘progress over time’ in Article 3 of the Paris Agreement, is assessed by the Substantive Model in its assessment of content and implementation by comparing the content of the successive NDCs with the current NDCs of the Party. The assessment of fairness is linked to Article 4 (4), which sets bifurcated substantive obligations on developed country Parties to take economy-wide absolute emission reduction targets and developing country Parties to enhance their mitigation actions and progress towards emission reduction or limitation targets in light of the different national circumstances. The Substantive Model will review and assess both the information of the communication, and progression in case of subsequent submission of NDCs. In cases of non-compliance, the procedures presented in Chapter Nine will trigger their work and follow up with the Party in question for facilitating compliance to contribute to the achievement of equity and climate justice.

The Paris Agreement on adaptation sets an obligation to communicate adaptation efforts and requires Parties to engage in adaptation planning and the implementation of adaptation

action.⁶⁵⁴ Further guidance on the content of the upfront information for adaptation communication was agreed in Decision 9/CMA.1. The Substantive Model will assess if all Parties have communicated their adaptation communication in accordance with the obligations. The Substantive Model's narrow assessment, in level one, will assess if all have communicated their adaptation communication, while in level II, the assessment of content and implementation will assess the content of the communication with the guidance of 9/CMA.1 and its implementation. It will also assess progression of efforts on adaptation by Parties. Level III assessment of adaptation contributions in the Integrated Model would depend on whether adaptation consideration is called for by the equity and fairness claims of the Party concerned.

In Article 9 the Paris Agreement sets an obligation on developed country Parties to provide finance, and to biennially communicate indicative quantitative and qualitative information on public financial resources provided. As discussed in Chapter Nine, the decision of the Paris Agreement agreed on the types of information to be provided by Parties. The 'substantive model' will assess if all the information for biennially communication are provided and will assess its content and implementation to consider the progression on climate finance contributions and its delivery.

Furthermore, the 'substantive model' goes beyond the procedural check of the submission of the Biennial Transparency Report (BTR) from 2024, by assessing the content of the BTR in line with the decision on the outline of the transparency reports.⁶⁵⁵ The model will also assess the implementation of the NDC targets and the finance contribution under Article 9 (5). Therefore the 'substantive model' would contribute to the achievement of equity and climate justice by ensuring implementation of the NDCs and fulfilment of the finance targets.

10.2.3. Level Three : Bottom-Up Assessment of Fairness and Equity

In the preceding two sections we have considered the two levels of assessment in the Integrated Model for the Compliance Mechanism of the Paris Agreement. The procedural and substantive assessments that the Mechanism could undertake have been presented. In this section I will put forward the third level of assessment that focuses on the bottom-up assessment of equity based on the self-assessed parameters and indicators of equity and fairness.

⁶⁵⁴ Paris Agreement (n12) Article 7 (9).

⁶⁵⁵ Decision 18/CMA.1, para 3, and Decision 5/CMA. 3, Annex IV.

Parties act on multiple layers of differentiation as acknowledged throughout the Paris Agreement and self-defined circumstances described in the NDCs. They operationalise these principles in their definitions and commitments submitted. The principle of common but differentiated responsibility and respective capacity, as discussed in Chapter Five serves as the starting point for establishing the specific commitments Parties undertake to contribute. This principle is further elaborated by the additional consideration of the specific national circumstances of the Party. The relevant circumstances can be described in terms of several factors including geographic situation, economic, social, and developmental concerns of the country. Specific needs to address poverty, structural problems of the economy, stability and security of the country, climatic conditions, geographic size, population size and demography, dependence on sources of energy, natural resource endowments, climate impacts vulnerability are all important factors that inform the national circumstances.

NDCs submitted by Parties incorporate different categories of indicators for equity and fairness in justifying their commitments are in line with the expectations of the Paris Agreement. These self-determined indicators of fairness and equity are generally presented in the equity/fairness sections of NDCs as mandated by the decision of the COP. In response to the obligation to include how they consider their contributions are fair and their reflection on equity, Parties have identified some criteria on which they base their assessment of fairness. To understand the variability in the types of equity and fairness criteria used by Parties, some examples will be helpful.

The table below presents the equity and fairness parameters identified by Parties in their NDCs. It shows the equity and fairness criteria of a large selection of NDCs from 60 NDCs representing 59 countries and the European Union. The countries included represent Parties from the different geographic regions, negotiating groups, different levels of economic development with developed, developing and LDCs included, highly climate change vulnerable countries including small island states. A closer set of examples will also be discussed on specific issues.

No.	Country	Description of Fairness and equity		Needs and Means of Implementation
		NDCs	Second or updated NDCs	Finance, Capacity Building, and Technology needs
1.	Afghanistan	Reduction per capita emission levels		<ul style="list-style-type: none"> Financial resources, capacity building, technology transfer, and other support is provided to Afghanistan.
2.	Albania	Net per capita GHG emission less than quarter of emissions of high-income countries.		
3.	Algeria	No historical responsibility.		<ul style="list-style-type: none"> Provisional contribution on conditional on access to financial resources, technology transfer on concessional terms and strengthening its technical capabilities.
4.	Angola	Vulnerability, per-capita emissions, GDP, Conditional contribution, adaptation contribution	Conditional contribution, per-capital emissions, impact of COVID-19 to delay implementation, adaptation contribution	<ul style="list-style-type: none"> Mitigation and Adaptation contributions amount to over 15.7 billion USD across sectors up to 2030. Capacity building and technology transfer required. Cost for Angola's identified NDC mitigation contribution through 2025 is estimated at around 44 billion USD and 144 million USD for adaptation contribution, representing a combined funding requirement of around 44.1 billion US (finance needs in the updated NDC).
5.	Antigua and Barbuda	Science-based, per capita emission, on the basis of CBDR.		<ul style="list-style-type: none"> Conditional adaptation and mitigation targets. Adaptation targets is estimated at approximately \$20M USD per year for the next ten years.

				<ul style="list-style-type: none"> • Cost of implementing the mitigation targets is estimated at approximately \$220M USD.
6.	Argentina	Justice and ambition, total global emissions, conditional targets, adaptation contribution, emissions trajectories on the BAU.	Just transition, equity, sustainable development (UN SDG goals).	<ul style="list-style-type: none"> • Conditional contributions and targets to implement NDCs
7.	Armenia	Low carbon development, CBDR-consideration including historical responsibility, GHG emission limitation burden sharing reflecting equity, right of future generations		<ul style="list-style-type: none"> • Develop an appropriate legislative and institutional framework for adequate financial assistance.
8.	Australia	National circumstances, population and economy, comparable to the targets of other advanced economies.	Target represents a halving of emissions per person in Australia (per-capita emission reduction) and based on national circumstances.	
9.	Azerbaijan	National conditions and historical responsibilities, principle of justice and per capita emission.		
10.	Bahamas	National capacities and respective capabilities, contributions based on CBDR		<ul style="list-style-type: none"> • Financial support to adaptation to the adverse impacts of climate change. • Cost for the implementation to met through multilateral and bilateral sources of support

11.	Bahrain	Principles and Provisions of the UNFCCC, CBDR-RC, and National Circumstance.		<ul style="list-style-type: none"> The extent to which the contributions will be implemented depends on the international support and the level of means of implementation.
12.	Bangladesh	Per capita, national development goals, share of past and current global GHGs emissions, conditional contributions on mitigation and adaptation and LDC country.	Per capital, national circumstance and conditional contribution	<ul style="list-style-type: none"> Delivery of the contributions will depend on the provision of finance, technology transfer and capacity building.
13.	Barbados	Negligible contribution to global GHG emissions, mitigation, and adaptation contribution		<ul style="list-style-type: none"> Significant financial, technology transfer and capacity- building support to implement the contribution.
14.	Belarus	Reduction from carbon intensity, development goals, GDP, and per capital emissions		<ul style="list-style-type: none"> Mobilization of additional resources and technologies to implement the targets.
15.	Belize	Total global emission contribution, past and current GHG emission, SIDs country, contributions- mitigation and adaptation.		<ul style="list-style-type: none"> Financial resource need to implementation the contribution (mitigation cost USD 150 million, and 112 million for adaption). Support for capacity building and technology were also conditions to implement the NDCs.
16.	Benin	Level of development, per capita emission, eradication of poverty and conditional contribution- mitigation and adaptation.		<ul style="list-style-type: none"> The implementation of the contribution requires financial, technological as well as capacity-building resources.

