

# **MANAGING COMPLIANCE WITH STANDARDS FOR THE PROTECTION OF THE ENVIRONMENT**

**JORGE E. VIÑUALES**

CENTRE FOR INTERNATIONAL ENVIRONMENTAL STUDIES

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## MANAGING COMPLIANCE WITH STANDARDS FOR THE PROTECTION OF THE ENVIRONMENT

By Jorge E. Viñuales\*

### 1. Compliance as a Process

Those interested in the means that can be used to ensure compliance with international law will no doubt find abundant food for thought in the arrangements most often contemplated in international environmental instruments. Compliance is envisioned in this context as a process that starts with the adoption, by a subject of international law,<sup>1</sup> of a legally binding commitment (or one which is not legally binding<sup>2</sup>) and continues throughout the life of the international « regime ». As a process, compliance needs to be « managed » and it admits different « degrees » which, in turn, influence the overall « effectiveness » of an international regime.

Thus characterised, the term compliance has a broader meaning than the one which is ascribed to it in more traditional approaches to international environmental law.<sup>3</sup> Not surprisingly, the means contemplated to manage compliance are also

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\* Pictet Chair of International Environmental Law, Graduate Institute of International and Development Studies, Geneva; Counsel, Lévy Kaufmann-Kohler, Geneva.

<sup>1</sup> Other entities the international legal personality of which is controversial, such as non-governmental organisations or transnational corporations, may also be involved in a process of compliance with international environmental standards. This is the case, for instance, in connection with the mechanisms to monitor compliance with the OECD Guidelines on Multinational Enterprises (the conformity of the activities of transnational corporations with such guidelines can be examined by “National Contact Points” set up in their home countries, if these latter have adhered to the OECD Guidelines; *Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises (June 2000)*, 40 *ILM* 237 (2000)) or under the monitoring system created by the North-American Agreement on Environmental Cooperation or “NAAEC” (pursuant to Article 14(1) of the NAAEC “The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law [if certain conditions are met]”, 32 *ILM* 1480 (1993).

<sup>2</sup> Such as the commitments arising from the OECD Guidelines, above n 1, which include recommendations relating, *inter alia*, to transparency, respect of human rights and decent labour conditions, the taking into account of environment, public health and safety standards.

<sup>3</sup> Traditionally, a more restrictive definition of “compliance” has been used in international legal scholarship. For instance, UNEP’s Manual on Compliance with and Enforcement of Multilateral Environmental Agreements defines compliance as the “[f]ulfillment by a Party of its obligations under an international agreement”, *See* United Nations Environment Programme, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements*, <<http://www.unep.org/DEC/OnLineManual/Resources/Glossary/tabid/69/Default.aspx?high=compliance#high>> (accessed 26 September 2010). On newer approaches to compliance, see: A Chayes *et al.*, ‘Managing Compliance: A Comparative Perspective’ in E Brown Weiss and H K Jacobsen (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 1998) 39-62 ; A Chayes and A Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995) 1-28.

considerably different. To make this point clear, one may refer to the framework described by Professor Cassese in his introductory essay to this section. Such framework refers to the existence (i) of one traditional approach to ensuring the respect of international law, namely the different forms of adjudication, the main role of which is deciding whether a State is in breach of an international obligation and determining the consequences of such a breach (in accordance with the general rules on State responsibility or with a specific regime operating as *lex specialis*), and of (ii) two alternative approaches, namely monitoring and institutional fact-finding, which seek to fill the gaps left by the inadequacy of adjudication to a new range of subject-matters regulated by international law. The means used in international environmental law are also an attempt to fill some of the gaps; gaps that have been left open not only by adjudication but also by monitoring and institutional fact-finding. More precisely, although international environmental law contemplates monitoring, fact-finding, and even adjudication mechanisms as part of the *palette* of means to manage compliance, a number of other means focusing on the « soft-belly » of the compliance process are also available, means that are based on a different understanding of the reasons why a State complies (or not) with a commitment.

## 2. Stages and Means of Compliance

The compliance process can be understood as an axis along which one could tentatively identify four different « stages » of compliance, each with its own basic methods of managing compliance. Of course, in reality, the compliance process is a *continuum* and some means may operate at more than one point of such *continuum*. The identification of four stages is, however, convenient for analytical purposes.

The initial stage is concerned with gathering information regarding State conduct. This is the natural place of monitoring systems broadly defined to include not only regular reporting systems but also other systems such as the establishment by States of domestic inventories or mechanisms capable of gathering the information that must be reported.<sup>4</sup> Depending on each regime, the monitoring system may be limited to a reporting obligation imposed on States, with limited or no follow-up processes for prompting, verifying or completing the information reported by States, or extend to more sophisticated mechanisms with significant information gathering powers.

