

## **Conclusions drawn from the Conference on Ensuring Compliance with MEAs**

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The traditional confrontational means of enforcing international environmental agreements (MEAs) have hitherto only been of limited efficacy in international practice. Therefore, in recent times new ways and means have been developed with the aim of making the Parties of MEAs better comply with their contractual obligations. Meanwhile a number of MEAs, such as the Montreal Protocol and the Geneva Convention on Long-range Transboundary Air Pollution with its accompanying Protocols, provide for mechanisms of compliance-control which are based on the idea of cooperation and partnership rather than confrontation. These new mechanisms are aimed at responding to compliance deficits in a non-adversarial manner. Under certain circumstances the non-complying State Party can even count on being supported by other Parties by means of capacity-building, transfer of technology and finance. However, the establishment of a graduated system combining compliance control mechanisms with traditional methods of law enforcement might also prove to serve well the aim of securing compliance with the States' obligations resulting from MEAs.

Although the employment of a collective, non-confrontational method of law enforcement appears to be a promising way to make the Parties to MEAs better comply with their treaty obligations, this new method is far from being unchallenged. It raises a number of procedural and substantive questions that are unsolved as yet. In any case, there is the need of a more detailed discussion among practitioners and academics on possible ways and means to consolidate and further develop the compliance control mechanisms under the various MEAs that currently exist.

The contributions contained in this volume offer rich insights into the structure and functioning of environmental compliance mechanisms. Moreover, they display a number of problems raised by these innovative mechanisms. Considering the broad spectrum of relevant findings, it becomes obvious that corresponding to the different structures of modern MEAs the compliance control mechanisms provided therein are rather diverse in nature and style. Therefore, any attempt to analyse the said compliance control mechanisms first requires a closer look at the characteristics of any particular MEA, because opting for a certain method and procedure of compliance control depends on the very type of the respective agreement, particularly the design and content of obligations that

it imposes on its Parties. Thus, our first concern is to elucidate the interdependence between the structure of the treaty regime and the way of organising treaty compliance (Section I.). Next, we will try to identify those elements in compliance control mechanisms that MEAs, although diverse in nature, may have in common, e.g. regarding the procedure employed and the institutions that are entrusted with exercising particular functions of compliance control (Section II.). Thirdly, there is a need to identify the role that non-governmental organisations (NGOs) may play in the various stages of the compliance control procedure (Section III.). Lastly, we will deal with the question as to how the compliance control mechanisms of the various treaty regimes might be coordinated or even pooled together, e.g. by means of clustering single mechanisms of a certain type. Moreover, the interrelationship between compliance control mechanisms and their relationship with other forms of law enforcement, particularly the traditional means of dispute settlement, have to be clarified (Section IV.).

## **I. Interdependence between Structuring a Treaty Regime and Ensuring its Compliance**

First of all, it should be stressed that ensuring treaty compliance begins with sound treaty-making. Thus, the States negotiating a particular agreement should be aware of the need to shape the contents of their contractual obligations as clearly and definitely as possible. The more abstract a particular treaty obligation is, the less it can be ensured that it will be complied with by any particular Party. However, treaty practice is far from being uniform as to how treaty contents are designed. Therefore, any attempt to develop an ideal model of compliance control that suits to a wide range of MEAs is doomed to failure. Rather, every single MEA needs its own tailor-made compliance control mechanism.

As a rule, non-compliance with an obligation aimed at preserving and protecting certain global environmental goods does not have any direct detrimental impact on an individual State Party. It rather affects the treaty community of States as a whole. Accordingly, the enforcement of MEAs primarily pursuing State-community interests, should be organised collectively rather than unilaterally. Good arguments speak in favour of entrusting a treaty body that represents the collective interests of State Parties with the task of controlling treaty compliance. The situation is different in the case of an MEA that clearly shows elements of bilateralism. For instance, treaty compliance problems arising under the Basel Convention of 1989 primarily affect the relationship between the State exporting

hazardous wastes and the importing State as well as any involved transit State. In this case it might be up to the directly affected State(s) to unilaterally respond to the non-compliant State. Consequently, the methods and means of law enforcement available under an MEA that shows strong elements of bilateralism considerably differ from those under an MEA that pursues certain State-community interests. With regard to the latter category of MEAs, such as the treaty regimes that are aimed at protecting the ozone layer and combating climate change, the employment of unilateral repressive means is hardly a suitable response to non-compliance. As is also true for treaties concerning human rights and humanitarian law such a reaction would frustrate rather than foster the achievement of the treaty objectives. There is the need of a compliance control mechanism that is inspired by co-operation and partnership.