17.	Bhutan	Historical and current emissions, sustainable development, land locked, mountainous LDCs country and conditional contribution mitigation and adaptation.		<ul style="list-style-type: none"> The successful implementation of the mitigation contribution depends on the level of financial and technical support received.
18.	Bolivia	CBDR, historical responsibility, distribution of global emission budget, ecological footprint, climate justice and contribution – mitigation and adaptation.		<ul style="list-style-type: none"> The implementation of the contribution depends on the provisions of means of implementation in accordance with Article 4.7 of the UNFCCC.
19.	Bosnia and Herzegovina	GDP	GDP, contribution-mitigation and adaptation.	
20.	Botswana	National circumstance, and adaptation and mitigation contributions.		<ul style="list-style-type: none"> Estimated cost of USD18.4 billion by 2030 to implement mitigation contributions.
21.	Brazil	Principles and provisions of the Convention, particularly Article 4, paragraphs 1 and 7, and Article 12, paragraphs 1(b) and 4, GHS per unit of GDP, GDP growth, income per capita increase, historical responsibilities, and equity.	Historical responsibility, population, economic structures, resource, the need to maintain sustainable economic growth, available technologies, and other individual circumstances	<ul style="list-style-type: none"> The implementation of Brazil's NDC is contingent upon international support.
22.	Brunei Darussalam	National circumstances- geography, climate, economy, sustainable development and poverty eradication; and contribution on mitigation – and adaptation.		

23.	Burkina Faso	National circumstance, LDC country- development priorities and adaptation and mitigation contribution.		<ul style="list-style-type: none"> • International support required to implement both adaptation and mitigation contributions.
24.	Cape Verde	National circumstance, vulnerability and contributions on adaptation and mitigation.		<ul style="list-style-type: none"> • The implementation of NDCs measures requires international financing of estimated cost 2 million Euros for the period from 2020-2030.
25.	Djibouti	CBDR, national circumstance, and level of development.		<ul style="list-style-type: none"> • The NDCs provides the implementation of the contribution will depend on capacity building, technology transfer and financing from different sources.
26.	Egypt	National circumstances, including economic and population growth rates, major sustainable development goals, and political circumstances.		<ul style="list-style-type: none"> • Implementation of INDCs requires sustainable international support from reliable resources through financial flows, capacity building, and technology transfer as relevant to the local context.
27.	Ethiopia	Per capita GHG emission, historical emission, and national circumstance.	National circumstance, level of development, and clarification of contribution 20% unconditional and 80% conditional contributions on means of implementation.	<ul style="list-style-type: none"> • The full implementation of NDC requires predictable, sustainable and reliable support in the form of finance, capacity building and technology transfer.
28.	EU and its 27 Member States	Progression beyond the current undertaking of a 20% emission reduction commitment, consistent with the need for at least halving global emissions by 2050 and GDP percentage reduction.	Represents a significant progression, and fairness assessed by contribution towards the temperature goal of the PA	

29.	Fiji	National circumstance, level of development,	National circumstances, such as geography, climate, economy, sustainable development and poverty eradication;	<ul style="list-style-type: none"> • The updated NDCs estimates that the cost of implementing the target is US\$ 2.97 billion for the period between 2017 -2030. • The NDCs also provides financial challenge compounded by competing adaptation and disaster risk challenges are exacerbated by the COVID19 economic crisis.
30.	Gambia	National circumstance, poverty reduction and development priorities Fairness in the context of the most vulnerable countries NDC .		<ul style="list-style-type: none"> • Financial support from all sources will be needed for the implementation of this NDC.
31.	India	Per capita emissions, historical emission, poverty eradication, and the means of implementation for enhanced action for achieving the implementation of NDCs and, the sustainable development goals.		<ul style="list-style-type: none"> • The preliminary estimates of finance needs indicate that India needs is USD 206 billion for implementing adaptation action, and whereas mitigation activities for moderate low carbon development would cost around USD 834 billion till 2030.
32.	Kenya	Historical responsibility, respective capability and national circumstances.	Total global emissions, poverty alleviation, sustainable development and national circumstance.	<ul style="list-style-type: none"> • Kenya requires 40 billion USD international support in form of finance, investment, technology development and transfer, and capacity-building to fully realise her intended contribution.
33.	Liberia	global greenhouse gas (GHG) emissions, level- development and national circumstance.		<ul style="list-style-type: none"> • To fully implement Liberia’s INDC mitigation and adaptation interventions, there is a need for adequate, predictable, and sustainable financial, technological,

				and capacity support and mechanisms provided by various sources.
34.	Mexico	National circumstance and contributions include conditional and unconditional adaptation and mitigation targets.		<ul style="list-style-type: none"> The implementation mitigation and adaptation actions for the period 2020 – 2030 requires the continuous development and strengthening of Mexico’s capacities.
35.	Morocco	Total global emission, per capita emissions and national circumstance.		<ul style="list-style-type: none"> Morocco estimates that the cost of implementation of adaptation projects for the water, forestry and agriculture sectors, the sectors most vulnerable to climate change, will at a minimum reach USD 35 billion (2020-2030).
36.	Nepal	National circumstance and level of development- an LDC country. Contribution are mitigation and adaptation targets.	Past and current global emissions, national circumstance- LDC country and level of development.	<ul style="list-style-type: none"> Nepal requires bilateral and multilateral grant support in the following priority areas to meet both qualitative and quantitative target
37.	New Zealand	No clear reference, only reflecting NDCs based on previous commitments.		
38.	Norway	Assessment of NDC contributes to meeting the ultimate objective of the Convention, emission reduction by targets, and global cost-effective, regional distribution of emission reduction target.	Fairness and ambition assessed by contribution of NDCs to meeting the global long-term goal of the Paris Agreement.	
39.	Papua New Guinea	National development goals, current and past emission	Contribution to the total emission, national circumstance - Small Island	<ul style="list-style-type: none"> Requested international support for the implementation of the NDCs.

		contribution and reflected equity on the resources needs.	developing country and addition adaptation targets to enhance ambition.	
40.	Peru	Per capita emissions, national circumstances, contribution on mitigation and adaptation.		<ul style="list-style-type: none"> Peru requires additional means of implementation to implement the targets provided in the NDC.
41.	Philippines	Sustainable industrial development, poverty eradication and inclusive growth, energy security, and social and climate justice- and conditional mitigation and adaptation targets.		<ul style="list-style-type: none"> The implementation of the NDCs will be through bilateral, regional and multilateral cooperation and support.
42.	Korea	Global greenhouse gas emissions, national circumstance and contribution on both adaptation and mitigation.	Historical emissions, and reduction of total national GHG emissions .	
43.	Saudi Arabia	Principles and provision of the provision of the Convention, contribution on economic diversification with mitigation and adaptation.		<ul style="list-style-type: none"> Saudi Arabia's NDC is not contingent on receiving international financial support, but it takes into account important role for technology cooperation and transfer as well as capacity building for NDC implementation.
44.	Singapore	National circumstance	Economy-wide absolute GHG emission, clear peaking	

			level and national circumstance.	
45.	South Africa	Equity reference framework, national circumstance and priorities, principles of equity and CBDR RC, equitable access to sustainable development. South Africa seeks recognition of its national investments in adaptation as part of its relative fair global effort.		<ul style="list-style-type: none"> South Africa's NDC estimated indicative scales of finance and investment required for both adaptation and mitigation. The finance and investments are required to enable and support the deployment of low carbon and adaptation technology as well as building the capacity.
46.	Sudan	CBDR RC, economic development and national circumstances – LDC country		<ul style="list-style-type: none"> The international support required to implement the intended contribution in terms of finance, technology and capacity building, over a cycle of contributions of 5-10 years, amount to a total of 12.88 USD billions, of which 1.2 billions USD\$ for adaptation and 11.68 billions for mitigation.
47.	Suriname	Negative emission, and level of development.	Sustainable development, and national circumstance	<ul style="list-style-type: none"> The implementation of the NDC will require financial support of an estimated cost of US\$3.492 Billion.
48.	Switzerland	Party's responsibility and capability.	Past, current and future GHG and total emissions, per capita emission, and contribution of a country are cost-efficient mitigation potential and abatement cost	
49.	Thailand	Contribution to the total global emission, emission per GDP and national circumstances.	Vulnerable country, total global emission contribution,	<ul style="list-style-type: none"> The level of contribution could increase up to 25 percent, subject to adequate and enhanced access to