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<sup>4</sup> For instance, Article 9 of the Convention on Long-Range Transboundary Air Pollution of 13 November 1979 (LRTAP Convention) states in relevant part: “The Contracting Parties stress the need for the implementation of the existing ‘Cooperative programme for the monitoring and evaluation of the long-range transmission of air pollutants in Europe’ (hereinafter referred to as EMEP) and, with regard to the further development of this programme, agree to emphasize: [...] (c) The desirability of basing the monitoring programme on the framework of both national and international programmes. The establishment of monitoring stations and the collection of data shall be carried out under the national jurisdiction of the country in which the monitoring stations are located”, 18 *ILM* 1442 (1979). See also, Articles 6 (Assessment and Review of Control Measures), 7 (Reporting of data), and 8 (Non-compliance) of the Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987 (Montreal Protocol), 26 *ILM* 154 (1987) ; Article 10 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 22 March 1989 (Basel Convention), 28 *ILM* 657 (1989) ; and Article 12 of the United Nations Framework Convention on Climate Change of 9 May 1992 (UNFCCC), 31 *ILM* 849 (1992).

The second stage focuses on facilitating compliance. Facilitation mechanisms can seek to channel diplomatic or moral pressure to persuade a State inclined to disregard a commitment to abide by it. In international environmental law, however, their main objective is often to assist States which are willing to abide by their commitments but lack the necessary resources/capabilities to do so.<sup>5</sup> Unlike the commitments undertaken in some other fields of international law, environmental commitments (e.g. in the areas of chemical or hazardous waste regulation, ozone depletion or climate change) may indeed require specialised knowledge and significant resources to be implemented. A State that would be willing to comply but lacks such resources would be unable to fully or reasonably comply with some or even most of the commitments which it has undertaken under the treaty. Moreover, even States that do have the resources to comply may benefit from the establishment of « facilitation » mechanisms seeking to render compliance more cost-effective. For these reasons, many multilateral environmental treaties contemplate mechanisms to provide financial, technical and/or managerial assistance to member States that are willing but unable to comply or to make compliance more cost-effective. As I will discuss later, these mechanisms may take a variety of forms ranging from financial or technical assistance, to sophisticated « flexibility mechanisms »,<sup>6</sup> to self-triggered supervisory systems (the so-called « non-compliance procedures » or « NCPs »).

The third stage is concerned with managing non-compliance. This stage is premised on the inability or the unwillingness, as the case may be, of a State to comply with its commitments under a given environmental treaty. The means operating at this third stage pursue four main objectives, namely detecting a case of non-compliance, identifying the likely reasons underlying such non-compliance, solving the situation through non-adversarial means (assistance) and, if necessary, applying pressure on the State concerned to cease its non-compliance. Multilateral environmental treaties often provide for advanced « non-compliance procedures », of different scope and sophistication, to meet these objectives. I will discuss the operation of these mechanisms later. However, let me note at this point that, despite their potentially adversarial features, NCPs are primarily aimed at detecting non-compliance, investigating its causes and facilitating the return to a situation of compliance, even by granting renewed assistance.

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<sup>5</sup> The Commission on Sustainable Development (CSD) sought to address this problem as early as 1996: “Concern exists [...] about the need to reduce the reporting burden placed on countries, particularly developing countries, by international legal instruments and various intergovernmental decisions. This marks a growing trend towards coordination and streamlining of the reporting process and cooperation at international and national levels for the purpose of data collection, analysis and dissemination”, UN doc. E/CN.17/1996/17, para. 13.

<sup>6</sup> The term flexibility mechanisms is commonly used to refer to the mechanisms set up in the Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997 (Kyoto Protocol), 37 *ILM* 22 (1998), to make compliance with the commitments adopted by State parties thereunder more cost effective. Some commentators would consider that these mechanisms are not, as such, mechanisms of compliance. Underlying such a view is a more restrictive definition of compliance than the one adopted in this article. The *travaux préparatoires* of the Kyoto Protocol suggest, however, that such mechanisms were adopted to facilitate compliance with emission reduction commitments. See J Depledge, *Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History*, Technical Paper FCCC/TP/2000/2, 25 November 2000, para. 349.

The fourth stage focuses on thoroughly characterising a situation of breach and deriving the legal consequences attached to it. The basic means used for this purpose are adjudicatory or quasi-adjudicatory mechanisms, deciding disputes on the basis of law and reaching legally binding decisions. Many multilateral environmental treaties provide for such mechanisms, although, in practice, they have been rarely implemented, if at all. The legal consequences to be derived from a finding of breach may be those generally described in the Articles on the Responsibility of States for Internationally Wrongful Acts<sup>7</sup> and/or those set out in other more specific regimes, such as those established in connection with liability for oil pollution or nuclear accidents.<sup>8</sup>

The reasons explaining the inadequacies of the traditional adjudicatory approach to ensure compliance with international environmental standards are important to understand why multilateral environmental treaties have focused on the means identified in connection with the first three stages of compliance.

