3

The New Generation of Environmental Non-Compliance Procedures and the Question of Legitimacy

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3.1 Introduction

This chapter will explore the evolution of Non-Compliance Procedures (NCPs). NCPs are designed in principle to facilitate and assist the compliance of States Parties with obligations deriving from Multilateral Environmental Agreements (MEAs), but potentially trigger harsher means to elicit compliance, such as suspension of a Party's rights under an MEA. The chapter will begin by analysing the classical NCPs such as the NCP in the Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol),[1] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[2] the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[3] and the Kyoto Protocol.[4] The chapter will then analyse new NCPs such as those established in the Paris Agreement[5] and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

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

[2] 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.

[3] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed 25 June 1998, entered into force 30 October 2001, 2161 UNTS 447.

[4] Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed 11 December 1997, entered into force 16 February 2005, 2303 UNTS 162.

[5] Paris Agreement signed 12 December 2015, entered into force 4 November 2016, 1673 UNTS 125.

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(Rotterdam Convention)[6] and the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention).[7] This chapter also takes a new look at classical NCPs in the Montreal, CITES and Aarhus Conventions and at whether, in the years since they were established, compliance has been ensured by more facilitative than coercive methods.

NCPs' functions raise questions of legitimacy; likewise, the powers of Conferences or Meetings of the Parties (COPs/MOPs) which decide ultimately on non-compliance in the majority of cases. Thus, the next step of the analysis will be the issue of the legitimacy of the functions of NCPs and COPs/MOPs in both old and new regimes. As will be further explained, the premise on which the legitimacy of the new generation of NCPs is hinged is the concept of facilitative compliance, and the exclusion of the possibility of far-reaching and radical measures of suspension in the rights of a Party to an MEA.

3.2 The Question of Legitimacy: General Introduction

The general question of the definition of legitimacy and its link to legality in international law is a subject which is still debated and largely unresolved. An in-depth discussion of this topic exceeds the framework of this chapter. As it has been aptly observed,

> [l]egitimacy is often criticised as a notoriously slippery concept. It is defined in a myriad of ways by many different authors … Yet it is a meaningful concept because it seeks to explain why these addressed by an authority should comply with its mandates in the absence of perceived self-interest or brute coercion. A legitimate power is broadly understood as to mean one that has the 'the right to rule'.[8]

According to Wolfrum,[9] there are different elements which may legitimise authority. These elements include source-based legitimisation, procedure-based legitimisation and result-based legitimisation, or a

[6] 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.

[7] 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.

[8] N Grossman, H Grant Cohen, A Follesdal and G Ulfstein, 'Legitimacy and International Courts: A Framework' in N Grossman, H Grant Cohen, A Follesdal and G Ulfstein (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) 4.

[9] R Wolfrum, 'Legitimacy in International Law from a Legal Perspective. Some Introductory Considerations' in R Wolfrum and V Roeben (eds), *Legitimacy in International Law* (Springer 2008) 1–24.

combination thereof.[10] In relation to source-based legitimisation, the classical view is that this derives from the consent of States. This is most pronounced in the case of treaties, in which international law obligations are legitimised through national institutions. Questions do remain in connection with the chain of legitimacy, such as the situations when some of the participating States are not democratically structured, but it is beyond the scope of this chapter to discuss these issues in depth.[11] Consent-based legitimacy is more complex in the case of customary international law in which the legitimising role of consent is less clear-cut than in relation to treaties. However, if customary international law is understood as a tacit agreement of States concerned, 'then its ultimate source is the consent of States'.[12] More problematic is the view according to which the source of customary international law is the fictitious consent of States. In this view, customary international law is based on the voluntary acts of States 'which they undertake in the awareness of their implications for the possible development of customary international law'.[13] Finally, an important element of consent-based legitimacy is the form in which it is accorded by States. Consent can be given to one act, which results in a singular international obligation (static), or can conversely be accorded as a general authorisation for the exercise of a dynamic (evolutionary) function setting up a regime of governance, consisting of a series of acts, based on a single, general authorisation by States. Such a regime may modify the regime of governance.[14]

Authority can secondly be legitimised through adequate and fair procedures (such as the rules concerning the composition of an institution, or the rules relating to its decision-making procedures and participation).[15] Public participation and transparency, according to Bodansky, are fairly weak forms of legitimation as they merely accord an opportunity for the public to communicate their views to relevant officials rather than enabling the public to participate in decision-making.[16] Nevertheless, as will be analysed further, public participation and transparency play a pivotal role in NCPs' legitimacy.

[10] Ibid., 6.
[11] Ibid., 7.
[12] Ibid., 8.
[13] Ibid., 8.
[14] Ibid., 8.
[15] Ibid., 6.
[16] D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *American Journal of International Law* 596, 619.

