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Non-Compliance Mechanisms or International Courts: How to Increase Treaty Compliance?

CAROLINE FOSTER AND CHRISTINA VOIGT

International courts are traditionally seen as 'guardians' of the international treaty regimes by which they were established and over which they have jurisdiction.[1] However in recent years many international treaties have established 'in-house' non-compliance mechanisms (NCMs) or other treaty bodies to facilitate implementation and promote Parties' compliance with their obligations.

Implementation and compliance committees are best known in international environmental law.[2] Certain treaty regimes have complaint procedures and dispute resolution bodies to hear claims by Parties, private entities or affected non-Party stakeholders, such as individuals and communities. Others have facilitative committees that aim to help Parties to overcome implementation or compliance challenges. Multilateral environmental treaty (MEA) regimes with established NCMs include, for example, the Montreal Protocol on Substances that Deplete the Ozone Layer,[3] the Convention on International Trade in

[1] Von Bogdandy, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014); KJ Alter, *The New Terrain of International Law* (Princeton University Press 2014); C Voigt (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019); T Squatrito, OR Young, A Føllesdal and G Ulfstein, *A Framework for Evaluating the Performance of International Courts and Tribunals* (Cambridge University Press 2018).

[2] T Treves, A Tanzi, C Pitea, C Ragni and L Pineschi (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009); MA Fitzmaurice and C Redgwell, 'Environmental Non-Compliance Procedures and International Law' (2000) 31 *Netherlands Yearbook of International Law* 35; C Godsfriend, 'Comparing Environmental Dispute Management Compliance Mechanisms in International Environmental Treaties and Traditional Dispute Resolution Mechanisms in the Search for Effective Implementation' (2020) 7 SOASLJ 74; J Brunnée, M Doelle and L Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press 2012).

[3] Montreal Protocol on Substances that Deplete the Ozone Layer, signed 25 November 1992, entered into force 14 June 1994, 1785 UNTS 517, available

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Endangered Species of Wild Fauna and Flora,[4] the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,[5] the Kyoto Protocol to the United Nations Framework Convention on Climate Change,[6] the Paris Agreement,[7] the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,[8] the Minamata Convention on Mercury,[9] the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes,[10] the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[11] and the Espoo Convention on Environmental Impact Assessment in a Transboundary Context.[12]

at https://treaties.un.org/doc/publication/unts/volume%201522/volume-1522-i-26369-english.pdf

[4] Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed 3 March 1973, entered into force 1 July 1975, 1453 UNTS 243, available at https://cites.org/eng/disc/text.php.

[5] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, signed 10 September 1998, entered into force 24 February 2004, 2244 UNTS 337, available at www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.aspx.

[6] Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed 11 December 1997, entered into force 16 February 2005, 2303 UNTS 162, available at https://unfccc.int/resource/docs/convkp/kpeng.pdf.

[7] Paris Agreement signed 12 December 2015, entered into force 4 November 2016, 1673 UNTS 125, available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[8] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, signed 22 March 1989, entered into force 5 May 1992, 1673 UNTS 57, available at www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx.

[9] Minamata Convention on Mercury, 10 October 2013, entered into force 16 August 2017, available at www.mercuryconvention.org/en/resources/minamata-convention-mercury-text-and-annexes.

[10] UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, signed 17 March 1992, entered into force 6 October 1996, 1936 UNTS 269, available at https://unece.org/DAM/env/water/pdf/watercon.pdf.

[11] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed 25 June 1998, entered into force 29 October 2001, 2161 UNTS 447, available at https://unece.org/DAM/env/pp/documents/cep43e.pdf.

[12] Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, entered into force 10 September 1997, 1989 UNTS 309, available

What is perhaps less well known is the extent to which highly developed NCMs are increasingly found across a wide spectrum of international law, with more non-compliance processes under negotiation as we write. Implementation and compliance machinery is found in various fields of international law including trade; international finance, including the work of the World Bank and the International Monetary Fund (IMF); disarmament; international criminal law and cultural heritage law. While scholarship has so far largely focussed on NCMs in international environmental law[13] and human rights law,[14] mechanisms operating in these other contexts also merit scholarly and comparative analysis. At the same time, the way in which NCMs operate within international environmental law has continued to evolve, taking on a range of features distinguishing a new generation of MEAs. In particular, recent NCMs in MEAs, such as the Paris Agreement Implementation and Compliance Committee, are losing their hard quality and becoming increasingly facilitative.[15] Multilateral environmental treaty NCMs have also become more sophisticated, taking on new processual elements such as that seen in the UNECE Water Convention, where an advisory opinion may now be sought through the Convention's NCM.