### 3. Some Observations on Environmental Adjudication

In the last decades, the development of international adjudication has marked an evolution in many fields of international law, ranging from human rights, to international criminal law, to trade and investment disputes. As discussed in other contributions to this book, this emerging trend has been based on the establishment of specialised adjudicatory bodies with jurisdiction over particular subject-matters.

A conspicuous absent in this trend is international environmental adjudication. Despite initiatives to establish an adjudicatory body with a special focus on environment-related disputes (e.g. adjudicatory systems contemplated in multilateral environmental agreements, the special environmental chamber in the International Court of Justice, an international environmental court or, at least, a set of arbitration rules specifically designed for environment-related disputes), such attempts have yielded limited results.<sup>9</sup> Instead, and aside from a small number of cases brought before the International Court of Justice,<sup>10</sup> environment-related disputes have

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<sup>7</sup> Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two).

<sup>8</sup> See e.g. Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960, 956 *UNTS* 251 ; Convention on Civil Liability for Nuclear Damage, 21 May 1963, 1063 *UNTS* 265 ; Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, 21 September 1988, 42 *Nuclear Law Bulletin* 56 (1988) ; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 17 December 1971, 944 *UNTS* 255 ; International Convention on Civil Liability for Oil Pollution Damage, 27 November 1992, 973 *UNTS* 3 ; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993, 32 *ILM* 1228 (1993) ; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 3 May 1996, 25 *ILM* 1406 (1996) ; Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 16 May 2003, IMO Doc. LEG/CONF.14/20 (2003).

<sup>9</sup> For an overview see T Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) 7-17; E Hey, *Reflections on an International Environmental Court* (Kluwer Law International 2000) 1-25.

<sup>10</sup> The first cases touching upon environmental issues are the two *Nuclear Tests* cases (*Nuclear Tests (Australia v. France) Judgment*, *I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France) Judgment*, *I.C.J. Reports 1974*, p. 457) and the *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, discontinued by order of 13 September 1993 (*I.C.J. Reports 1993*, p. 322). The first

« borrowed *fora* » normally devoted to other fields, such as human rights courts and commissions, the World Trade Organisation Dispute Settlement Body or investment tribunals.<sup>11</sup> Even the International Tribunal on the Law of the Sea (ITLOS), whose mandate covers substantial environmental aspects, has so far played a limited role (mostly in connection with provisional measures) in adjudicating environment-related disputes. One may therefore wonder why international environmental adjudication has followed a different path.

The answer must be sought, in my view, in the two core ideas underpinning international environmental law as a field, namely « prevention » and « balance ». The idea of prevention is enshrined in an array of principles such as those of no-harm, prevention, precaution, cooperation, prior informed consent, and environmental impact assessment, which, in turn, can be found at the basis of many multilateral environmental agreements. The basic message carried by these principles is that environmental damage may be irreversible. Therefore, it is of vital importance to foster compliance with environmental standards, through monitoring and other means, rather than to determine responsibility through an adjudication mechanism once damage has occurred.

However, adjudicatory means do have a role when it comes to finding a balance between the scope of environmental standards and that of other rules of international law. Indeed, the principles and concepts provided by international environmental law in this respect, such as the principle of common but differentiated responsibilities or the concept of sustainable development, are broad enough to admit very different interpretations and, therefore, call for the intervention of a body which can solve potential conflicts between environmental and other standards authoritatively, with an eye to the future. More specifically, I believe that it is very useful and even necessary that international courts and tribunals established to decide disputes arising in other fields of international law pay attention to the environmental dimensions of such disputes and, as necessary, allow for some room for environmental considerations to be taken into account in their own jurisprudence. Such a need may explain, at least in part, the phenomenon of « borrowed *fora* » referred to above. But even in these cases, the function of adjudication mechanisms remains geared to the idea of prevention, because their efforts to clarify the relations between environmental and other standards are mainly important to balance different demands with an eye to the future.

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cases expressly dealing with environmental questions are the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, and the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7. The last environment-related case to have been decided by the International Court of Justice is the *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, 20 April 2010. Two environment-related cases are pending before the Court: *Aerial Herbicide Spraying (Ecuador v. Colombia)*; and *Whaling in the Antarctic (Australia v. Japan)*. See J E Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2010) 32 *FILJ* 232.

<sup>11</sup> The most complete overview so far is provided by the five-volume collection published by Cambridge University Press: *International Environmental Law Reports* (vols. I-V). This collection does not make reference to investment disputes. For a study of the impact of environmental considerations on investment disputes see: J E Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2010) 80 *BYIL* 244-332. On disputes concerning other areas see Stephens, above n 9.