			level of development and national circumstances. Adaptation and mitigation contributions	technology development and transfer, financial resources and capacity building support
50.	The United Republic of Tanzania	Principles of the Convention, equity and CBNDRR		<ul style="list-style-type: none"> Tanzania's capacity to undertake strong adaptation and mitigation actions beyond national efforts depend on support for implementation.
51.	Timor-Leste	Global emissions, and vulnerable LDC- SIDS country,		<ul style="list-style-type: none"> Timor-Leste to pursue the proposed adaptation and mitigation action depend on the receipt of technology transfer, finance and capacity building.
52.	Togo	Historical contribution, level of development, CBNDR-RC and conditional adaptation and mitigation contribution.		<ul style="list-style-type: none"> The NDCs provide support needs in the form of financing, capacity-building, technology transfers and others, linked to the implementation of the NDCs.
53.	Tuvalu	Emission contribution, national circumstance- vulnerable SIDS country		<ul style="list-style-type: none"> Tuvalu's NDCs unconditional, conditional, and aspirational contribution to reducing emission, and the conditional contribution are dependent upon resources.
54.	Uganda	National circumstance as an LDC country, GDP per capita, and conditional contribution on adaptation and mitigation.		<ul style="list-style-type: none"> In order to fully implement adaptation and mitigation contribution-capacity building, technology transfer and finance are the most important needs of Uganda.
55.	United Kingdom of Great Britain and Northern Ireland's	Fairness and ambition of INDCs in the context of the below 2°C	Temperature goal of the Paris Agreement, range of IPCC recognised equity principles,	

			total reduction of emission and emission per capita	
56.	United States	Economy-wide target of reduction of GHGs by percentage.	Net-zero emissions, economy-wide, by no later than 2050.	
57.	Vanuatu	Historical contribution, level of development, national circumstance- small island least developed country. Conditional contribution on mitigation and adaptation targets.		<ul style="list-style-type: none"> The implementation of the NDCs is conditional on financial resources estimated to be USD \$ 173.6 million.
58.	Viet-Nam	Global GHG emissions and GHG emissions per capita, national circumstance, and conditional mitigation and adaptation contribution.	GHG emissions per capita, development level and national circumstance.	<ul style="list-style-type: none"> The NDCs will be implemented with the support technologies, and financing for adaptation action.
59.	Zambia	National circumstances, development level and conditional contribution on mitigation and adaptation.		<ul style="list-style-type: none"> This emission reduction is conditional and subject to the international support in form of finance, technology and capacity building (US\$ 50 billion by the year 2030, of which USD 35 billion from international sources)
60.	Zimbabwe	CBDRRC, poverty reduction, and national circumstance low emission and net carbon sink, conditional contribution– mitigation and adaption.	Principles and provisions of the Convention, (CBDR) and equitable access to atmospheric space, and level of development.	<ul style="list-style-type: none"> Conditional actions will be implemented subject to availability of affordable international financial support, investment, ability to leverage on our resources, technology development and transfer and capacity development.

Table 10 Equity and Fairness Parameters identified by Parties in their NDCs.

Most countries, with notable exceptions including China, dedicate a section to addressing how they consider their NDCs are fair and ambitious in light of the national circumstances. Although it makes references to the principles of equity and CBDR in its NDC, China does not reflect on the fairness of its contributions.⁶⁵⁶ The United States NDC has a section in its table responding to the question on fairness and ambition of its commitments which makes a general statement that reads “[t]he United States’ NDC exceeds a straight-line path to achieve net-zero emissions, economy-wide, by no later than 2050. It also promotes the goal of keeping within reach a 1.5-degree Celsius limit on global average temperature increase.”⁶⁵⁷ Similarly, the EU’s NDC refers to significant progression made, reduction in per capita emission rates, and greenhouse gas efficiency compared to other major economies.⁶⁵⁸ India’s NDC has a section dealing with fairness and ambition considerations that points to the country’s limited contribution to climate change both in cumulative and per capita emissions.⁶⁵⁹

South Africa’s NDC takes a closer look at equity and fairness considerations and makes use of the Climate Equity Reference Calculator (CERC) as well as the Climate Action Tracker (CAT) assessment, discussed above in Chapter 9, with some methodological modifications to justify the fairness of the commitments submitted. South Africa’s calculation of climate contributions is not limited to mitigation efforts, and it assumes that some countries may need to do more in one area of climate action- adaptation in its case- than others. Its NDC argues that due to the disproportionate burden of adaptation and the high volume of resources allocated to these efforts, it is making fair contributions to the global effort against climate change:

It is an injustice that with a relatively small share of historical cumulative emissions, our economy has been disproportionately negative [sic] affected by climate change.

⁶⁵⁶ UNFCCC NDC Registry, China’s Achievements, New Goals and New Measures for Nationally Determined Contributions (28 October 2021).

<<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/China%20First/China%27s%20First%20NDC%20Submission.pdf>> accessed on 7 May 2022.

⁶⁵⁷ UNFCCC NDC Registry, The United States of America Nationally Determined Contributions, (22 April 2021) pp 20-21.

<<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/United%20States%20NDC%20April%202021%20Final.pdf>> accessed on 7 May 2022.

⁶⁵⁸ UNFCCC NDC Registry, Update of the NDC of the European Union and its Member States, (17 December 2020) pp 17-18.

<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/European%20Union%20First/EU_NDC_Submission_December%202020.pdf> accessed on 7 May 2022.

⁶⁵⁹ UNFCCC NDC Registry, India’s Intended Nationally Determined Contribution: Working Towards Climate Justice, (02 October 2016) pp 33-34.

<<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/India%20First/INDIA%20INDC%20TO%20UNFCCC.pdf>> accessed on 7 May 2022.

Poor communities have low capacity to adapt and thus suffer the most from impacts. Nevertheless, we have invested in adaptation, and thus made a fair contribution to the global effort...South Africa expects that the global stock-take will take into account the adequacy and effectiveness of adaptation and the support provided for adaptation.⁶⁶⁰

South Africa also argues that equity should be the primary consideration when dealing with fair share of remaining global emission space and presents some equity principles that it values and prioritises.⁶⁶¹ It particularly identifies responsibility, capability and the right to development including the need to prioritise development for those living in poverty.⁶⁶² The NDC also dedicates a section to addressing the core principles of equity and what the assessment of equity should be like. Under the equitable access to sustainable development heading, South Africa argues that equity considerations should reflect fairness of mitigation, adaptation and means of implementation efforts. It underlines the need for balance between mitigation and adaptation action on the one hand and efforts to eradicate poverty, reduce inequality, increase employment, and promote inclusive growth on the other. Assessment of fairness and adequacy of commitments, according to the South African NDC is a holistic consideration involving mitigation and adaptation efforts.

South Africa's NDC brings forward an important question as to the nature of equity considerations in the climate change regime. As discussed before in this thesis, and particularly Chapter Nine on previous attempts to assess equity and fairness of contributions, there seems to be an assumption that climate action is limited only to mitigation. Apart from some mention of climate finance as part of the equity considerations, most attention remains on mitigation. The question is, therefore, whether equity should be considered across all climate action collectively, as suggested by South Africa's NDC, or if it should be calculated individually for each. Is there space for trade-offs between the different forms of climate action? Considering the importance of the individual goals, it is not beneficial for the achievement of the overarching goal of the Agreement if some Parties could only do one thing and not others. However, in terms developing countries, the case can be made that due to the limited capability

⁶⁶⁰ UNFCCC NDC Registry, South Africa First Nationally Determined Contribution Under the Paris Agreement, (September 2021) p 25.

<<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/South%20Africa%20First/South%20Africa%20Updated%20first%20NDC%20September%202021.pdf>> accessed on 7 May 2022.

⁶⁶¹ Id at 24

⁶⁶² Id

they have, some prioritization is in line with equity and fairness. The application here still should not result in an interpretation that would render the entirety of the regime ineffective. For example, it should not mean a large emitter can prioritise adaptation action in lieu of mitigation action since that would defeat the very purpose of the agreement.