All these 'quasi-judicial' NCMs are designed to exist alongside formal dispute resolution processes, including through international courts and tribunals (ICTs).[16] Yet their functions in some cases overlap with those of

at https://unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf.

[13] See, for example: Treves et al. (n 2).

[14] S Atapattu, *UN Human Rights Institutions and the Environment, Synergies, Challenges, Trajectories* (Routledge 2023).

[15] See, for example: M Doelle, 'In Defence of the Paris Agreement's Compliance System: The Case for Facilitative Compliance' in B Mayer and A Zahar (eds), *Debating Climate Law* (Cambridge University Press 2020); C Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement' (2016) 25 *Review of European, Comparative & International Environmental Law* 161; C Voigt and G Xiang, 'Accountability in the Paris Agreement: The Interplay between Transparency and Compliance' (2020) 1 *Nordic Journal of International Law* 31; G Zihua, C Voigt and J Werksman, 'Facilitating Implementation and Promoting Compliance with the Paris Agreement: Conceptual Challenges and Pragmatic Choices' (2019) 9 *Climate Law* 65; C Campbell-Duruflé, 'Accountability or Accounting? Elaboration of the Paris Agreement's Implementation and Compliance Committee at COP 23' (2018) 8 *Climate Law* 1; S Oberthür and E Northrop, 'Towards an Effective Mechanism to Facilitate Implementation and Promote Compliance under the Paris Agreement' (2018) 8 *Climate Law* 39.

[16] T Squatrito, OR Young, A Føllesdal and G Ulfstein, *A Framework for Evaluating the Performance of International Courts and Tribunals* (Cambridge University Press 2018); C

ICTs, ranging from clarifying treaty obligations and providing authoritative interpretations, rendering advisory opinions, inquiring into Parties' compliance challenges and providing suggestions for addressing them, to the resolution of disputes between Parties.[17] The relationship between compliance mechanisms and international courts is complex and not clear cut – and this book has set out to explore this relationship. To this end, the book's comparative institutional and empirical analyses examine the design of NCMs, their importance for advancing and protecting shared international interests and matters influencing their legitimacy and effectiveness. Overall, the book aims to improve the understanding of which processes and institutions enhance States' compliance with their international obligations and for what reasons.

The book's first aim is to generate a greater understanding of the often-overlooked NCMs operating in diverse areas of international law, considering the prompts for the setting up of NCMs and factors influencing their design, including subject-specific trajectories. We investigate the nature of the processes employed under these compliance mechanisms and treaty bodies, and investigate their advantages and disadvantages by juxtaposing punitive versus facilitative measures, reactive versus proactive initiatives, and procedures promoting implementation versus addressing non-compliance. An emerging conclusion is that there is a significant spectrum of legal effects, depending for instance on whether mechanisms involve facilitative engagement with the Party concerned, rendering an advisory opinion or resolving a contentious case, and the level of transparency and third-party access to proceedings. Importantly, the book's analyses are forward looking, embracing discussions on novel NCMs like those in Chapter 5 (water law), Chapter 8 (trade) and Chapter 9 (finance). The exploration of new ways in which existing mechanisms may be used is also an emerging trend as discussed in Chapter 6 (State-to-State triggering of NCMs), Chapter 16 (human rights and environment) and Chapter 7 (science-based treaties). Authors

Lutmar, CL Carneiro and SM Mitchell, 'Formal Commitments and States' Interests: Compliance in International Relations' (2016) 42(4) *International Interactions* 559–64.

[17] C Voigt (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019); C Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011); C Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence* (Oxford University Press 2021).

engage specifically with the development of new compliance processes in current treaty negotiations in fields including international pandemic law, biodiversity on the high seas and plastics pollution as seen in chapters including Chapter 2 (health).