As already indicated, choosing the “right” mechanism for ensuring treaty compliance depends on the type of obligations contained in each particular treaty. A closer look at modern MEAs reveals that the obligations resulting from them widely differ from each other as to their content and structure. It appears that there is a sliding scale of obligations. They vary from clear-cut obligations such as exactly determined environmental standards over broader but still measurable ones to obligations that are highly abstract in character.

Roughly speaking, there are two divergent main categories of treaty obligations, namely the “result-oriented” obligations on the one hand and the “action-oriented” ones on the other. However, the extent to which the result to be achieved by the Parties concerned is designated and specified widely varies. Action-oriented treaties may suffer from a comparable deficiency. Very often, their objective is only abstractly defined, there is no precise time limit for achieving this objective, and also the action to be taken is only broadly designated. While it appears to be easy to assess whether a particular Party has taken meaningful action as required, it often proves to be very difficult, if not even impossible, to assess whether that Party has achieved the treaty’s objective in practice. Such “action-oriented” treaty obligations are contained e.g. in the International Convention on the Regulation of Whaling of 1946, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) of 1973, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context of 1991, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 1989, the Convention on Biological Diversity of 1992, the Paris Convention on the Protection of the Marine Environment of the North-East Atlantic of 1992, and the Cartagena Protocol on Biosafety of 2000. The lack of efficiency of the control mechanisms identified in respect of this type of MEA is the direct result of the latter’s design. Particular mechanisms still have to be developed which would

provide for an efficient compliance control of action-oriented MEAs taking into consideration the objective they pursue.

Setting concrete environmental standards to be achieved within a fixed time limit, such as norms setting clear-cut targets for reducing the emission of a particular harmful substance, is a perfect example for imposing a “result-oriented” obligation on Parties to a MEA. As a rule, compliance with such standards proves to be easily measurable and can therefore be smoothly controlled. Among MEAs that impose “result-oriented” obligations on their Parties are e.g. the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987, a number of Protocols to the Vienna Convention on Long-Range Transboundary Air Pollution of 1979, the Kyoto Protocol of 1997 to the Framework Convention on Climate Change of 1992, and the Stockholm Convention on Persistent Organic Pollutants of 2001.

These compliance control mechanisms are intended to ensure the fulfilment of legally binding treaty obligations. Thus, they do not encompass the assessment whether the Parties to a treaty meet their “soft law” obligations arising under that treaty, such as the HELCOM recommendations. Although legally non-binding in nature, such “soft law” instruments quite often contain action- or result-oriented standards that prove to be very meaningful in practice. But how to ensure that the Parties concerned will comply with these standards? By including these recommendations into the system of the States Parties’ reporting obligations, the Helsinki Convention shows a promising way to induce its Parties to make all efforts in view of their implementation of those recommendations in their domestic legal orders.

## **II. Procedural and Institutional Questions concerning Compliance Control**

Although, as has been indicated, compliance control mechanisms are diverse for a good reason, they all contain some common elements. Firstly, environmental agreements are in need of some element to provide for and assess the facts concerning the attainment of the treaty objective. Secondly, a non-compliance procedure may be required for assessing cases of non-compliance and determining an adequate response. Closely related, there is – thirdly – the necessity of an institution that can provide these functions. In this regard, the proper role of non-governmental organisations has to be defined and some procedural safeguards may be required.

### *1. Reporting*

As stated above, the commonly used means for ensuring compliance with international agreements cannot easily be applied in the case of multilateral environmental agreements, because they often concern common interest norms rather than reciprocal obligations. Largely building upon concepts common in human rights law, environmental agreements very much rely on reporting in order to ensure compliance. Such reporting systems fulfil different functions:

Firstly, they allow for a proper assessment of facts, including those relevant in view of compliance and the overall achievement of treaty objectives. Such assessment of facts is particularly relevant in the case of environmental obligations, which frequently are of a technical nature and relate to measures that are often to be taken internally. Reporting first of all aims at exchanging information between the Members of the respective agreement.