Outcome is the third and the last element potentially legitimising authority. This basis for legitimacy is more vague and less tangible than source and procedure-based legitimisation. In broad brushstrokes, if an institution acting on the basis of an established procedure does not achieve the expected results, then this may lead to the erosion of legitimacy.[17]

Wolfrum's analysis of legitimacy is highly positivistic. In fact, the concept of legitimacy has not only a normative but also a sociological aspect. On the one hand, in its sociological aspect, it refers to popular attitudes about authority. As Bodansky writes, '[a]uthority, has popular legitimacy if the subjects to whom it is addressed accept it as justified'. Bodansky observes that 'the more positive the public's attitudes about an institution's right to govern, the greater its popular legitimacy'. On the other hand, 'legitimacy' can have a normative meaning, referring to whether a claim to authority is well founded; and to 'whether it is justified in some objective sense'.[18] These two aspects of legitimacy are conceptually distinct.[19] Bodansky has also opined that legitimacy in the context of international environmental law developed 'through a consensual rather than an authoritative process' and the phenomenon of authority plays only an ancillary role.[20]

The next issue, which is subject to ongoing debate, is the question of the link between legality and legitimacy. There are highly divergent views on this subject and there does not exist one single approach which would gain general approval. It may be said that, as argued by Bodansky, legality plays a fundamental role in ensuring that the exercise of authority by an international institution can be connected to its treaty basis, which in fact is consent.[21] However, Bodansky is also of the view that legitimacy is a broader concept than that of legality. For example, legality is not the only criterion for assessing legitimacy and the justification for exercising authority may also be based on wider extra-legal considerations and not be limited to legally binding rules.[22]

The general notion of legitimacy adopted in this chapter will be grounded in the concept of legitimacy as based on consent accorded as a general authorisation for the exercise of a dynamic (evolutionary)

[17] Wolfrum (n 9) 7.
[18] Bodansky (n 16) 604.
[19] Ibid., 602.
[20] Ibid., 604.
[21] Ibid., 311.
[22] Ibid., 311–18.

function, setting up a regime of governance which consists of a series of acts based on a single, general authorisation by States. As mentioned, in Wolfrum's analysis, such a general consent may modify the regime of governance. This form of consent is particularly apt in relation to environmental dispute settlement and the establishment and operation of NCPs. COPs/MOPs adopt decisions (most commonly on the basis of so-called enabling clauses contained in an MEA) to set up NCPs, which through a series of decisions, may contribute to the implementation of State Parties' obligations, influencing the regime of governance. However, it may be added that legitimacy in relation to the operation of NCPs sits at the nexus of consent-based and procedural legitimacy. Procedural legitimacy (transparency, public participation) will be discussed further.

3.3 Conferences of the Parties/Meetings of the Parties: General Considerations

COPs and MOPs play a pivotal role in the functioning of NCP regimes. They ultimately decide on non-compliance and the measures which are to be imposed in the event of non-compliance. They are well placed to manage non-compliance. As the highest organs of an MEA, they exercise all-encompassing functions relating to the MEA, adopt the most important decisions and have an overview of the whole agreement.

There is a plethora of bodies established by various multilateral treaties whose functions go beyond just managing the treaty regime. However, it was the advent of MEAs in particular that initiated a fertile legal (if inconclusive) debate on the nature of the functions of COPs. When MEAs began to be established after the 1972 Stockholm Conference on the Human Environment, COPs were created in order to make the management of MEAs more efficient and flexible, in contrast to previous bureaucratic arrangements. The functions of COPs have evolved beyond those of the early, basic COP with limited powers as in the Ramsar Convention on Wetlands of International Importance.[23] The COP of the Ramsar Convention today enjoys wide powers, as do other COPs. The term 'Conference of the Parties' was first used in the 1973 Convention of Trade in Endangered Species of Wild Fauna and Flora (CITES). The original Article 6 of that Convention provided that the COP would 'as the necessity arises, convene Conferences on the

[23] Ramsar Convention on Wetlands of International Importance, signed 2 February 1971, entered into force 21 December 1975, 996 UNTS 245.

Conservation of Wetlands and Waterfowl'. It also stated that the COP had an advisory character. This Article was amended in 1986 in order to create a Conference of the Contracting Parties, tasked with the oversight and promotion of the Convention's implementation. The reference to the COP's advisory character was deleted. The 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter[24] created a body (the Consultative Meeting of States Parties) that enjoyed more powers. This body, however, lacked any express authority to establish subsidiary bodies and had very limited powers of supervision.

The powers of COPs today vary. Camenzuli, however highlights one common trend among contemporary COPs; namely that their powers are very broad, including their law-making powers. She has identified the following general powers: setting priorities and reviewing the implementation of the relevant convention based on reports submitted by governments; consolidating and analysing information from governments, NGOs and individuals to make recommendations to the Parties on the implementation of the convention; making decisions necessary for promoting the effectiveness of the convention; revising the convention when necessary; and acting as a forum for discussing matters of importance.[25] As a rule, the powers of COPs are set out in the referent treaty. However, certain treaties define COPs' powers in an open-ended fashion. For example, the London Convention provides that COP is 'to consider any additional action that may be required' (Article XIV(4)(f)). The 1979 Convention on Long-range Transboundary Air Pollution[26] provides that the COP can '[f]ulfil such other functions as may be appropriate under the provisions ... of the Convention' (Article 10(2)(c)). The UNFCCC states that the COP is to '[e]xercise such other functions as are required for the achievement of the objective of the Convention' (Article 7(2)). COPs often have the mandate to keep the implementation of the treaty 'under regular review' and make, within their mandate, the

[24] London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, signed 29 December 1972, entered into force 30 August 1975, 1046 UNTS 120.