The preceding considerations suggest that the main focus of a judicious reformer should be on strengthening the means to monitor, facilitate and manage compliance, as well as to carve out sufficient space for environmental considerations to be taken into account in specialised adjudication mechanisms. In order to see what could be adjusted or added, the following section provides an overview of the *palette* of means available in international environmental law.

#### **4. Compliance's « Soft-Belly »: Reporting, Facilitation and Management Mechanisms**

##### **A. Reporting**

The use of monitoring and reporting systems is widespread in multilateral environmental agreements.<sup>12</sup> The basic characteristics of such mechanisms are comparable to those presented by monitoring systems in human rights and arms control regimes. For analytical purposes, a distinction can be made between three different reporting systems according to their scope.

The most basic systems, such as the one applicable to the reduction and control of sulphur and nitrogen oxide emissions under the 1979 Convention on Long-Range Transboundary Air Pollution,<sup>13</sup> as completed by its 1985 Sulphur Emissions Protocol<sup>14</sup> and its 1988 Nitrogen Oxides Protocol,<sup>15</sup> only provide for the regular submission by States of reports communicating *inter alia* their level of emissions. A similarly limited approach was initially followed by the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, until a more robust system was adopted in 2002 by the Conference of the Parties.<sup>16</sup>

Other more sophisticated systems entitle an administrative body of the environmental treaty in question to verify the information submitted, to request additional information and/or to gather its own information (in some cases through inspection systems). For instance, the Conference of the Parties of the 1971 Convention on Wetlands of International Importance,<sup>17</sup> in its fourth meeting in 1990,

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<sup>12</sup> See: R Wolfrum, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law' (1998) 272 *RCADI* 36-55.

<sup>13</sup> Article 9(e), LRTAP Convention, above n 4.

<sup>14</sup> Article 4 of the Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent, 8 July 1985, 27 *ILM* 707 (1988) ; and Article 5 of the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, 14 June 1994, 33 *ILM* 1542 (1994).

<sup>15</sup> Article 8 of the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes, 31 October 1988, 27 *ILM* 698 (1988).

<sup>16</sup> An Implementation and Compliance Committee was established at the sixth Conference of the Parties in Geneva in 2002. COP Decision VI/12 on Establishment of a Mechanism for Promoting Implementation and Compliance, *Final Report of the Sixth Conference of the Parties to the Basel Convention*, UNEP/CHW.6/40 (2003) 45. See: A Shibata, 'Ensuring Compliance with the Basel Convention – its Unique Features' in U Beyerlin, P T Stoll, R Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Martinus Nijhoff 2006) 69.

<sup>17</sup> Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 2 February 1971 (Ramsar Convention), 11 *ILM* 963 (1972).

established an inspection procedure, conditional upon the consent of the State party concerned.<sup>18</sup> Similarly, the 1973 Convention on the International Trade of Endangered Species provides for an inspection system to assess whether trade in a given species has put such species in danger.<sup>19</sup>

Still other mechanisms entitle the relevant administrative body, on its own motion or at the request of a State party or another entity, to assess the compliance of the reporting State with the obligations arising from the treaty and, in some cases, also to take a number of steps (e.g. conciliate the parties, provide assistance or apply sanctions) to manage non-compliance. The mechanisms falling under this third category arguably go beyond the common understanding of reporting or monitoring systems. Their operation spans indeed « stage 1 » to « stage 3 » of the compliance process identified in section 2 above, taking different forms in each stage, as I shall discuss next.

## B. Facilitating Compliance

The mechanisms designed by multilateral environmental agreements in this connection can, for the main part, be organized under two main categories: financial and technological assistance, and efficiency increasing mechanisms.

Concerning the first category, those who have followed the climate negotiations throughout the last three years can appreciate the importance of providing financial and technological assistance to developing countries in order for them to undertake more ambitious mitigation commitments and/or to adapt to the consequences of climate change. The provision of financial and technological assistance can be seen as a reflection of the understanding that, in some cases, even those States inclined to abide by their commitments, may not have the necessary capabilities to do so. Such an understanding has two major implications for the effectiveness of multilateral environmental treaties. On the one hand, it is important in order to incorporate financial and technological assistance as an integral part of the treaty regime. This may take different forms, including the provision of funds to poor States to enable them to participate in the meetings of the treaty bodies,<sup>20</sup> or to cover the so-called

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<sup>18</sup> Recommendation 4.7: Mechanisms for Improved Application of the Ramsar Convention, 1990, REC. C.4.7 (Rev.) Annex 1. The Ramsar Advisory Mission was formerly known as the Monitoring Procedure (prior to Resolution IV.14 (1996)) and the Management Guidance Procedure (prior to Resolution VII.12 (1999)).