Secondly, it needs to be emphasised that reporting is closely related to monitoring. Reports form the basis for monitoring, and the latter may in turn produce data that can be used for verifying the reports submitted by the Members.

Thirdly, reporting procedures can bring about a dialogue between the regime body assessing reports and the reporting Member State(s) which may considerably facilitate further implementation and compliance.

Fourthly, reporting may have some direct effect of persuasion, because it can produce a “chain reaction” in the case that the report of a Party reveals non-compliance and needs to be corrected after its verification. It should be noted that non-governmental organisations can play an important role in view of the dialogue which may be initiated by the reporting system. NGOs may be included in the process of preparation of a national report and they may also be involved in discussing the follow-up of the international assessment procedure back home.

One effect of reporting is often enough neglected, namely its effects within the system of the reporting State. Reports have to be prepared by several agencies or at least require their impact. Thus, reporting provides for a constructive dialogue within the State concerned.

This gives an indication how the reporting system may be enhanced. The results of the assessment should be conveyed to the State concerned and brought into the national process on framing the policies concerning environmental issues.

## *2. Assessment of Reports*

Reports submitted by States need to be assessed at the international level. This assessment first of all involves an institutional question. It may be carried out by different entities within the treaty regime. A first option for organising this assessment procedure would be to leave it up to independent expert bodies to set up assessment boards within the treaty regime. Such institutional structure is rather common to human rights instruments but has so far scarcely been used in the environmental field. Another option would be to entrust the Secretariat with the assessment of reports, thus placing it in the hands of international officials. However, both options are hardly ever chosen in international environmental agreements, because – obviously – the assessment of reports is considered a highly political affair which the States Parties do not wish to place in the hands of independent or impartial bodies. It should be noted that these two options represent a centralised approach, because independent expert bodies and secretariats can be considered institutions which are independent from any State influence and only responsible for the international regime and its objectives as such.

It is fairly common for multilateral agreements to entrust the task of assessing reports to specific Compliance Control Committees, which are composed of representatives of the Member States, or to assign this task to the Conference of the Parties. In both cases, the assessment procedure is mainly in the hands of the Member States and their representatives. Taking into account the strong interest in entrusting the assessment to a political institution, it is recommendable to apply a double-tiered procedure in which the Compliance Control Committee or any other subsidiary body of the Conference of the Parties carries out a first assessment that can be considered a preparatory work for the Conference of the Parties, which will then have the last word on the assessment.

Another important issue with regard to the assessment of reports concerns the method of verification. The efficiency of the assessment significantly relies on the availability of information from other sources. Non-governmental organisations play an important role in this respect because they may produce such data or may at least voice doubts in view of the plausibility of the reports submitted by the Parties.

## *3. Supplementary Means of Information-Gathering*

Furthermore, the database for assessing reports may be considerably broadened by way of on-site inspections and fact-finding missions. Inspections are largely known and applied in the field of disarmament and arms control. So far, they have rarely been applied in environmental

regimes. However, the International Whaling Convention, the UN Fish Stocks Agreement and the Antarctic Treaty provide for such inspection. The first two agreements are examples for a decentralised form of inspection. In this regard, there is a need for further development in international environmental law.

#### *4. Non-Compliance Procedure*

Many international environmental agreements include a non-compliance procedure in addition to the reporting system. Such procedures involve important procedural and institutional questions.

The first question concerns the initiation of such procedures. In this regard, different options exist in view of the entity to trigger such procedures. Interestingly enough, many of such non-compliance procedures envisage a right to self-incrimination, which seems to be quite appropriate when considering that most non-compliance procedures also envisage “positive actions”. Furthermore, a right of the Secretariat of the environmental regime at hand to trigger procedures is frequently envisaged. However, it is still an open question whether treaty bodies representing Member States, e.g. the Conference of the Parties or Compliance Control Committees, may have the right to initiate such procedures, too. Some treaty regimes even envisage a right to trigger proceedings for any other Contracting Party. So far, however, such an option has hardly ever been implemented. This coincides with experiences in human rights regimes, where State complaints are often provided for but have only rarely been used. Another option would be to give a right to trigger proceedings to non-governmental organisations. To this point, however, such a possibility has not yet been envisaged and will probably face resistance from States Parties.