[25] LK Camenzuli, 'The Development of International Environmental Law at the Multilateral Environmental Agreements Conference of the Parties and Its Validity', available at www.ecolex.org/details/literature/the-development-of-international-environmental-law-at-the-multilateral-environmental-agreements-conference-of-the-parties-and-its-validity-mon-085461/.

[26] 1979 Convention on Long-range Transboundary Air Pollution, signed 13 November 1979, entered into force 16 March 1983, 1302 UNTS 217, Article 17.

decisions necessary to promote effective implementation (see e.g., the Paris Agreement, Article 16, paragraph 4).

COPs' functions cover both external and internal matters. Several of their functions can develop international law. They are the following: (i) powers of decision-making on the amendment and modification of conventions and the adoption of new protocols; (ii) decision-making and resolution powers; (iii) supervisory powers; (iv) interpretative powers; (v) powers in respect of the establishment of non-compliance mechanisms (vi) keeping under regular review the implementation of the treaty (e.g., Article 16(4) of the Paris Agreement). Through the reviewing process COPs may 'examine specific difficulties of compliance and consider measures aimed at improving it'.[27] As previously observed, there is no uniform and consistent view on the legal nature of the COPs in scholarship. The most prevalent view is that they are of a hybrid character, positioned between issue-specific diplomatic conferences and the permanent plenary bodies of international organisations, and that they exercise their functions at the interface of the law of treaties and the law of international organisations.[28] They constitute useful fora for State Parties to evolve treaty regimes and co-operate. They are treaty bodies in the sense that they are created on the basis of a treaty, but they should not be equated with bodies that comprise independent experts or bodies with a limited membership.

The extensive range of functions of MEAs is an example of so-called creative legal engineering. The powers of the organs established by MEAs, in particular COPs, gave rise to varying views regarding the nature of convention organs and bodies endowed with decision-making powers. According to one view, they can be seen as free-standing entities, involving institutional arrangements, or structures, which are independent from the Parties, and having, at least to a certain extent, an autonomous character in the sense of having (i) their own law-making or rule-making powers (or at least, the power to generate or alter obligations) and (ii) the power to formulate, or operate, mechanisms within the treaty regime, such as compliance mechanisms, which may have effects that are binding on the

[27] UNEP Training Manual on International Environmental Law, available at https://autlawiel.files.wordpress.com/2014/10/unep-tm-ch-4-compliance-and-enforcement-of-multilateral-environmental-agreements.pdf.

[28] G Nolte, 'Third Report on Subsequent Agreement and Subsequent Practice of States Outside of Judicial and Quasi-Judicial Proceedings' in G Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press 2013) 365.

Parties. The Kyoto Protocol[29] granted a very broad functional remit to its MOP: 'The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. Any such trading was to be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments.' It is clear that the MOP of the Kyoto Protocol was empowered to fill in the gaps in the text of the treaty and it has been the MOP that has also set out the modalities for the operation of the treaty's mechanisms such as emissions trading, joint implementation and the clean development mechanism.

Churchill and Ulfstein refer to institutions such as COPs and MOPs as 'autonomous institutional arrangements' (AIA).[30] Alternatively we could adhere to the view that COPs can be seen as no more than a form of diplomatic conference providing a continuous, or at least regular, context within which decisions can more readily be made than through the calling of *ad hoc* diplomatic conferences. In fact, it is submitted that COPs /MOPs may take on the character of either an AIA or a diplomatic conference, depending on both the substantive nature of what is discussed, and on whether or not their decisions will require subsequent validation to become binding on the Parties.

3.4 Non-Compliance Procedures: General Considerations

This section will deal with so-called non-compliance procedures, which concern measures directed at the Parties to MEAs in cases of non-compliance with treaty provisions or the decisions of COPs. Non-compliance procedures can be considered *quasi*-legal, as they, with the possible exception of the Enforcement Branch of the non-compliance mechanism established under the Kyoto Protocol, do not result in formally binding decisions. Non-compliance procedures do, though, uniformly address deficits in the implementation of MEAs. It has been said that they 'counteract, by means of cooperative approaches, the symptoms and causes of failure by Parties in the implementation of, and compliance

[29] Kyoto Protocol, Article 17. The Parties included in the Kyoto Protocol's Annex B were permitted to participate in emissions trading for the purposes of fulfilling their commitments under Article 3.

[30] R Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623–59.

with, their obligations'.[31] Frequently, non-compliance is not the result of wilful disobedience, but due to a lack of capacity to implement a treaty. Therefore, NCPs also address the root causes of failure to implement a treaty, such as the need for capacity building and reduction of compliance costs; the functions of the Paris Agreement's Compliance Committee provide a good example.[32]

However, NCP decisions on non-compliance carry great weight and they have proven to be a very effective mechanism of engendering compliance. Not all decisions on non-compliance are referred to COPs/MOPs. For example, the Paris Agreement's Compliance Committee reports annually to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) but adopts it decisions autonomously. Further, in its decisions '[t]he Committee may identify issues of a systemic nature with respect to the implementation of and compliance with the provisions of the Paris Agreement faced by a number of Parties and bring such issues and, as appropriate, any recommendations to the attention of the CMA for its consideration'.[33]

[31] L Pineschi, 'Non-Compliance Mechanisms and the Proposed Center for the Prevention and Management of Environmental Disputes', available at http://dadun.unav.edu/bitstream/10171/22204/1/ADI_XX_2004_05.pdf, 242.