<sup>19</sup> Articles XII(2)(d) and XIII(2) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 12 *ILM* 1085 (1973). In accordance with Article XII(2)(d), the CITES Secretariat's functions include "to study the reports of the Parties and to request from Parties such further information with respect thereto as it deems necessary to ensure implementation of the present Convention". See: E Milano, 'The Outcomes of the Procedure and their Legal Effect' in T Treves *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009) 407, 412.

<sup>20</sup> Such provisions are mostly found in so-called "first-generation" financial mechanisms, such as the CITES Trust Fund (Decision 13.1, *Strategic Vision and Action Plan*, CoP13 Decisions (2003), Annex 1, Goal 7) or the Basel Convention's Technical Cooperation Trust Fund (Decision V/32, *Enlargement of the Scope of the Technical Cooperation Trust Fund*, Doc. UNEP/CHW.5/29 (1999)). See: L Boisson de Chazournes, 'Technical and Financial Assistance' in D Bodansky, J Brunnée, E Hey, *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 947, 962.

« incremental costs » of compliance,<sup>21</sup> or to help them modernise their infrastructures and development model.<sup>22</sup> As a rule, the resources enabling such funding are contributed by developed States on a voluntary basis,<sup>23</sup> although in some cases contributions have been made more automatic.<sup>24</sup> On the other hand, the often unspecified relation between the provision of such assistance and the exigibility of the commitments undertaken by developing countries may undermine the overall effectiveness of a multilateral environmental regime.<sup>25</sup>

Regarding facilitation by means of reducing the cost of compliance, a number of mechanisms have been introduced or are currently being discussed in order to make compliance with commitments relating to climate change mitigation or forest conservation more efficient. The basic idea was introduced already in 1987, with the adoption of the Montreal Protocol. Article 2(5) of the Montreal Protocol allowed indeed for inter-party transfers of the excess in production of regulated substances « for the purpose of industrial rationalization ». Also, Article 2(8) provided for the joint fulfilment of the obligations of State parties which are members of a regional economic integration organisation, a mechanism often referred to as the « bubble ». The most sophisticated mechanisms for facilitating compliance by reducing the costs of compliance so far have been introduced with the adoption of the Kyoto Protocol to the UNFCCC. Articles 4 (bubble), 6 (joint implementation), 12 (clean development mechanism) and 17 (emissions trading) all provide for mechanisms to make compliance with the emission reduction commitments undertaken by Annex I countries more cost-effective. Still another mechanism currently under negotiation is the so-called « REDD-plus » mechanism (REDD-plus stands for « Reducing Emissions from Deforestation, Degradation and Forest Enhancement »). The basic idea of this mechanism is to channel funds to developing countries in order for them to conserve their forests, which are extremely valuable resources not only for biodiversity purposes

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<sup>21</sup> Article 10(1) of the Montreal Protocol, above n 4, provides that the Protocol's financial mechanism "shall meet all agreed incremental costs of [Article 5] Parties in order to enable their compliance with the control measures", without defining the term "incremental costs". It only states that the Meeting of the Parties should adopt an indicative list of the categories of incremental costs, which it did in 1992; see: Doc. UNEP/OzL.4/15. Incremental costs are the costs incurred by Article 5 States when converting from ozone depleting technology to ozone benign technology in order to comply with the provisions of the Protocol. The Multilateral Fund for the Implementation of the Montreal Protocol is entrusted with the task of managing the financial mechanism and providing funds for the progressive phase out the use of ozone-depleting substances.

<sup>22</sup> See e.g., the Multilateral Fund for the Implementation of the Montreal Protocol; or the Global Environment Facility (Agreement Establishing the Global Environmental Facility, 33 *ILM* 1273 (1994)). See also: Article 10A Montreal Protocol, above n 4; Article 18 of the Convention on Biological Diversity (CBD), 31 *ILM* 818 (1992); Articles 6(e) and 16-18 of the Convention to Combat Desertification, 33 *ILM* 1016 (1994).

<sup>23</sup> See, e.g., Article 11 UNFCCC, above n. [4]; Article 11 Kyoto Protocol, above n. [7].

<sup>24</sup> See, e.g., Article 10(9) Montreal Protocol, above n. [4]; or the Adaptation Fund of the Kyoto Protocol where a portion of the certified emission reduction units granted under the clean development mechanism is set aside as a contribution to the Adaptation Fund (Decision 10/CP.7, *Funding under the Kyoto Protocol*, FCCC/CP/2001/13/Add.1, 10 November 2001, para. 2).