LDC and SIDS Parties are at the frontline of the impacts of climate change, and they suffer consequences of multi-dimensional challenges. NDCs from these countries refer to the circumstance of being in such vulnerable groups. For example, Kiribati's NDC highlights the situation of the country as a member of the LDC and SIDS groups. It also stresses that the country has very low per capita emissions, it is in no way responsible for climate change and any climate action it takes is more than fair.⁶⁶³

Parties use different indicators in their NDCs to show the fairness and equity of their contributions. These indicators can be put into some broad categories in line with equity principles identified by the IPCC AR5. There also some parameters that do not fall within the general standards of equity but are employed by Parties as justifications for the fairness and ambition of their climate action. Most Parties use more than one indicator in their reflections on equity and fairness considerations.⁶⁶⁴

In the first category are capacity/capability-based indicators that are usually expressed in terms of GDP, GDP/Capita, income level and similar parameters. These indicators are used by Parties mainly to point to who they think should be shouldering the cost of taking climate actions. The GDP or GDP per capita of a Party can be used to show how it is not able to take more action and can be used in tandem with situational indicators below such as being an LDC.⁶⁶⁵

In the second category, several Parties have used responsibility-based indicators such as historic responsibility, with a small share of global emissions presented as a numeric figure or general reference. There is no standard by which to measure small shares. The problem with discounting the small contributors is the accumulated impact of these small share Parties which

⁶⁶³ UNFCCC NDC Registry, Republic of Kiribati Intended Nationally Determined Contribution, (21 September 2016) <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Kiribati%20First/INDC_KIRIBATI.pdf>

⁶⁶⁴ See Rajamani, et al. (n618)

⁶⁶⁵ See Sonja Klinsky et al. 'Operationalizing equity and supporting ambition: identifying a more robust approach to 'respective capabilities''(2017) 9.4 Climate and Development , pp 287-297.

might build to about 18% of global emissions.⁶⁶⁶ Establishing the comparability of emission contributions and therefore their relative fairness is, moreover, complicated by the choice of the base year, the inclusion and exclusion of some gases and sectors, and the data being utilised for the assessment.

The third category includes indicators that utilise a responsibility-capacity composite justification for fairness and equity commonly expressed in terms of emissions/capita and emissions/GDP. Some Parties rely on emissions per capita as an indicator as a proxy for responsibility, while others choose to emphasise the progressions, they are making measured in terms of emissions per capita improvements. However, despite the intuitiveness of basing equity considerations on emission per capita assessments, the wider use of this indicator is not present in the NDCs partly because of a lack of understanding.⁶⁶⁷ Parties with fewer emissions per capita compared to global averages generally tend to use absolute values, as opposed to the choice of more emissions-intensive Parties, which claim fairness on the basis of progression they are making in terms of reduced emissions intensity.

The fourth category consists of situational indicators such as LDCs or SIDS country grouping membership, and vulnerability. These indicators are mainly utilised by developing country Parties that belong to special interest groups of SIDs and LDCs. The circumstances of the Parties are used to justify the climate action commitments submitted in the NDCs. The NDCs of these Parties mostly also contain elements beyond mitigation action, and some of the commitments are conditioned on the availability of capacity and financial support. More NDCs from developing country Parties also contain adaptation sections compared with developed country Parties.⁶⁶⁸ A related situational indicator used in several NDCs is vulnerability to the impacts of climate change. Vulnerability is an important factor in mitigation and adaptation action required and some Parties have relied on their vulnerability as a consideration of equity and fairness.⁶⁶⁹ Other considerations such as population growth have also been used by some Parties.

⁶⁶⁶ Harald Winkler, et al. 'Countries start to explain how their climate contributions are fair: more rigour needed' (2018) 18 *International environmental agreements: Politics, law and economics* 99.

⁶⁶⁷ *Id* at 106.

⁶⁶⁸ Synthesis report by the Secretariat, *Nationally determined contributions under the Paris Agreement*, (September 2021) FCCC/PA/CMA/2021/8, para 24.

⁶⁶⁹ Kennedy Liti Mbeva, and Pieter Pauw. '*Self-differentiation of countries' responsibilities: Addressing climate change through intended nationally determined contributions*' (2006) No. 4/2016. German Development Institute Discussion Paper, p 23.

What I call subjective or bottom-up indicators are in the fifth category. Examples of these indicators include a desired peak year, and references to the Party's own progression. The fairness consideration of the EU NDC, for example, links fairness and equity with meeting the mitigation objectives of its own objectives of climate neutrality by 2050. The fairness assessment is associated with the trajectory of achieving the global temperature goal of the Paris Agreement.⁶⁷⁰

We have seen above that Parties use different categories of indicators related to capacity, responsibility, responsibility-capacity composites, situational indicators, and subjective bottom-up parameters. Finally, in the sixth category are efficiency-based indicators such as justifications based on least cost pathways for emissions reductions. Some Parties have opted to highlight the challenges of abatement in economies with locked in high-carbon industries and infrastructure. Most Annex I countries emphasise cost efficiency and tend to limit the assessment of fairness to mitigation action. However, fairness or equity indicators should not only focus on mitigation efforts but should also include other climate action in adaptation and provision of the means of implementation including finance and technology.

South Africa, for example, has argued that because it takes more adaptation action, its contribution to the global efforts is already higher than what it needs to do. This argument is also used to support the position that developed country Parties need to provide the means of implementation required by developing country Parties to finance their climate actions both in terms of mitigation and adaptation. Therefore, the measure of fairness of contributions is, among other factors, a function of vulnerability of countries and differences in what is needed in response to fighting the onset of climate change and addressing the impacts it is already having.

The question for the Compliance Mechanism is related to the scope of its assessment of the self-defined parameters of equity and fairness. Does it function as an arbiter of factual claims, or can it entertain challenges that resemble questions of law that will require interpretation of the legal nature of obligations? In a scenario where the Party has made claims of fairness based on the existence of certain factual considerations, such as membership in a certain group, the work of the Compliance Mechanism might be straightforward. Data-points that are easy to

⁶⁷⁰ UNFCCC NDC Registry, NDC of the EU, (n655) 18.

ascertain might not present a challenge. However, contested claims as to some action taken by a Party may be more problematic.

An interesting example from Russia's NDC can demonstrate this problem clearly. In early 2021, Russia's Environment Ministry announced a change to Russia's forestry emissions accounting to include emissions offsets from unmanaged forests.⁶⁷¹ The generally accepted standard is to include only managed forests as potential carbon offset in emissions calculations. These changes that include unmanaged forests would create a problem of accounting as well as verification issues in assessing the offset offered. The credibility of the achievement of Russia's targets including fossil fuel emissions claimed to be offset will be under scrutiny.

In its NDC submitted on November 25, 2020, Russia has included a section under the heading "how the party considers that its nationally determined contribution is fair and ambitious in light of its circumstances." In this section, Russia underscores the importance of emission sinks and their utilization of the fullest extent:

The first nationally determined contribution of the Russian Federation is consistent and calls to reduce greenhouse gas emissions by 2030, reduction of greenhouse gas emissions to 70 percent compared to the 1990 level, taking into account the maximum possible absorptive capacity of forests and other ecosystems and subject to sustainable and balanced socioeconomic development of the Russian Federation. This indicator was determined based on the need to ensure the economic development of the Russian Federation on a sustainable basis, as well as to protect and improve the quality of sinks and storage facilities for greenhouse gases.⁶⁷²

The Russian Federation has claimed that the utilisation of the absorptive capacity of its forest sinks is a factor in its fairness consideration. However, the question remains as to who would resolve the mismatch in the methodologies followed by Russia and other country Parties. Can the Compliance Mechanism raise this matter in its assessment of the compliance of Russia with its obligations? A model that depends on procedural considerations would only have the scope to check whether Russia has submitted an NDC and might go further to check the inclusion of the sections expected in the NDC. The assessment in the 'substantive model' could potentially

⁶⁷¹ <<https://thebarentsobserver.com/en/climate-crisis/2021/07/russia-says-its-forests-neutralize-billions-tons-greenhouse-gases-scientists>>

⁶⁷² UNFCCC NDC Registry, Nationally Determined Contribution of the Russian Federation, (25 November 2020) 14-15.

<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Russian%20Federation%20First/NDC_RF_eng.pdf>

investigate the fairness of the contribution of the Party, but the political feasibility of such a stringent level of scrutiny is highly doubtful in the bottom up set up of the Paris Agreement. The proposal in the ‘integrated model’, however, bases its assessment on the self-identified parameters set by the Party concerned and could be helpful in the work of the Compliance Mechanism.