[32] X Wang and G Wiser, 'The Implementation and Compliance Regimes under the Climate Change Convention and Its Kyoto Protocol' (2002) 11 *Review of European, Comparative & International Environmental Law* 181, 182. See e.g., functions of the Compliance Committee of the Paris Agreement: 'With a view to facilitating implementation and promoting compliance, the Committee shall take appropriate measures. These may include the following: (a) Engage in a dialogue with the Party concerned with the purpose of identifying challenges, making recommendations and sharing information, including in relation to accessing finance, technology and capacity-building support, as appropriate; (b) Assist the Party concerned in the engagement with the appropriate finance, technology and capacity-building bodies or arrangements under or serving the Paris Agreement in order to identify possible challenges and solutions; (c) Make recommendations to the Party concerned with regard to challenges and solutions referred to in paragraph 30(b) above and communicate such recommendations, with the consent of the Party concerned, to the relevant bodies or arrangements, as appropriate; (d) Recommend the development of an action plan and, if so requested, assist the Party concerned in developing the plan'; (e) Issue findings of fact in relation to matters of implementation and compliance referred to in paragraph 22(a) above': 20/CMA.1, para 30, FCCC/PA/CMA/2018/3/Add.2, 19 March 2019, available at https://unfccc.int/sites/default/files/resource/cma2018_3_add2_new_advance.pdf.

[33] Modalities and procedures for the effective operation of the Committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, see in depth: G Zihua, C Voigt and J Werksman, 'Facilitating Implementation and Promoting Compliance with the Paris Agreement under Article 15: Conceptual Challenges and Pragmatic Choices' (2019) 9 *Climate Change Law* 65.

Since the establishment of a Non-Compliance Committee under the Montreal Protocol in 1992, it has been a common practice of States Parties to MEAs to create treaty bodies, called 'Compliance' or 'Implementation Committees' (or both) which have the function of determining a State Party's compliance with its international obligations. NCPs may be established in the treaty itself (e.g., the Paris Agreement) or on the basis of so-called enabling clauses in MEAs, which provide for the establishment of such a procedure by a decision of the relevant COP. An example of this is found in Article 8 of the Montreal Protocol.[34] However in a few cases such NCPs have been established without such an authorisation. For example, the NCP in the Basel Convention on Transboundary Movement of Hazardous Wastes,[35] was established without an enabling clause in the Agreement. NCPs are designed to respond to a breach of environmental obligations in the multilateral, not bilateral, context. The multilateral context is capable of accommodating the type of obligations which are of a character relevant to community interests in a truly satisfactory manner. Environmental obligations, in particular obligations relating to global issues, are not reciprocal in nature. For this reason, the classical settlement of dispute procedures as envisaged by Article 33 of the UN Charter, which are bilateral in nature, are perhaps less suitable for addressing non-compliance in a multilateral context and remedying non-compliance in respect of global issues such as climate change, and the protection of biodiversity or the ozone layer.

Legal procedures such as judicial and arbitration are different in nature, as they are adversarial, rendering binding decisions, based on third-party application of the law, and their legitimacy has its roots in different justifications. The (quite extensive) judicial practice in environmental matters before courts and tribunals has generated some critical comments. The judicial settlement of environmental disputes has been mostly focussed in the International Court of Justice (ICJ) and the International Tribunal for the Law of Sea (ITLOS). It may be said that there have been certain environmental considerations in the jurisprudence of the World Trade Organization, but they have essentially been analysed from the point of view of a limitation to the liberalisation of

[34] The Montreal Protocol on Substances That Deplete the Ozone Layer, signed 16 September 1987, entered into force 1 January 1989, 26369 UNTS 28.

[35] 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.

trade.[36] The European Court of Human Rights (ECtHR) has dealt with a number of cases where environmental harm was interfering with private and family lives (Article 8 of the European Convention on Human Rights (ECHR)).[37]

There has been some support in the literature for the view that environmental disputes are amenable to judicial settlement partly due to the 'hardening' of the fabric of international environmental law.[38] This view is not entirely shared by the author of this chapter. The existing jurisprudence of international courts and tribunals has admittedly relied to some extent on principles of international environmental law and in some instances even clarified and developed them. However, international courts and tribunals (in particular the ICJ) prefer to apply well-tested principles of general international law and their attempts to venture into the realm of pure international environmental law have often been subject to severe criticism. An example is the ICJ's pronouncements in *Costa Rica v Nicaragua* regarding compensation for environmental damage which demonstrate that the Court has not entirely grasped the particularities of international environmental law.[39] It was stated in this regard that 'overall, the judgment demonstrates that the law on this topic may not be completely settled and there is plenty to argue about in future cases'.[40]

[36] See e.g., WTO, EC Measures Concerning Meat and Meat Products (Hormones) AB-1997-4, Report; EC Approval and Marketing of Biotech Products DS291, available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm.