<sup>25</sup> See: R E Benedick, *Ozone Diplomacy. New Directions in Safeguarding the Planet* (Harvard University Press 1998) 241. See also: Article 5(5), Montreal Protocol, above n 4; Article 20(4) CBD, above n 22; Articles 3(1) and 4(7) UNFCCC, above n 4; and Article 13(4) of the Convention on Persistent Organic Pollutants, 22 May 2001 (POP Convention), 40 *ILM* 532 (2001).

but also for the capture and storage of carbon dioxide. The underlying rationale is that conserving forests in developing countries would be an effective and much cheaper way to reduce global emissions of carbon dioxide as compared with other approaches, such as technological changes in the way energy is produced or in the transportation sector. There are, however, a number of problems with the use of flexibility mechanisms to the extent that they may create perverse incentives to increase emissions precisely in order to receive the resources devoted to emission reduction mechanisms. This issue has arisen, for instance, in the context of certain projects under the clean development mechanism of Article 12 of the Kyoto Protocol in connection with the elimination of a very powerful greenhouse gas known as HFC23, which is created as a by-product of the production of an ozone-depleting gas, HFC22, still in the process of being phased out.<sup>26</sup> Similarly, it has been noted that the implementation of a REDD-plus mechanisms would create a much higher supply of emission rights, which would produce a decrease in the price of such rights. This, in turn, would send the wrong signal to markets, as companies and States would be incited to simply purchase emission rights to meet their obligations instead of adopting long-term technological strategies.

### C. Managing Non-Compliance

In case the preceding mechanisms prove insufficient to ensure compliance, multilateral environmental agreements often contain additional procedures to manage instances of non-compliance. « Non-compliance procedures » or NCPs span almost the entire compliance process, from the initial efforts to gather information, to providing assistance to facilitate compliance, to the management of situations of non-compliance, either through facilitative or adversarial methods.<sup>27</sup> NCPs can be characterised by reference to four main aspects of their establishment and operation, namely their legal basis, the ways in which the procedure can be triggered, their structure, and the measures that they can adopt.

Regarding the legal basis of NCPs, most often they are created by the Conference of the Parties to a given multilateral environmental agreement acting pursuant to a delegation clause contained in the treaty.<sup>28</sup> NCPs have also been adopted in the context of older environmental agreements, which did not contain a delegation clause, on the basis of the implicit competences of the Conference of the Parties under the agreement.<sup>29</sup> The legal basis of the NCP may be important to determine the binding nature of the outcomes of the procedure. This point has been controversial, for instance, in connection with the decisions adopted by the body in charge of the NCP set up

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<sup>26</sup> M Wara, 'Measuring the Clean Development Mechanisms's Performance and Potential' (2008) 55 *UCLA Law Review* 1759.

<sup>27</sup> On NCPs in general, see: Treves, above n 19.

<sup>28</sup> Examples include: Article 8, Montreal Protocol, above n 4; Article 18, Kyoto Protocol, above n 6; Article 34 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol), 39 *ILM* 1027 (2000) ; Article 17, POP Convention, above n 25.

<sup>29</sup> Examples include the NCPs adopted on the basis of the implied competence of the COP arising from Article 15(5) of the Basel Convention, above n 4, or from Article 10(2) of the LRTAP Convention, above n 4.

pursuant to Article 18 of the Kyoto Protocol. According to this article: « Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol ». Effectively, this provision makes ratification (acceptance) a requirement for a NCP to be authorised to adopt binding decisions. However, this procedure has not been followed in the setting up of the NCP of the Kyoto Protocol, which would suggest that any decisions reached by the body in charge of the NCP would not be binding. The limited practice of this NCP so far does not allow reaching any practical conclusion on how things will evolve, although at least in one case (Greece) the decision of enforcement branch of the NCP was complied with.<sup>30</sup>

The second feature characterising NCPs is the way in which the procedure can be triggered. In most cases, NCPs can be triggered both by the State which is in a situation of non-compliance (a feature that stresses the non-adversarial nature of NCPs)<sup>31</sup> and by other State parties (either all other State parties<sup>32</sup> or only those State parties which can show a specific interest<sup>33</sup>). In some cases, NCPs can also be triggered by a body set up by the treaty, especially the Secretariat (either in connection with non-compliance of specific obligations – reporting –<sup>34</sup> or of most – unspecified – obligations).<sup>35</sup> More rarely, the NCP can be triggered by a private party, such as a non-governmental organisation.<sup>36</sup> This latter possibility could provide an interesting avenue to increase the public pressure for States to comply with their obligations under an environmental agreement. However, as it has happened in the human rights field, direct access by individuals may also have the undesirable consequence of politicizing or overburdening the bodies in charge of the NCP if adequate safeguards are not introduced.

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<sup>30</sup> CC-2007-1-6/Greece/EB, 6 March 2008 (preliminary finding) ; CC-2007-1-8/Greece/EB, 17 April 2008 (final decision) ; .CC-2007-1-10/Greece/EB, 7 October 2008 (decision on the review and assessment of the plan submitted under paragraph 2 of section XV) ; and CC-2007-1-13/Greece/EB, 13 November 2008 (decision under paragraph 2 of section X).