Together with the design of the triggering of non-compliance procedures, the issue of insignificant or dubious cases of non-compliance is sometimes raised. It is still an open question whether the initiation of a compliance control procedure should require a *prima facie* finding that the alleged non-compliance is of significance. Depending on the design of the trigger mechanism, it may also be necessary to define how to deal with anonymous or abusive incriminations and allegations.

#### *5. Options for Responding to Verified Cases of Non-Compliance*

If a non-compliance procedure results in the determination that the Party at hand did not comply with its obligations, the question arises as to how the treaty regime should respond to such case.

It is acknowledged that Draft Article 48 on State Responsibility is rather inadequate under these circumstances.

While classical means of dispute settlement in international law or other enforcement procedures would amount to a judgment or even to the authorisation of suspensions of obligations – as is true for WTO dispute settlement – the compliance procedures are largely designed in such a way as to allow for a non-confrontational solution of the matter and to include positive incentives in this regard. Such positive incentives can include giving advice to the non-compliant Party, imposing reporting obligations, assisting in the elaboration of a “compliance plan” by the Party concerned, and they can even reach as far as giving financial or technical support. However non-compliance procedures may also entail “negative” incentives, which may include the issuing of formal cautions, the public “naming and shaming” of the non-complying Party, and the imposition of other sanctions, including the suspension of certain treaty rights or privileges. This wide range of potential responses seems to be adequate in view of the objective, namely to facilitate a non-confrontational settlement of the matter. However, a further question arises in this regard. It relates to the potential combination of positive and negative incentives that may be deemed appropriate in a number of cases.

#### *6. Institutional Setting and Procedural Safeguards*

Some further open questions concern the institutional setting and procedural safeguards of non-compliance procedures. First of all, different options exist in view of determining the treaty body in charge of non-compliance procedures. Such body could be composed of independent experts who might fulfil a somewhat quasi-judicial function. However, as is also true for the institutional design of assessments of reports, States Parties tend to be hesitant in this regard. They have mainly entrusted political institutions – and mostly those representing the Parties concerned – with taking care of those procedures. However, a split-up can be considered where the determination of non-compliance is left to some expert body, whereas the decision on the consequential response is and should be left up to political institutions. The Implementation Committee under the Montreal Protocol functions as a political organ when taking decisions on (potential) responses to the non-compliance of parties.

This is illogical. Taking such decisions requires a respective expertise combined with the impartiality of the persons in question. Representative organs, composed of politically acting persons, do not meet the required standards of expertise and impartiality.

There are also different options regarding the powers and mandate of compliance bodies. Such bodies may be entrusted with the task of seeking a consensual solution of the compliance problem together with the State Party in question. Moreover, it may be envisaged that such body may make non-binding recommendations to the Conference of the Parties. Finally, the body concerned may be mandated to decide upon and call for steps for bringing about full compliance with the treaty concerned, including measures for assisting the Party's compliance, such as technical assistance, technology transfer, financial assistance, information transfer and training, but also for issuing cautions and suspending any rights or privileges under the agreement at hand.

In view of the importance of compliance control, the sensitivity of the issue in question and the wide range of potential measures to be taken, some procedural safeguards have to be established. This requires a differentiated approach separating fact finding and assessment of facts from decision-making. While the establishment and verification of relevant facts as well as the factual and legal evaluation of each alleged case of non-compliance, and even the determination that a Party has not complied with the treaty obligations should take place in an open process, any discussions and decisions on potential responses should be kept confidential.

In view of the importance of compliance control procedures, some basic rules are required to ensure the accountability and fairness of proceedings. Such basic rules should include the principle of procedural cooperation, the principle of non-discrimination and equal treatment, the effective protection of legitimate confidentiality interests, and the proportionality of measures to be taken, including those of data acquisition.

### **III. The Role of Non-governmental Organisations (NGOs) in Compliance Control Procedures**

In determining the role that NGOs may play in compliance control procedures, the particular stages of this procedure should be kept apart from each other.