[37] T Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009); 'The Settlement of Disputes in International Environmental Law' in S Alam, JH Bhuiyan, TMR Chowdhury and EJ Techera (eds), *Routledge Handbook of International Environmental Law* (2013) 175; 'International Environmental Disputes: To Sue or Not To Sue?' in N Klein (ed.), *Litigating International Law Disputes: Weighing The Options* (Cambridge University Press 2014) 284; A Boyle and J Harrison, 'Judicial Settlement of International Environmental Disputes' (2013) 4 *Journal of International Dispute Settlement* 245; M Fitzmaurice, 'The International Court of Justice and International Environmental Law' in C Tams and J Sloane (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 353; Y Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) 65.

[38] Stephens, *Routledge Handbook* (n 37) 175–6.

[39] *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*). *Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica* [2018] ICJ Rep 1.

[40] See critical comments by D Desierto, 'Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: The ICJ Compensation Judgment in Costa Rica v. Nicaragua and the IACtHR Advisory Opinion on Marine Protection for the Greater Caribbean', EJIL: Talk !, 14 February 2018, available at www.ejiltalk.org/environmental-damages-environmental-reparations-and-the-right-to-a-healthy-environment-the-icj-compensa

The Court was much more comfortable in invoking within the framework of international environmental law the classical *Chorzow Factory* pronouncement according to which a responsible State has to 'wipe out all consequences of a wrongful act'.[41]

There are also alternative explanations as to why NCPs are more suited to deal with environmental non-compliance than traditional dispute settlement procedures. It may be that States prefer NCPs due to the fact that they exercise more control over the whole process and its result compared to third-party mechanisms, such as judicial or arbitral procedures. NCPs have less stringent effects; decisions are not final in the form of *res judicata* and are less intrusive. NCPs also favour prevention by relying on monitoring, verification or reporting which better suits the aims of international environmental law.[42] NCPs' character is well defined by reference to the Mechanism for Promoting Implementation and Compliance with the Basel Convention.[43] In its Objectives it is stated that

> The objective of the mechanism is to assist Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of the compliance with the obligations under the Convention.[44]

The mechanism's nature is described in the following terms:

> The mechanism shall be non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention. It will pay particular attention to the special needs of developing countries and countries with economies in transition, and is intended to promote cooperation between all Parties. The mechanism should complement work performed by other Convention bodies and by the Basel Convention Regional Centres.[45]

tion-judgment-in-costa-rica-v-nicaragua-and-the-iacthr-advisory-opinion-on-marine-protection/, accessed 11 October 2020.

[41] *Case Concerning the Factory at Chorzow* (Merits) (*Germany v Poland*) [1928] PCIJ (Series A, No 9) 47.

[42] See M Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 *Yearbook of International Environmental Law* 123–62.

[43] The Mechanism for Promoting Implementation and Compliance with the Basel Convention, available at www.basel.int/TheConvention/ImplementationComplianceCommittee/Mandate/tabid/2296/Default.aspx.

[44] Objectives, para. 1, www.basel.int/TheConvention/ImplementationComplianceCommittee/Mandate/tabid/2296/Default.aspx.

[45] Article 2 NCP Basel Convention.

There are several NCP mechanisms which follow more or less the classical mechanism set out under the Montreal Protocol. The main features of the NCP of the Montreal Protocol are its facilitative character and transparency. In addition, the NCP under the Montreal Protocol follows the requirements of due process: notification, the right to a fair hearing and impartiality. Although the NCP is not a judicial procedure, it has certain characteristics, such as the right to a fair hearing, which according to paragraph 10 of the NCP, ensures that a Party potentially in non-compliance has the right to participate in the consideration by the Committee of relevant submissions.

However, although the main feature of the Montreal Protocol NCP is its facilitative character, one of the measures that may be adopted in cases of non-compliance is the suspension of a State Party's treaty rights. In the case of the Kyoto Protocol, in particular, the consequences of a finding of non-compliance through the NCP were onerous when a State Party had failed to comply with its emissions reduction target. Yet it may be said that the far-reaching powers of the NCP mechanism under the Kyoto Protocol are unique and in the view of the author are not representative when it comes to drawing conclusions concerning the legitimacy of NCPs in general, also taking into account previous (older) generation mechanisms.[46]

This controversial aspect of non-compliance under the Kyoto Protocol is excluded from the regime of the Paris Agreement.[47] Article 15 of the Paris Agreement establishes a Compliance Committee as a mechanism to facilitate implementation and promote compliance with the Agreement. The task of the Committee is explicitly facilitative: 'The Committee is expected to enhance the effective functioning of the Paris Agreement both by encouraging parties to implement the Agreement and by holding them accountable for aspects of their performance. This should build confidence and trust among the parties.'[48] The Committee is a standing, expert body with a mandate to address situations related to the performance of individual Parties. The procedure under the Paris Agreement has been agreed as follows:

[46] See Compliance under the Kyoto Protocol, available at https://unfccc.int/process/the-kyoto-protocol/compliance-under-the-kyoto-protocol.

[47] Paris Agreement, signed 22 April 2016, entered into force 4 November 2016, UNTS 3156, available at https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280458f37&clang=_en.

[48] C Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement' (2016) 25 *Review of European, Comparative & International European Law* 1.