In the Russian example, because the Party identified the usage of offset mechanisms as part of its equity consideration, the Compliance Mechanism would be allowed to check whether the claim is justified. In its consideration, therefore, the analysis would go beyond a question of fact and might involve some legal interpretation questions pertaining to the domestic law that paved the way for the inclusion of unmanaged forests in the methodology for emission offset calculations. In line with the facilitative role of the Compliance Mechanism, the Committee would be able to work with Russia to bring it into compliance if the finding is that there is non-compliance. The recommendations may involve the modification of the legal framework that created the situation of non-compliance.

10.3 Consideration of Systemic Issues under the ‘Integrated Model’

Another possible role of the Compliance Mechanism that will require an integrated approach such as the one presented by the ‘integrated model’ is the consideration of systemic issues referred to in Decision 20/CMA.1. paragraph 32. As discussed in Chapter Six, the Compliance Mechanism of the Paris Agreement has been mandated to consider 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.⁶⁷³ The consideration includes identifying challenges with respect to the implementation of the Paris Agreement by a number of Parties, and making recommendations on how to address such challenges to the CMA, the governing body of the Paris Agreement. Also, decision 20/CMA.1, paragraph 33 provides the CMA could request the Committee to examine issues of a systemic nature faced by a number of Parties. However, there are different questions that need to be resolved to operationalise the systemic consideration role of the Mechanism. The first question is what qualifies as a systemic issue? The second question relates to the legal basis and the process for identifying the systemic issues. There are also questions around what the minimum number of affected Parties should

⁶⁷³ Decision 20/CMA.1 (n535) paragraph 32.

be for reaching the threshold for an issue to be considered systemic. The Agreement and its subsequent decisions do not provide clear guidance on the nature of these issues. In terms of thresholds for qualifying as a systemic issue there are two potential assessments.

First, for obligations that are applicable to all Parties it might be difficult to define an issue as a systemic one without failure by a significant number of Parties. For example, a systemic issue could arise if 50 Parties fail to submit their NDCs, potentially leading to ineffective implementation of the Paris Agreement and jeopardising equity and climate justice. The reasons for such a large-scale non-compliance might relate to the design of the obligations or the ability of countries to meet them. In any case, an issue of this magnitude requires a system level consideration and not a Party-by-Party assessment. In the ‘integrated model’ the Compliance Mechanism could examine the reasons for mass-scale non-compliance and provide recommendations to address any systemic problems identified. In this role the Compliance Mechanism goes beyond the individual Party assessment envisaged by both the Procedural and Substantive models. One of the findings in Chapter Nine highlighted the possible role of the Compliance Mechanism as an adjudicating body dealing with constitutional matters. The Integrated Model offers more scope for the work of the Mechanism in its systemic considerations as it encompasses both procedural and substantive approaches as well as the self-determined parameters of equity and fairness.

Secondly, the systemic issue consideration could involve bifurcated obligations aimed at specific groups. As discussed in Chapter Three on the mapping of obligations of the Paris Agreement, and in Chapter Nine on the discussion on the substantive obligations, Parties assume differentiated obligations. Such differentiation allows the Compliance Mechanism to assess group compliance at a systemic level. A pertinent example relates to the developed country Parties obligation on the provision of USD 100 billion per year by 2020.⁶⁷⁴ COP26 decision, the Glasgow Climate Pact, stated that it:

[n]otes with deep regret that the goal of developed country Parties to mobilize jointly USD 100 billion per year by 2020 in the context of meaningful mitigation actions and transparency on implementation has not yet been met and *welcomes* the increased pledges made by many developed country Parties and the *Climate Finance Delivery*

⁶⁷⁴ Decision 2/CP.15, Copenhagen Accord, paragraph 8, FCCC/CP/2009/11/Add.1. (30 March 2010).

Plan: Meeting the US\$100 Billion Goal and the collective actions contained therein;⁶⁷⁵

Developed country Parties as a group failed to meet their obligations and the recognition in the Glasgow Climate Pact decision points to a systemic issue. In the ‘integrated model’ the Compliance Mechanism could consider such issues and make recommendations on how to address it. In this specific case, the Compliance Mechanism can follow up on the *Climate Finance Delivery Plan: Meeting the US\$100 Billion Goal* and ensure compliance for the fulfilment of the obligation. The delivery plan has modified the originally agreed timeline for the fulfilment of the USD100 billion per year goal by 2020 to 2025.⁶⁷⁶ As discussed in Chapter Seven, climate finance is essential for the realisation of equity and climate justice. The failure to meet the goal by 2020 and its modification of the timeline has adversely impacted equity and climate justice. The Integrated Model of the Compliance Mechanism by identifying such systemic issues of non-compliance and following up on their rectification can contribute to the achievement of equity and climate justice in the Paris Agreement. This sort of consideration can serve as an interesting test for the Compliance Mechanism. Equity compliance in the Integrated Model, in terms of the 100 billion could be achieved in a way that does not antagonise or single out individual Parties in keeping with the Paris Agreement’s spirit and the mandate of the Compliance Mechanism as a facilitative and non-punitive system of compliance promotion.

10.4. Conclusion

In this chapter I have presented the potential integrated model for the work of the Compliance Mechanism. In this model, the Compliance Mechanism would take on procedural as well as a substantive assessment of the compliance of Parties and a subjective assessment of the equity and fairness of the contributions made based on parameters set by the Parties themselves. This model solves two of the most important shortcomings of the procedural and substantive models. The shallowness of assessments in the procedural model and the political feasibility issues against the substantive model could be solved by the broader scope of consideration afforded by an integrated model, involving both procedural and substantive assessments in line with the self-determined parameters of equity and fairness. Furthermore, such an expanded

⁶⁷⁵ See <<https://ukcop26.org/wp-content/uploads/2021/10/Climate-Finance-Delivery-Plan-1.pdf>>

⁶⁷⁶ See, Page 2 <<https://ukcop26.org/wp-content/uploads/2021/10/Climate-Finance-Delivery-Plan-1.pdf>>

scope of consideration would allow the Compliance Mechanism to deliberate on systemic issues emanating from large scale non-compliance and make recommendations to contribute to future compliance and the achievement of equity and climate justice. The integrated model builds on the substantive assessment offered by the substantive model to assess whether Parties have complied with the differentiated obligations they take on in their NDCs and other relevant communications. The integrated model, by leaning into the bottom-up architecture of the Paris Agreement, focuses on utilising the self-defined criteria for equity and fairness as an entry point to assess the contributions of Parties.

In the final, concluding chapter, I will summaries the main structure and argument presented in the Thesis, as well as identifying possible ways forward to enable the Compliance Mechanism to play a key role in facilitating compliance in a way that leads to greater equity and climate justice.

Chapter 11 Conclusion

In this closing chapter, general conclusions are drawn from the Thesis. The first section provides a scene-setting to capture the overall context in which the thesis was written. The second section recaps the findings of the Thesis and provides an overview of the key points in each chapter. The summary also presents recommendations and the implications of the findings and proposals in the Thesis. Finally, opportunities for future research and further improvements to the Compliance Mechanism will be briefly discussed.

11.1. Changing Global Contexts

The seriousness of the climate crisis and the urgency of the need to take the necessary action as soon as possible have never been clearer. The world is going through events that will shape the geo-politics, power structures and general international cooperation for many years to come. The Covid-19 pandemic has shown the unpreparedness and vulnerability of all countries to emergency situations. It has, on the other hand, also shown that it is possible to achieve a global scale response, although issues of inequality and global justice remain central to reservations against how the pandemic was and is being handled. Countries have shown they will prioritise their own interests rather than showing solidarity with those that do not have the same level of economic resources available at their disposal. Most countries have also embarked on the road to recovery in terms of rehabilitating their stalled economies and embattled health systems. These recovery efforts have the potential to mainstream climate action and global solidarity, but whether that potential is realised remains to be seen. As things stand now, it seems most places may simply revert to old ways.

The Russian invasion of Ukraine is another largely consequential event of a magnitude that has altered global geopolitics. The implications of the invasion for global cooperation and the multilateral processes including the climate change regime are already being felt, with G7 countries taking strong positions and imposing sanctions on Russia. As Russian energy supply is important to many countries in Europe and the wider world, retaliatory measures taken could have serious implications for climate action. As countries start looking elsewhere for their energy supply, new and cheaper sources of fossil fuel are being seen as plausible short-term solutions. This focus on energy security may negatively impact the climate agenda. At the May 2022 Climate Ministerial meeting organised by the UK COP26 presidency, countries have

signalled that they must prioritise their energy security in this time of war and that they are considering all options moving away from the coal phase-out narratives and stronger positions on fossil fuels, thereby jeopardising the achievement of the 1.5 degrees Paris goal.