Second, the book investigates the working hypothesis that there is an 'interest-outcome' correlation: the more broadly that legal interests are shared among States (e.g., global public goods, common concerns),[18] the less beneficial may be a narrow legal result particular to a specific situation and the more instrumental it may be to employ a more far-reaching process in which all with a legal interest have a degree of ownership. For broadly shared interests, NCMs may provide a more fruitful avenue for States to address concerns, compared to confrontational, contentious litigation or arbitration. Non-compliance mechanism proceedings may be pursued either in place of or alongside proceedings in ICTs. The authors' research supports the hypothesis that non-compliance machinery is particularly well suited and important for addressing broadly shared international legal interests affecting common concerns and global public goods. This is brought out in the research presented for instance in Chapter 2 (health), Chapter 4 (watercourses), Chapter 6 (State-to-State triggering of NCMs), Chapter 10 (economic law) and also in Leonardo Borlini's work in Chapter 17 (international criminal law), the latter a field of densely interdependent and shared interests.

Third, in analysing the legitimacy of NCMs, the authors consider firstly procedural challenges such as consent, participation, representation and reliance on NGOs and human rights organisations, including problems with funding, technological organisation and capacity but also mandate, legitimacy and selective political orientation, representation by lawyers, the independence of the members of NCMs, the independence of secretariats supporting them, the role of scientific bodies, the need for technical expertise and assistance, public involvement and the provision of triggering information. The legitimacy of NCMs with reference to

[18] J Brunnée, 'International Environmental Law and Community Interests: Procedural Aspects' in E Benvenisti and G Nolte (eds), *Community Obligations in International Law* (Oxford University Press 2018); see also KN Scott 'Non-Compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements' in D French, M Saul and ND White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart 2010).

their outputs is then considered, including the prevention of harm versus the remedying of harm; stewardship of common versus individual interests; multilateral versus bilateral effects, and containing the unilateral exercise of power.

Chapter 3 (environment) helpfully sets a baseline in relation to these analyses of legitimacy, with the environmental field having been considered the core field in recent decades for the establishment of non-compliance machinery. Malgosia Fitzmaurice underlines the emergence of facilitative compliance and the foundational requirement here of procedural legitimacy. This theme is taken up in subsequent chapters such as Chapter 4 (watercourses) which highlights the importance of representation and participation by all actors, a commitment properly to take into account the public interest and also the importance of scientific and technical expertise, a matter also addressed in Chapter 7 (science-based treaties). Chapter 12 (right to a healthy environment) goes on to discuss the importance of public participation under the Escazú Agreement, while Chapter 20 (law of the sea) also highlights the important role of public opinion in bringing about compliance and opening co-operative horizons.

Finally, the book considers the relative effectiveness of non-compliance machinery and the factors that may help make NCMs work best. The book looks into whether and why in some circumstances the use of informal NCMs may be more effective in helping to bring States into compliance with their treaty obligations or to address situations of non-compliance than recourse to an ICT for breach of a treaty. Factors differentiating NCMs from ICTs include the mode of initiation of procedures, non-adversarial procedures, largely the absence of punitive sanctions, the need for more follow up and less timebound decision-making and the absence of legal bindingness. Non-compliance mechanisms' complementarity and synergy with ICTs are addressed, as well as their complementarity and synergy with other NCMs, and situations that fall between the mechanisms. The relationship between NCMs and between NCMs and ICTs is a fascinating topic, including the cross-referencing and communication among NCMs, as well as cross-referencing and communication between NCMs and ICTs; the potential for strategic litigation; the value of diversity in available fora, but also the danger of 'forum shopping' and the relationship to national decision-making and the work of domestic courts, especially regarding the exhaustion of domestic remedies, as well as margins of appreciation and subsidiarity.