1. The mechanism to facilitate implementation of and promote compliance with the provisions of the Paris Agreement established under Article 15 of the Agreement consists of a committee (hereinafter referred to as the Committee).
2. The Committee shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The Committee shall pay particular attention to the respective national capabilities and circumstances of Parties.
3. The Committee's work shall be guided by the provisions of the Paris Agreement, including its Article 2.
4. In carrying out its work, the Committee shall strive to avoid duplication of effort, shall neither function as an enforcement or dispute settlement mechanism, nor impose penalties or sanctions, and shall respect national sovereignty.[49]

The functions of the Committee are elaborated in paragraphs 20 to 27, as well as paragraphs 32 to 34 (Consideration of Systemic Issues) of the Annex to Decision 20/CMA.1, titled 'Modalities and Procedures for the Effective Operation of the Committee Referred to in Article 15, paragraphs 1-3'. Paragraph 22(a) of the Modalities and Procedures provides that the Committee will initiate consideration of issues which relate to the core legally binding obligations under the Paris Agreement. These are cases where a Party has not:

(a) Communicated or maintained a nationally determined contribution (NDC) under Article 4 of the Paris Agreement, based on the most up-to-date status of communication in the public registry referred to in Article 4, paragraph 12, of the Paris Agreement;
(b) Submitted a mandatory report or communication of information under Article 13, paragraphs 7 and 9, or Article 9, paragraph 7, of the Paris Agreement;
(c) Participated in the facilitative, multilateral consideration of progress;
(d) Submitted a mandatory communication of information under Article 9, paragraph 5, of the Paris Agreement.[50]

[49] Modalities and Procedures for the Effective Operation of the Committee Referred to in Article 15, paragraphs 1–3 of the Paris Agreement, FCCC/PA/CMA/2018/3/Add.2 Annex (19 March 2019), available at https://unfccc.int/sites/default/files/resource/CMA2018_03a02E.pdf.

[50] Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, paragraph 2, of the Paris Agreement, FCCC/PA/CMA/2018/3/Add.2, Annex (19 March 2019).

The innovative nature of the measures which may be adopted by the Compliance Committee under the Paris Agreement merits attention.

The view has been expressed that the Committee's architecture and functions 'are designed in such a way as to provide for the legitimacy, continuity, stability, and predictability of its activities' and that '[i]ts operation will be an important cornerstone of the Agreement's legitimacy, effectiveness, and longevity'.[51]

According to paragraph 30 of the Modalities and Procedures, 'the Committee shall take appropriate measures'. These may include the following:

(a) Engage in a dialogue with the Party concerned with the purpose of identifying challenges, making recommendations and sharing information, including in relation to accessing finance, technology and capacity-building support, as appropriate;
(b) Assist the Party concerned in the engagement with the appropriate finance, technology and capacity-building bodies or arrangements under or serving the Paris Agreement in order to identify possible challenges and solutions;
(c) Make recommendations to the Party concerned with regard to challenges and solutions referred to in paragraph 30(b) above and communicate such recommendations, with the consent of the Party concerned, to the relevant bodies or arrangements, as appropriate;
(d) Recommend the development of an action plan and, if so requested, assist the Party concerned in developing the plan;
(e) Issue findings of fact in relation to matters of implementation and compliance referred to in paragraph 22(a) . . . .[52]

The list of measures is a result of long and complex negotiations; thus, their application requires caution from the Committee. The Committee has discretionary powers to apply the measures. However, when doing so, 'its decision is to be informed by the legal nature of the relevant provisions of the Agreement and the comments received from the party concerned, and the Committee "shall" pay particular attention to the national capabilities and circumstances of the party concerned.[53] Special circumstances of LDC [Least Developed Countries] and SIDS [Small Island Developing States], as well as situations of *force majeure*, are to be

[51] Zihua, Voigt and Werksman (n 33) 79.
[52] Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, paragraph 2, of the Paris Agreement, FCCC/PA/CMA/2018/3/Add.2, Annex (19 March 2019), para 30.
[53] Zihua, Voigt and Werksman (n 33) 80.

recognized, 'where relevant'.[54] Under clauses (b) and (c) the Committee fulfils a facilitative role and under clause (d), similarly to other MEAs, it may recommend the development of an action plan.[55] Measure (e) only relates to the matters referred to in paragraph 22(a). This measure was the subject of much debate. The measure sits in contrast with the facilitative nature of the mechanism and has the potential to be confrontational.[56] A compromise was reached that under paragraph 22(a), any 'finding of fact' 'would relate to readily identifiable circumstances of non-compliance with a binding obligation, such as the non-submission of a report . . . ' and that 'such a finding would lead to the logical conclusion that the party was in non-compliance, but without a formal finding of non-compliance by the Committee'.[57] There are two interesting features of this measure: it is based on the legal nature of the provisions concerned; and

> the Committee could issue findings of fact in various ways. 'Issuing' could, for example, take the form of a public statement, or a letter to the party, or be included in the Committee's annual report to the CMA, or a combination of the above. This step remains to be clarified.[58]