On the climate finance front, the above two crises have exacerbated an already problematic situation. The Covid-19 pandemic and the invasion of Ukraine have shifted the attention and resources away from climate related measures. The urgency of these events compared to the climate situation is, for politicians, more apparently pressing. It is easier to garner political support for these actions. The amount of finance provided for climate action is nowhere close to what is needed. Further complicating the problem, countries have not been taking their responsibilities seriously and accountability is lacking. The \$100 billion per year collective pledge by developed countries at the Copenhagen COP in 2009 remains unmet and COP 26 in Glasgow finally recognised this as a failure. At country level, the pledge made by the Obama administration of \$3 billion to the GCF of which only 1 billion has been delivered, is a reminder how there is minimal accountability in the climate change regime.

Equity and climate justice should not be just guiding principles mentioned in political statements and negotiation rooms. They should inform how the global community decides on the options to address the ever-present multi layered challenges the world faces. To take the right step towards this, accountability will be essential. Individual accountability of Parties in the climate change regime could be aided by with the Compliance Mechanism which can play a vital role in ensuring equity and climate justice are achieved through better compliance with obligations in the Paris Agreement and fair shares of the burdens for climate action are allocated to all Parties.

11.2 Summary of the Thesis

The Thesis set out by introducing the background and posing the research question which aims to address to what extent the Compliance Mechanism of the Paris Agreement can play a role in the achievement of equity and climate justice. The goal was to contribute to the operationalisation of the principle of equity and climate justice through the Compliance Mechanism. The importance of the Compliance Mechanism as an accountability system to ensure the fairness of the contribution of countries to the global effort in the fight against climate change is central to the Thesis. However, as the Paris Agreement and the Compliance

Mechanism stand now, the complete procedures, institutional arrangement, and modalities for compliance are not in place to facilitate such accountability. The Thesis proposed three potential models (the procedural, substantive, and integrated models) for how the Mechanism could potentially contribute to the achievement of equity and climate justice. The three proposed models provide a framework for the study of the work of the Compliance Mechanism and contribute to the existing literature by offering an analysis of how the practical operationalisation of the principle of equity and climate justice could be treated by an individual accountability assessment system in a facilitative environment.

Chapter One presented the methodological approach, and significance of the study. In chapter Two, the Thesis recounts the historical factors that contributed to the creation of the climate change regime starting with the 1960s when the issue of the changing climate gained scientific attention which culminated in the 1979 World Climate conference. The scientific advancements and climate modelling have also been important for the recognition of the seriousness of climate problem. The creation of the IPCC in 1988 also provides another milestone. However, the political problems with taking a concerted global effort against climate change surfaced early in the first Heads of States and Ministerial meetings of the Atmospheric Pollution and Climate Change Conference in 1989. The meeting concluded with a declaration that emissions had to be stabilised while ensuring the development of the world economy, and that developed countries needed to take the lead. The second World Climate Conference in 1990, although it did not end up producing internationally agreed targets, recognised important principles such as equity, CBDR, and the concept of sustainable development to guide efforts of countries. The next phase of the development of the regime was initiated by the decision of the United Nations General Assembly (UNGA) to initiate the negotiation of the UNFCCC which was adopted in 1992. In the process, developing countries highlighted that addressing climate change is a political issue anchored in developmental concerns the injustices of the international economic system. The challenges in the process of negotiating the Convention include, uncertainties related to the level of emissions, consequences, and measures to take; high costs of limiting emissions; divergence of North/South positions; and the complex dynamics not only between the Global North and Global South countries, but also among Global North countries.

Equity and climate justice at a practical level mean that all Parties take their fair share of burdens and enjoy their fair share of the resources available including the space for poorer

countries to grow and deliver dignified and liveable futures for their citizens. The UNFCCC established in its opening paragraph of the preamble that climate change is an issue that is a common concern to humankind, and which needed to be addressed collectively. The Convention introduced a CBDRRC as the first guiding principle of allocation of efforts and as a strong rationale for the differentiated obligations in Article 3. The Kyoto Protocol followed the top-down logic of the Convention to impose specific emission reduction obligations on developed countries. The Paris Agreement's departure from this top-down architecture as a bottom-up mechanism has marked the change in approach to the global effort to addressing climate change.

Chapter Three, dedicated to the Paris Agreement's institutional and legal mechanics, presented the evolution of the obligations that emanate from it. The legal nature of the Agreement is the starting place. The Paris Agreement is a regime made of harder procedural rules and softer substantive rules. While the obligation to submit NDCs periodically is a hard rule, guidance given in terms of the content of these commitments can be considered soft. The main guiding principles including equity and the CBDRRC have continued their significance in the new Agreement. Going further the Paris Agreement introduced what Rajamani called the Lima Qualifier which stated that CBDRRC should be considered in light of different national circumstances (hence CBDRRC-NC). This addition, although seems a restatement of the differentiation principle, redefined the nature of differentiated obligations under the Agreement. This is also in addition to the effect of the architecture of the Agreement as a bottom-up mechanism where Parties get to decide what their contribution to the collective effort should be.

The Paris Agreement creates two layers of obligations – one set that emanates from the Agreement itself and another set from the NDCs and other mandatory communications that Parties submit to the UNFCCC. These obligations are aimed at achieving the three main goals of the Agreement, i.e., the temperature goal, adaptation action, and finance. These goals are also important for what is considered as climate action. Mitigation, adaptation, finance, technology, capacity building, and transparency are all essential elements of what constitute climate action under the Paris Agreement. As a bottom-up system, the bed rock of the Paris regime are NDCs along with other mandatory commitments, such as the obligation of developed country Parties to make submissions in accordance with Article 9(5). The Agreement and subsequent decisions including 1/CP.21 have provided clear guidance on what

should be included in these submissions. Important considerations include progression in terms of taking gradually more climate action, inclusion of key elements such as timeframes and accounting methodologies, and reflection on equity and fairness. In terms of finance, mandatory communications in Article 9(5) mentioned above, for example, require developed country Parties to provide indicative quantitative and qualitative information on climate finance. The chapter also addressed the institutional set up of the Paris Agreement and the role of bodies such as the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) and the Compliance Mechanism.

As the purpose of the Thesis is to understand the way the Compliance Mechanism might be used in facilitating the achievement of equity and climate justice, it is useful to provide some lessons for why compliance happens and what motivates states to comply with their international obligations. In Chapter Four, I captured the essence of some of the important international law and international relations theories on compliance. The lessons from these theories were then instrumental in the design of the proposed models for the Compliance Mechanism. In that chapter, the goal was not to agree with one theory or another but to utilise the collective explanatory value of these conceptual framings as inputs for further research and model design. These theories point to factors that need to be considered for any effective compliance mechanism design. Theories from international law, international relations, and common ones for both fields were discussed.

From traditional legal theories of compliance, the managerial, legitimacy and transnational legal process theories were discussed. Managerialism emphasises a cooperative problem-solving approach towards compliance based on the argument that most non-compliance is a result of lack of clarity of treaties and lack of capacity. It suggests managing compliance is the right approach. In a treaty like the Paris Agreement where cooperation is necessary and written into the rules, the idea of managing compliance resonates well. The legitimacy theory argues compliance is more likely in situations where the rules are accepted to have legitimacy. Legitimacy here involves among other indicators, textual determinacy, and coherence with other commitments and obligations of the state. Legitimacy also pays particular attention to the process of rulemaking as a factor that determines the state's willingness to comply. By emphasising the role of the domestic process to develop NDCs and the guidance given on the need for procedural integrity of national processes, the procedural model I propose in this Thesis partly addresses this issue. The transnational legal process theory is also interested in

the process side. The theory argues that, as states are not the only stakeholders in international obligations, broader participation and engagement by all interested stakeholders in the internalisation of legal obligations is essential for the prospects of compliance. Lessons from this theory are drawn to aid the inclusion of NDC processes and implementation of process related guidance as part of the compliance equation in the procedural model I proposed.