The book's chapters reveal important complementarity and synergies between and among mechanisms.[19] This ranges from the insight by Laura Pineschi in Chapter 4 (watercourses) that all available means must be used to achieve full implementation, to the analysis from Alice Fabris in Chapter 19 (cultural heritage) where the combined contribution of compliance mechanisms still leaves a need for further action as problems of cultural protection in armed conflict continue to fall between the gaps. In the case of Sun's analysis in Chapter 18 (disarmament) it is clear that the interplay between mechanisms becomes important when some of these mechanisms fail, including at times of change in political leadership, and that a balance of procedural options can help achieve positive outcomes. The combination of judicial, non-traditional specialised bodies is important in diverse fields, especially when used strategically, as seen in the contributions from Noemi Magugliani and Jeanne-Pierre Gauci in Chapter 15 (human trafficking). Civil society actors have learnt how to switch between NCMs and ICTs for best effect in some areas, as analysed by Elena Evangelidis in Chapter 11 (wildlife conservation). However certain advantages of NCMs remain clear, with this type of machinery tending to be quicker and less expensive, helping avoid costly long-running disputes and promoting co-operation, and providing access to support and constructive engagement in solving the compliance issue at stake. Emerging new mechanisms and innovations will help capitalise on this promise as seen in the analyses by Carlos Cruz Carrillo in Chapter 5 (water law) and Jonathan Brosseau in Chapter 9 (finance).

There are also tensions in the books' findings, with the pieces by Andreas von Staden in Chapter 13 (human rights) and Samuel White in Chapter 14 (human rights) complementing one another with contrasting conclusions from differently configured studies, raising questions for future consideration. Andreas von Staden comments on the jurisdictional overlap in the human rights domain which results in a growing body of decisions coming from different institutions that address the same or related rights with respect to the same States. This raises, among other things, the question of their comparative effectiveness in resolving disputes and providing remedies to victims of human rights violations. In his view, the legal status of the output of individual complaints procedures is, by itself, determinative neither of compliance nor of

[19] See, previously A Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements' (2011) 24(1) *Journal of Environmental Law* 103.

non-compliance. Samuel White, on the other hand, suggests, based on an analysis of the UK's experience with the European Convention on Human Rights on the one hand, and the International Covenant on Civil and Political Rights (ICCPR) on the other, that the former, characterised by a strong, judicial compliance mechanism, can be linked with better human rights outcomes. By contrast, the ICCPR, with its weaker, reporting-based compliance monitoring and opt-in right of individual petition has, in his view, not had the same impact.

This book represents a rich body of work where the complexity of the issues and interconnection of the themes involved becomes apparent, adding to previous valuable scholarly contributions in the field. An edited collection, it is the result of work carried out by the selected pool of authors following their constructive discussions at a workshop titled 'International Courts versus Compliance Mechanisms' held in October 2021 under the auspices of PluriCourts, the Center of Excellence for the Study of the Legitimacy of the International Judiciary hosted by the University of Oslo, Faculty of Law and administered by Professor Dr Christina Voigt. The authors represent different international legal fields; among them are prominent scholars and practitioners in these areas. Importantly, however, they bring together a wide legal and geographical spectrum of views from researchers in different parts of the world at different stages in their careers. Authors were invited to develop their work for publication and the editors worked closely with many of the authors on their individual chapters to bring the project to fruition. The novelty of the developments discussed, the depth of the authors' legal analyses and the quality of their contributions, were key factors in the inclusion of the chapters in this book.

The editors are hopeful that the book will inform and enlighten academics working at all levels on the topics of international courts and tribunals, governance structures and international governance and compliance, as well as conflict resolution; officials and analysts working for international environmental, human rights, development, trade and investment-related institutions and organisations; legal practitioners, lawyers, advisors and governmental consultancies including in environmental, social and trade ministries; judges, arbitrators and clerks at courts and tribunals; attorneys in the areas of international environmental, human rights, trade, economic and development law; the members of secretariats supporting NCMs under various international treaty regimes; and civil society organisations and foundations working on issues relating to global governance and compliance.

In sum, the research for the book has revealed, as expected, greater complexity in interactions between reliance on NCMs and ICTs, as well as a wide variety of factors regarding their design, legitimacy, effects, outcomes and the conceptual underpinnings of their work. This research has cast an important light on how procedural innovations may help render NCMs more effective as well as on the circumstances in which they may be needed, including particularly where States share common interests, populations are interdependent, and implementation makes significant administrative, regulatory and political demands.

Producing the book has been a fruitful exercise in exchanging views and ideas on strengthening protection for fundamental interests through the rule of law. The ultimate starting point for the deliberations in the book is the importance of treaty compliance. International law abounds with treaties; yet effective implementation and compliance are recurring challenges. However, both are crucial for the effectiveness of any given treaty and the international legal order.