As we can see from the Paris Agreement NCP regime, very harsh measures of suspension have been abandoned. There is a marked evolution in the recent NCPs, departing from the 'classical' regimes based on hard measures. This is not the only recent NCP which has abandoned harsh measures in cases of non-compliance and replaced them with a facilitative approach. The Rotterdam Convention has also elaborated an NCP where the possibility of a suspension in the rights of a Party to a treaty has been eradicated. Both the Compliance Committee and the Conference of the Parties will have recourse in cases of non-compliance to measures which offer assistance rather than punish.[59] A similar soft approach has been adopted by the Implementation Committee of the

[54] Ibid., 80.
[55] See in depth, ibid., 80–82.
[56] Ibid., 83.
[57] Ibid., 83.
[58] Ibid., 83.
[59] 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; paras 19 and 20 of the Procedures and Mechanisms on Compliance with the Rotterdam Convention, www.pic.int/TheConvention/ComplianceCommittee/Overview/tabid/8446/language/en-US/Default.aspx.

Water Convention.[60] This Convention also defines its compliance procedure as facilitative, supportive and collaborative in nature (Articles I and XI). The means to suspend a Party's rights exist but have never been used. The Committee has the jurisdiction to render Advisory Opinions, which are outside the remit of compliance ('The advisory procedure is aimed at facilitating implementation and application of the Convention through the provision of advice by the Committee and shall not be regarded as alleging non-compliance . . . ' (Article V)). Such a procedure may be requested by the Parties in respect of difficulties in implementing the Convention *vis-à-vis* each other, and/or non-Parties (subject to their consent) or by a Party in respect of its own compliance difficulties. The Parties or non-Parties considered to be potentially concerned and which choose not to participate in the advisory procedure will be kept informed of its progress. The Committee provides advice and assistance for individual Parties and groups of Parties in order to facilitate their implementation of the Convention.[61] Such a procedure is an entirely unique and new way of solving disputes between States in the most non-confrontational manner.[62]

It may be added that the International Law Commission in its Guidelines on the Protection of the Atmosphere has included a provision on non-compliance, which follows the patterns set out in other MEAs.[63]

[60] 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.

[61] This procedure was used for the first time in 2021: 'Albania and Montenegro have agreed to establish a joint technical working group on "Monitoring & assessment" and to develop and implement an information exchange protocol to operationalize their cooperation on the shared Cijevna/Cem River basin.' . . . 'The Committee is assisting Albania and Montenegro as part of an advisory procedure – a unique tool, which distinguishes this body from other similar mechanisms and enables it to engage with countries seeking to resolve water issues in a non-confrontational manner.' https://unece.org/environment/press/water-conventions-implementation-committee-provides-advice-albania-and-montenegro.

[62] See Chapter 5, this volume.

[63] Guideline 11 Compliance

1. States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties. 2. To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements: (a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive

However, it is worth noting that Special Rapporteur Murase explained that he 'favoured cooperative compliance mechanisms, meant to give assistance to a non-compliant party, over punitive or enforcement mechanisms, which were based on the responsibility of States and intended to place penalties on the non-compliant party'.[64]

3.5 Legitimacy and NCPs

Addressing the question of legitimacy of NCPs, Savaşan refers to the legal basis of their establishment, that is, whether an enabling clause in the primary treaty was the basis of the NCP; or whether they were established without such a clause.[65] According to Savaşan, the problem of legitimacy only arises when such a clause is absent and a COP decision establishes a 'hard' NCP with binding outcomes imposing obligations that go beyond the applicable treaty.[66] Such an approach would eliminate from the category of objectionable NCPs the new generation of 'soft' NCPs (which do not include far-reaching measures in relation to a non-compliant State), as represented by the NCP in the Paris Agreement. Savaşan is of the view that the application of punitive measures applied in NCPs (e.g., under the far-reaching regime of the Kyoto Protocol) may enhance the deterrent effect of an NCP mechanism but also challenge their legitimacy and therefore 'should be applied in line with the rules of international law'.[67] It may be argued that in the event of very harsh and binding measures under NCPs, only the amendment of the treaty may justify them.[68]

Only if such measures are applied in accordance with international law will compliance be enhanced without compromising legitimacy. Such an application of punitive measures would be in accordance with determinacy (clear rule of law) and fairness.

manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions; (b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

[64] International Law Commission, Seventieth Session New York, 30 April–1 June and Geneva, 2 July–10 August 2018, A /CN.4/L.909.

[65] Z Savaşan, 'Legitimacy Questions of Non-Compliance Procedures: Examples from Kyoto and Montreal Protocols' in C Voigt (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019) 377.

[66] Ibid.

[67] Ibid., 386.

[68] Ibid., 377.