International relations theories of neo-realism, institutionalism and the liberal theory are also discussed in the chapter. The focus of the neo realist theory is the centrality of self-interest of states and power. The theory insists that states will only comply if it suits them. Cost benefit analyses for both compliance and non-compliance are also important in this theory. The political aspects of the proposals I present are informed by these realist considerations although I do not subscribe to this being the only factor that determines potential compliance. Institutionalism, in all its three guises, is another theory which identifies some crucial factors for the compliance of states. Institutionalism underscores the role of embedded social norms and institutions and requires that their impact on state behaviour must be considered. These arguments are very relevant to the climate regime compliance and how parties design their contributions to the global effort. The liberal theory argues that the domestic political process and space for engagement of civil society and other stakeholders including the private sector are crucial factors for compliance. This essence of the arguments presented by the theory is generally in line with the lessons learned from other theories in international law.

Lessons are also learned from multidimensional theories crosscutting both international relations and international law. The theories in this category are the enforcement and reputational theories. The enforcement theory associates the possibility of compliance with the coercive mechanism behind the treaty concerned. However, the problem with enforcement models is the potential erosion of concessions made by states as they fear the intrusiveness of the enforcement mechanism. This would mean treaties with stronger enforcement mechanisms end up being limited either in participation or the level of commitments taken on by the states. This is especially problematic in a bottom-up structured treaty like the Paris Agreement where Parties decide what commitments to take. The importance of keeping the facilitative nature of the Compliance Mechanism of the Paris Agreement is therefore critical for the success of the Agreement in achieving its targets. The reputational theory also contributes to the understanding of what motivates states to comply with international law. The theory, as the name indicates, argues that states are protective of their standing in international community

and therefore will comply with their obligations to keep that status. Naming and shaming mechanisms, although not as strong as sanctions or suspension of treaty benefits, are still powerful tools according to this theory. With a strong reporting and review mechanism in conjunction with the Compliance Mechanism, the Paris Agreement is a potential place for a successful compliance push by leveraging reputational concerns of countries. We are already seeing countries taking more climate actions when they are labelled as laggards. Beyond scrutiny over meeting the procedural obligations of submitting targets under the Paris Agreement, countries especially in more liberal democracies are more than ever being challenged by their citizens and civil society on the fairness of their climate actions.

Chapter Five continues with the thread of compliance to present some examples of compliance mechanisms from selected MEAs. These MEAs have distinctive compliance mechanisms and can lay the foundation for the discussion as how the Compliance Mechanism of the Paris Agreement ought to be. This chapter also leads into Chapter Six, which discusses the Paris Agreement Compliance Mechanism. There are some key components in the analysis of any compliance mechanism. The first feature relates to the objective and purpose of the mechanism. While the purpose of the compliance mechanism can be analysed in the abstract, outside the confines of the overall treaty, for the purpose of effectiveness and efficiency, the relationship between the general goal of the treaty and its compliance mechanism are important. This determines the specific powers and duties the mechanism will have. It also dictates the scope of the consideration envisaged for the mechanism. For example, by creating two separate branches entrusted with compliance of two groups of parties, the Kyoto Protocol compliance mechanism anticipates two scopes for the work of the mechanism. The second and related feature is the institutional arrangement. The two branches in the Kyoto compliance mechanism, the facilitative and enforcement branches, the panel, and the Expert Review Team make up the institutional arrangement of the mechanism. Similarly in the Paris Compliance Mechanism, the Committee, as described below, is the centre piece. Other features relate to the procedures employed by the mechanism for the initiation of its consideration, also called triggers, and the measures to be taken by the mechanism as a result of its determination.

The Paris Agreement Compliance Mechanism, which is the focus of Chapter Six, is created through Article 15 of the Agreement. Further guidance on its modalities, procedures and institutional set up is provided by the Conference of Parties of the Paris Agreement (CMA). The Mechanism was designed to be facilitative, non-adversarial and non-punitive. The main

purpose of the Mechanism is stated in the name of the Committee at the core of the arrangement – the committee to facilitate implementation and promote compliance as referred to in Article 15 (2) of the Paris Agreement. The goal is therefore to help Parties comply as opposed to making breach determinations, for example. The 12-member expert committee is the core of the Compliance Mechanism. The development of the Mechanism has not been completed and the CMA has tasked the Committee to finalise the modalities, procedures and institutional set up of the Mechanism.

In its current form, the initiation of the work of the Mechanisms commences in cases where a Party has failed to fulfil its obligations including submitting its NDC, mandatory reports and communications under Article 13(7) and (9), participating in the facilitative multilateral consideration process, and submitting mandatory communications under Article 9(5) of the Agreement. The outcomes and measures envisaged by the current Mechanism include dialogue with the Party, assistance to comply in terms of finance and technology, recommendation to the Party to comply, and recommended action plans for bringing the Party into Compliance with its obligations. The Compliance Mechanism has also inbuilt flexibilities and consideration of specific national circumstances in light of equity in the application of the compliance processes. These flexibilities may include technical assistance and support and differentiated timelines and allowances.

Building on these discussions that lay the foundation for the understanding of the role of the Compliance Mechanism in the achievement of equity and climate justice, the next chapters turn to the consideration of equity and the proposed compliance models which may best incorporate it. From the outset, the Thesis presented two roles for the Compliance Mechanism of the Paris Agreement in the achievement of equity and climate justice. The first role, the general compliance role, relates to the achievement of overall compliance. I argued that because of the nature of the Agreement that has inbuilt differentiation tools, overall compliance would itself result in better achievement of equity. The converse is also true: compliance with only some obligations and leaving others might jeopardise equity and climate justice. For instance, without the finance component of climate action being complied with, the meeting of only mitigation obligations does not satisfy the compliance test. Therefore, this Thesis has presented models that have looked at general compliance as an issue of equity and by promoting general compliance, the Compliance Mechanism thereby promotes equity and climate justice overall.

The second role of the Mechanism relates to the specific issue of compliance with equity related obligations in the Agreement. These obligations include differentiation rules, and the guidance requiring Parties to include in their NDCs how they consider their commitments to be fair and their reflections on equity and fairness. These specific obligations open the door for the specific compliance consideration of equity issues. Before presenting the models, I proposed for the Compliance Mechanism on how it could perform the general and specific compliance assessment, I first addressed the role of the principle of equity in the Paris Agreement which was the subject of Chapter Seven.

The principle of equity is one of the foundational principles of the climate change regime and its continued relevance is shown in its place in the preamble and Article 2 of the Paris Agreement. The concept of climate justice made it into the international climate agreements for the first time in the Paris Agreement. These various equity and justice terms are loaded with connotations in the provisions in which they are found. They can address intergenerational dimensions of the climate challenge. They can also relate to the distributional issues that arise out of the impacts of climate change as well as measures taken against it. Developmental and economic inequality considerations are also generally discussed in relation to these concepts.

The equity principle and climate justice, however, remain unoperationalised in the Paris Agreement. Thus, there are some questions that need answering. Is equity a substantive stand-alone obligation that can be achieved by itself? Or is it a tool that is useful for the interpretation of the obligations in the Paris Agreement? In this Thesis I have argued that it can serve both purposes. It is both a goal that needs to be achieved as a major component of the Paris Architecture, as well as a tool that is important in interpreting the other obligations emanating from the Agreement. In addition, the equity principle is instrumental in promoting the procedural integrity of processes and NDCs submitted in fulfilment of obligations under the Agreement. In a strictly legal, common-law sense, there is also some potential for the use of the principle in bridging gaps in the expressed rules of the Agreement. In light of this understanding of equity and the nature of compliance and compliance mechanisms, I then present the three models for potentially operationalising the principle of equity and climate justice in the Compliance Mechanism of the Paris Agreement.

The models I have developed for the compliance mechanism are the procedural, substantive, and integrated Models. The naming of the models was based on the main type of assessment they would do. The models also have layers and levels of assessment representing different depths and breadth of assessment envisioned. The idea behind these models is to provide alternative frameworks for how the Compliance Mechanism could function in a way that would enable it to contribute to the achievement of equity and climate justice. Beyond the equity related compliance elements, these models offer a comprehensive structure for the Compliance Mechanism. Afterall, one of the main premises of the Thesis is that overall compliance is a method of promoting equity and climate justice.