It is particularly at the stage of investigation and verification of facts that NGOs should play an important role. For instance, they can fulfil the function of "counter-statements" or can serve as a "substitute" for data that States have failed to provide. The standing of NGOs with respect to the reporting procedure depends on their status within the institutional structure and the procedural rights granted to them. A number of MEAs give NGOs observer status that implies the right to participate in the meetings of the

Parties and to present there any information or reports relevant to the objectives of the MEA concerned; however, NGOs with observer status do not have the right to vote (see e.g. Art. 11, para. 2 of the Paris Convention for the Protection of the Marine Environment of the North-East Atlantic of 1992).

Regarding the other procedural stages of compliance control, i.e. evaluation of verified facts, and decision-taking on responses to non-compliance, the inter-State character of the proceedings should be maintained. In both stages NGOs should at best play a rather limited role. In any case, States must remain the masters of the proceedings, even if NGOs are to be involved in them.

Whereas access of NGOs to the procedural stages of investigation and verification of facts should be prescribed in the text of the MEA itself, determining the criteria for admission and participation in the reporting procedure should be left up to the conference of the Parties to the MEA concerned. It should be up to this body to prescribe a number of eligibility requirements that any NGO wishing to participate in this stage of the procedures must meet. Among these requirements should be e.g. the NGOs representative character, its own affectedness or legitimacy to act on behalf of third affected persons, its specific skills and expertise in environmental affairs, and its accountability for all the actions that it has taken.

#### **IV. Clustering Single Compliance Control Mechanisms and the Latter's Relationship with Dispute Settlement Proceedings**

##### *1. Clustering*

The fact that a broad number of international environmental treaty regimes contain compliance control mechanisms gives enough reason to consider the possibility of clustering the proceedings of compliance control in such a way that a particular entity would be entrusted with addressing compliance cases stemming from different agreements. However, it is questionable whether this task could be fulfilled by one single body, because the latter would be required to have specific expertise concerning the environmental problem at hand and the technicalities of fact-finding and assessment as well as the capability to take highly political decisions, especially those on responding to cases of non-compliance.

## *2. Relationship of Co-operative Law Enforcement with Authoritative Dispute Settlement*

Compliance control mechanisms raise another lingering question, namely that of their relationship with dispute settlement proceedings. Most international environmental agreements envisage the possibility of employing such proceedings in parallel with compliance control mechanisms. Furthermore, a particular case may give rise to judicial or quasi-judicial proceedings under various international treaty regimes. In view of the peculiar structure of non-compliance mechanisms which aim at seeking a non-confrontational solution of the matter, they may appear to be a specific kind of dispute avoidance rather than dispute settlement. Accordingly, there are strong arguments in favour of requiring compliance control to take place prior to dispute settlement. Thus, the latter somewhat appears to be an ultimate remedy. As regards dispute settlement proceedings outside the treaty regime in question, it is worth discussing whether the environmental treaty regime and its compliance control mechanism constitute a “self-contained regime”. If this proves true, there may be doubts as to whether other dispute settlement mechanisms can be employed at all, even after the termination of the non-compliance procedure to include a formal statement on its successful or non-successful termination.

Decisions taken under compliance control mechanisms generally do not possess any legally binding force. Even if a non-compliance procedure results in giving an appropriate response to non-compliance, such a response would still be of only a preliminary nature, because it is up to the Conference of the Parties to take a final decision. However, the findings made in the non-compliance procedure should play an important role in any subsequent dispute settlement proceedings, although they do not possess any binding force. Due to the expertise involved and the Compliance Control Committee’s legitimacy, any measure recommended or taken in a non-compliance procedure is likely to have so much weight and persuasiveness that it will have to be respected in any subsequent dispute settlement proceeding. Something like a shifting of the burden of proof should take place in the sense that the findings made under the compliance control mechanism can only be overruled in a subsequent dispute settlement proceeding if they have been rebutted by clear and convincing evidence.

*Aus: Ulrich Beyerlin, Peter-Tobias Stoll, Rüdiger Wolfrum (Eds.), Ensuring Compliance with Multilateral Environmental Agreements: Academic Analysis and Views from Practice, © 2006 Koninklijke Brill NV. Printed in The Netherlands, pp 359-369.*