<sup>31</sup> See e.g. Montreal Protocol NCP (*Decision IV/5 on Non-Compliance Procedure*, doc. UNEP/OzL.Pro.4/15 (25 November 1992) at 13, and Annex IV, at 44 ; subsequently amended by *Decision X/10 on Review of the Non-Compliance Procedure*, doc. UNEP/OzL.Pro.10/9 (3 December 1998) at 23, and Annex II, at 47), para. 4 ; Basel Convention NCP (*Decision VI/12 on Establishment of a Mechanism for Promoting Implementation and Compliance*, Appendix, doc. UNEP/CHW.6/40 (10 February 2003) at 45), para. 9(a) ; Kyoto Protocol NCP (*Decision 27/CMP.1 on Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol*, doc. FCCC/KP/CMP/2005/8/Add.3 (30 March 2006) at 92), section VI.1(a) ; Biosafety Protocol NCP (*Decision BS-I/7 on Establishment of Procedures and Mechanisms on Compliance under the Cartagena Protocol on Biosafety*, doc. UNEP/CBD/BS/COP-MOP/1/15 (27 February 2004), Annex I, at 98), section IV.1(a).

<sup>32</sup> See e.g. Montreal Protocol NCP, above n 31, para. 1 ; Kyoto Protocol NCP, above n 31, section VI.1(b).

<sup>33</sup> See e.g. Basel Convention NCP, above n 31, para. 9(b) ; Biosafety Protocol NCP, above n 31, section IV.1(b).

<sup>34</sup> See e.g. Basel Convention NCP, above n 31, para. 9(c).

<sup>35</sup> See e.g. Montreal Protocol NCP, above n 31, para. 3.

<sup>36</sup> See e.g. Alpine Convention NCP (*Decision VII/4 Mécanisme de vérification du respect de la Convention alpine et de ses protocoles d'application* (Seventh Alpine Conference, 2002), reprinted in 33 *Environmental Law & Policy* (2003) 179), para. 2 ; Aarhus Convention NCP (*Decision I/7 on Review of Compliance*, doc. ECE/MP.PP/2/Add.8 (2002)), para. 18.

The third feature of NCPs is their structure. In most cases, the management of the NCP is delegated to a subsidiary body created by the COP, the function of which may be either to make recommendations to be subsequently adopted (or not) by the COP<sup>37</sup> or, in some cases, to itself adopt decisions.<sup>38</sup> The composition of such a body varies from one case to the other. Some bodies consist of representatives of State parties,<sup>39</sup> whereas others consist of independent experts appointed by the COP.<sup>40</sup> Moreover, according to the reach and sophistication of the NCP in question, procedures may involve a facilitative phase (focusing on providing assistance to the non-complying State) and an enforcement phase (focusing on imposing « measures » - in fact, sanctions - to the non-complying State), sometimes managed by different « branches » of the administrative body in charge of the NCP.<sup>41</sup> The more an NCP is structurally complex the better it seems to be adapted to manage the two main hypotheses of non-compliance, i.e. involuntary and wilful non-compliance.

This latter point takes me to the fourth feature of NCPs, namely the types of measures that they can adopt in order to manage non-compliance. As it has already been noted, NCPs may lead to the provision of financial/technical assistance,<sup>42</sup> but also to a number of more adversarial consequences, including the issuance of warnings, requests for the submission of information or plans, declarations of non-compliance, suspension of the advantages granted by the treaty in question, and even sanctions, such as penalties or trade bans.<sup>43</sup> The differing adversarial character of these measures provides considerable room for the bodies in charge of NCPs to graduate their response according to the type of non-compliance situation that they have to manage.

## 5. Enhancing Compliance : Four Recommendations

The foregoing observations suggest that, whereas a number of innovative mechanisms have been developed to ensure compliance with international environmental standards, there are still several avenues that could be explored in order to enhance the performance of some of these mechanisms as well as of the more traditional methods

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<sup>37</sup> Montreal Protocol NCP (1998), above n 31, paras. 7(f), 9, 13 and 14.

<sup>38</sup> Kyoto Protocol NCP, above n 31, Section II.8-9, Section VIII.7, Section IX.9. In the context of CITES, both the body in charge of the NCP – the Standing Committee – and the COP can adopt decisions. See: Article XIII(3) CITES, above n 19; CITES NCP (*Resolution Conf. 14.3*, Fourteenth Meeting of the COP (June 2007) Annex), 46 *ILM* 1178 (2007), paras. 11, 12(d), and 30.

<sup>39</sup> Montreal Protocol NCP (1998), above n 31, para. 5.

<sup>40</sup> Kyoto Protocol NCP, above n 31, section V.1-3.