In the procedural model, I present an alternative that is more aligned with current understandings of how the compliance mechanism is expected to work. In the model I offer an approach that would promote overall compliance as well as specific equity related compliance. The model is based on the general assumption that the provisions of the Paris Agreement impose generally procedural obligations that need to be catered for by a mainly procedural model of the Compliance Mechanism. These obligations are satisfied by the performance of the prescribed act. As the obligations are procedural the substantive assessment of the quality of the content is not expected. The requirements in Article 3 of the Agreement and communications in accordance with articles 4, 7, 9, 10, 11 and 13, adaptation communication, and indicative climate finance as per article 9 (5) are also procedural obligations. The role of the Compliance Committee in ensuring general compliance, in the Procedural Model is, therefore, to check whether these communications are submitted. In its specific equity compliance role, it will determine whether the Party has submitted how it considers its contributions are fair, and its reflection on fairness and equity. Under this model, the submission of these elements of the NDC would satisfy the consideration by the Compliance Mechanism. This model is easily compatible with the bottom-up structure of the Paris Agreement which lets Parties decide their own contributions and parameters of equity. This model presents the least ambitious approach to the role of the Compliance Mechanism.

Although this is a first step, procedural assessment alone will not be sufficient to achieve a level of accountability that would make the regime more effective. The Paris system is an amalgamation tool of individual climate action by Parties guided by some common frameworks. In essence, any contribution made by a Party cannot be challenged because of the self-determined nature of contributions. However, the architecture of the Paris Agreement has

a collective assessment tool built into it to measure whether the contribution made by Parties has been beneficial for the attainment of the overall goal of the Agreement. That assessment is the Global Stocktake. I argue, this accountability mechanism needs to be supplemented by an individual accountability mechanism to address the individual Party level issues in terms of the adequacy and fairness of climate action. I argue that the Compliance Mechanism is well situated to be such an accountability mechanism. However, with its role limited to a procedural consideration of compliance both in general and equity terms, the Mechanism cannot play this role. The Substantive Model offers more space for such a role.

My Proposed Substantive Model, using the considerations in the Procedural Model, would address general compliance with obligations emanating from the Agreement and specific equity compliance based on objective minimum standards. In this model I present three levels of assessment of the contribution of Parties to climate action. Level one is a shallow assessment that investigates the inclusion of mandatory elements in the communications submitted in fulfilment of the procedural obligations. In other words, it checks for completeness of the submissions. Level two goes deeper to assess the content of the submissions made to determine whether the substantive obligations are met. Examples of these substantive obligations include the requirement of progression. The Compliance Mechanism in a purely procedural model would not be able to perform these assessments. The assessment would require comparing previous submissions and current ones. Another assessment requiring deeper consideration involves the differentiated content of NDCs with regards to mitigation action. While developed countries are required to submit economy-wide emission reduction targets, developing countries are only given a general mandate of enhancement of emission reduction action. The Compliance Mechanism will have to consider the content of the submissions and needs to have a baseline understanding of the economy of the country if it's a developed country Party, and comparative data to show enhancement in the case of the developing country Party.

Level three assessment in my proposed Substantive Models might prove to be more controversial than the two assessments put forward in the previous two levels. This level is a subjective specific equity compliance assessment on the equity related obligations of the Paris Agreement particularly associated with the NDCs. In the NDCs Parties are mandated to provide how they consider their submissions to be fair and ambitious and include their reflections on equity and fairness. This allows Parties to develop their own subjective parameters of equity and fairness. Again, in this scenario a mere procedural check of whether this communication

has been made is not enough to ensure accountability. Therefore, the Substantive Model proposes to address this by introducing an objective minimum standard of what needs to be in the assessment of equity and fairness. Based on equity literature and lessons learned from other attempts at measuring equity and fair shares of contributions, I argue that the Compliance Mechanism can be used to assess fairness claims of Parties. I do not, however, provide a formula as to how to calculate fair shares as some attempts have tried to do. The role of the Compliance Mechanism is not to make specific determinations on the fairness of climate action taken by Parties. However, the Mechanism can be used to create a minimum standard of considerations Parties need to include in their assessment of their own action in terms of fairness and equity. I argue that these objective minimum standards already exist as part of climate change law and the general international environmental law regime. The main minimum standards to be considered in the assessment of fairness and equity include responsibility, capacity, and the economic development concerns. There is also a potential for a composite indicator to be developed by negotiation between the Parties. In this model, a Party that fails to consider these minimum standards will not be deemed to have met its specific equity compliance obligations. For example, an equity and fairness communication that does not reflect on a Party's capacity or its responsibility would be non-compliant with the obligations of the Agreement.

The proposals of the substantive model, although they offer the largest possibility to encourage Parties to take into account equity obligations of the Agreement in fulfilling their substantive obligations, are likely to face greater political resistance. One of the reasons is that such rigid interpretation of what Parties should do as part of their climate action goes against the bottom-up architecture of the Agreement which allows Parties to define their fair shares. The Integrated Model is designed to accommodate these concerns and create a model that takes advantage of the strengths of the two previous models to create a bottom-up friendly model. In this model I employ the same three level analysis developed in the Substantive Model. The first two levels involve roughly similar considerations in the Procedural and Substantive Models respectively. The third level brings the bottom-up logic to the issue of specific equity compliance. The Integrated Model is adaptive in its application, and it determines fairness and equity compliance by making use of the Party's own equity parameters it identifies in its NDC. For example, a Party relying on responsibility as a parameter why is its contribution is fair would be assessed based on that criterion. Similarly, capacity-based claims would allow the Mechanism to assess such claims. Parties have identified different parameters presented in the

Thesis and the Compliance Mechanism would create an individually tailored assessment of equity and fairness basing its criteria on Parties' own subjective equity claims. Level one and two assessments in this model also need to address the fulfilment of procedural and substantive obligations. By assessing if Parties have communicated all mandatory submissions, if the submissions contain complete information required to be submitted, checking whether progression and ambition related mandates are met, and finally assessing equity and fairness of such contributions based on the self-determined parameters of equity and fairness, the Integrated Model can provide a complete general and equity specific compliance assessment.

11.3 Way forward and further study

This Thesis has presented three proposals on the role the Compliance Mechanism of the Paris Agreement can play in the achievement of equity and climate justice. It has provided an individual accountability mechanism that ensures equity and climate justice are given an important place in climate action. The Models presented are frameworks for how the work of Compliance Mechanism could be organised and understood. Further study into the individual models will add value to the foundational work in this Thesis. The work of the Paris Agreement Compliance Committee in further developing the modalities and procedures of the Mechanism can benefit from these frameworks.

The UNFCCC is a very politicised process, and the political viability of these models is an important future study area. There is strong divide between Global North and South countries and their visions for the future of climate action. While one mainly focuses on mitigation efforts, the other emphasises the need to also address adaptation, loss, and damage, and provide finance and technology as equally important. Divergence on issues seems also to entrench groups and individual Parties into combative and highly competitive process. Although I have made some general remarks on political viability of these proposals, the general question as to how to operationalise equity and climate justice in a way that is politically acceptable requires further study.

In the coming two years some major events in the UNFCCC process could shape future research agenda in this space. In 2023, the Global Stocktake (GST) will take place to assess the collective progress made by countries to meet the goals of the Paris Agreement. Equity is a major principle guiding the work of the GST. Based on assessments done by the IPCC, the

findings of the GST which will likely show a deficit in climate action to achieve the temperature, adaptation and finance goals of the Agreement and that Parties need to take more ambitious action. The question of fairness of contributions will be a central issue in that discussion. This issue will also be important in the forward-looking recommendations that will be made by the GST and the models I have presented in this Thesis can provide the framework for discussions on how to create an accountability mechanism at an individual party level. Although the modalities and procedures are being developed and the fleshing out of the Compliance Mechanism is not yet complete, Decision 20.CMA/1, paragraph 2 has mandated the review of these modalities and procedures in 2024. As this round of review comes after the GST and potentially coincides with the next cycle of NDC submissions, it will be an opportunity to test and expand on the models developed here.

Specific recommendations put forward in the Thesis can also be explored in future research to expand the practical and operational side of the equity debate. One such proposal relates to the minimum standards of equity and fairness within the Paris regime. The objective standards could be further developed beyond what this Thesis has presented to enrich future considerations by the Compliance Mechanism or the literature in the field.

The urgency of climate action is clearer now more than ever. The science is clear on what needs to happen in terms of addressing the causes and impacts of climate change. The Paris Agreement, with all its defects, is the venue for global cooperation and taking the necessary action in line with our common but differentiated responsibilities and capabilities. In this collective effort, no one should be left behind and the burdens and benefits of a safer and stable climate should be distributed fairly. In today's changing world, equity and justice should be central to all cooperative endeavours so that all share the burdens and the benefits. Ensuring that bodies like the Compliance Mechanism of the Paris Agreement play their part in achieving equity and climate justice is a good start to achieving that outcome.

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