<sup>41</sup> *Ibid*, section IV (Facilitative Branch) and section V (Enforcement Branch).

<sup>42</sup> Basel Convention NCP, above n 31, para. 20(a) ; CITES NCP, above n 38, para. 30(a) and (d); Kyoto Protocol NCP, above n 31, section XIV.

<sup>43</sup> For the issuance of warnings, see: Montreal NCP (1998), above n 31, para. 2 ; Basel NCP, above n 31, para. 20(b); CITES NCP, above n 38, para. 29(c) and (g) ; Biosafety NCP, above n 31, Section VI.2(b) ; Aarhus NCP, above n 36, Section XII.37(f). For the request of further submissions of information, see: Montreal NCP (1998), paras. 3 and 5(c); Basel NCP, para. 22(a); CITES NCP, para. 29(b); Biosafety NCP, Section VI.1(d); Kyoto NCP, above n 31, Section IX.3 ; Aarhus NCP, Section VII.25(a). For declarations of non-compliance, see: Montreal NCP, para. 9; Kyoto NCP, Section IX.4(a) and (7), and Section XV.1(a); CITES NCP, para. 29(g); Aarhus NCP, Section XII.37(e). For suspension of advantages and sanctions, see: Aarhus NCP, Section XII.37(g); CITES NCP, paras. 30 and 34; Kyoto NCP, Section XV.5.

of enforcement of international law. In what follows, I would like to summarise what I see as the four main and most realistic avenues that should be considered in this regard.

First, the monitoring powers of the bodies set up by multilateral environmental agreements should be expanded to include, to all the extent possible, the ability of these bodies to verify the information submitted by States, to request additional information, to gather their own information, to assess compliance and, when necessary, to adopt binding measures to manage compliance. One interesting approach to provide these bodies with an additional flow of information would be to increase their openness to civil society groups, particularly by amending the provisions relating to the triggering of the procedures. Also, bodies in charge of NCPs should consist of independent experts appointed by the State parties rather than of State representatives. Their structure and potential outcomes should match the types of non-compliance situations that are most likely to arise in practice. This is particularly important taking into account that some types of non-compliance situations are best addressed in a non-adversarial manner, by the provision of technical and financial assistance.

Second, the scope and modalities of technical and financial assistance should be significantly revisited. The provision of public funds by industrialised States remains very important both as « initial » resources and as a display of genuine commitment, and should be made less dependent on voluntary contributions, which are too subject to changes of governments and/or priorities. However, it should also be understood that in order for environmental finance to reach the scale required by the daunting environmental challenges now facing the international community a major role will have to be played by the private sector. The private sector should in turn be incentivised to take part in the global protection of the environment, not merely as a sign of « good citizenship » (which was the essence of corporate social responsibility efforts) but also, and mainly, for economic reasons. Schemes for the channelling of private funds towards environmental projects (such as the clean development mechanism, the joint implementation mechanism, REDD-plus, benefit-sharing agreements for the exploitation of genetic resources, etc.), despite the difficulties relating to their implementation, should be maintained and adjusted to enhance their operation. More generally, domestic and foreign investment in environmental opportunities should be encouraged through a variety of means, ranging from environmental taxes, cap-and-trade systems, insurance schemes and reasonable foreign investment protection.

Third, at a less operational level, it appears important to clarify the basic legal principles that currently characterise the respective contribution of developed and developing States to the protection of the environment. Whereas the concept of sustainable development or the principle of common but differentiated responsibilities were important tools in the quest for integrating as many countries as possible in the efforts to protect the environment, the very vagueness of these tools that facilitated consensus may undermine the operation of the environmental agreements thus adopted. In particular, it seems important to determine with some precision the relations between, on the one hand, the provision of financial and technical assistance and, on the other hand, the reporting as well as substantive obligations of the receivers of such assistance.

Fourth, and relatedly, the fact that international environmental law is geared towards the prevention of environmental damage must not lead to the conclusion that adjudication mechanisms have no role to play in this context. As noted above, despite the absence of an international environmental court, the environmental dimensions of human activities are increasingly being taken into account by other specialised *fora* in the context of human rights, trade, investment and other types of disputes. In this regard, it seems important that sufficient space is left by these « borrowed *fora* » to integrate environmental considerations, by means such as the systemic integration rule codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties<sup>44</sup> or the introduction of environmental clauses in treaties focusing on other areas of international law.

Incorporating (some of) the preceding recommendations into international law may not always be politically feasible. It is, however, not unrealistic, as suggested by the fact that each one of them has already crystallized in one or more specific contexts. Compliance with international environmental standards is an incremental, slow, and patient process, and the mechanisms that seek to enhance this process should not misapprehend its nature.

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<sup>44</sup> Vienna Convention on the Law of Treaties, 1155 *UNTS* 331, 8 *ILM* 679.