As mentioned above, procedural safeguards are also elements of legitimacy. As persuasively argued by Savaşan, within NCP regimes, procedural safeguards protect legitimacy. These safeguards may include a preliminary phase of prior consultation between the Parties concerned; due process; and transparency of proceedings. Rights of confidentiality and transparency are guardians of fairness in these mechanisms.[69] However, there are also some procedural elements of legitimacy which can be improved. For example, the role of civil society in the Montreal Protocol NCP does not meet the element of transparency. Civil society can take part in the proceedings as observers only if the secretariat notifies this and no Party objects. Contrastingly, under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)[70] NCP, any member of the public, that is, any natural or legal person, may submit a communication to the Committee, which definitely enhances legitimacy.[71]

Questions regarding other aspects of the legitimacy of NCPs should not detract from the general issue of their usefulness in protection of the environment, that is, the outcomes. What is the relationship between the general usefulness of NCPs and their legitimacy? It appears that the procedural aspects of legitimacy (which have been mentioned), play a dominant role in their usefulness (outcomes). For example, the participation of civil society undoubtedly enhances the overall effectiveness of these mechanisms. However, the issue of the legitimacy of NCPs remains a broader one, encompassing all constitutive elements that is, substantive and procedural aspects and the outcomes, all entwined. The theory of consent-based legitimacy alone does not fully reflect the nature of legitimacy in these procedures, which is constituted of various elements, all of equal importance.

In the view of the author, the multilateral system on which NCPs are based makes them much better suited to address the issues concerned than classical settlement of disputes predicated upon bilateralism. NCPs indeed serve a common interest of States in the protection of the environment. That said, the UNECE Water Convention Implementation Committee, within the paradigm of its advisory function, can also, for instance, facilitate assistance within the bilateral context. This function co-exists with the NCP, which is based on multilateralism.

[69] Ibid., 381.
[70] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) UNTS 2161 447
[71] Ibid., 382.

It may be added that NCPs, which at present are based on providing assistance rather than on imposing stricter measures in cases of non-compliance, are also better equipped to fulfil environmental aims than adversarial mechanisms. However, in this context, the empowering of the Paris Agreement Compliance Committee to make 'findings of fact' should be recalled. The Paris Agreement's system of compliance and the role of the Committee has been aptly described in the following way: 'The Committee can only apply facilitative measures, and cannot impose penalties, fines, fees, sanctions, or enforcement measures of any kind. However, there will be an element of public and political accountability associated with the Committee's recommendations, including the "findings of fact", as these relate to the non-performance of the relevant provisions.'[72]

The adoption of harsh measures in case of non-compliance raises questions. However, NCPs in modern practice in general either do not include such measures or refrain from applying them. For example, the main measure employed by the Committee and the MOP in the Aarhus Convention to ensure improvement in compliance (as applied in 41 per cent of cases) has been the 'recommendation' (paragraph 37(b)). A review of practice up to 2019 indicates the MOP has issued just one 'caution' (paragraph 37(f)). Cautioning, together with suspension (but not withdrawal) of special rights and privileges[73] is considered a 'more confrontational' means of enforcing compliance.[74] The contemporary practice of the Montreal Protocol NCP evidences that indicative measure 'c' has not been resorted to but rather the provision of encouragement and facilitation to States in non-compliance. There is not a strict adherence to ascending order of the measures, as assistance (indicative measure 'a') is linked with caution (indicative measure 'b'), thus applying a mild 'carrot and stick' approach. However, the harshest indicative measure 'c' has not been applied, thus softening the measures. While the MOP in its decisions refers to the possibility of recourse to indicative measure

[71] Zihua, Voigt and Werksman (n 33) 99.

[72] Aarhus Convention, 'C. Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.'

[73] G Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9(2) *Transnational Environmental Law*, 232.

'c', it has never applied this measure in contemporary practice. These examples clearly indicate that in the classical NCP under the Montreal Protocol there is a noticeable trend to avoid withdrawal of a Party's rights and privileges.[75]

In respect of measures under the NCPs leading to assistance (providing that all procedural safeguards are upheld) rather than punishment, the question of legitimacy in a traditional sense (based on consent) may not arise. The modern trend is exemplified by the NCP in the Paris Agreement, the Rotterdam Convention and the approach of the International Law Commission's (ILC) special rapporteur, Shinya Murase, with the focus on co-operative efforts combined with procedural safeguards.

Savaşan has observed that the concept of legitimacy is very complex, consisting of a multitude of diverse elements. It may be that such complexity commands further detailed examination and empirical studies 'on the distinctive characteristics of different institutions and to develop legitimacy perspective for each one of these'.[76] There is a great variety at present of these mechanisms that require case-by-case studies of legitimacy, based on theory and practice. It may be observed, however, that even if various NCPs merit a divergent analysis, there is a visible and common trend towards the adoption of softer measures, influencing the calculus of legitimacy.

[74] For example, in relation to non-compliance on the part of Argentina, MOP of the Montreal Protocol decided as the first measure upon the provision of assistance (indicative measure 'a'): 'To the degree that Argentina is working towards and meeting the specific Protocol control measures, Argentina should continue to be treated in the same manner as a party in good standing. In this regard, Argentina should continue to receive international assistance to enable it to meet these commitments in accordance with item A of the indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance.' Interestingly this was combined with an indicative measure 'b' (caution) and the MOP added that: 'In the event that the country fails to return to compliance in a timely manner, the parties shall consider measures, consistent with item C of the indicative list of measures. These measures may include the possibility of actions available under Article 4, such as ensuring that the supply of CFCs (that is the subject of non-compliance) is ceased and that importing parties are not contributing to a continuing situation of non-compliance.' The MOP also decided: '3. To request that Argentina submit to the Implementation Committee a plan of action with time-specific benchmarks to ensure a prompt return to compliance. Argentina may wish to consider including in its plan actions to establish production quotas that will freeze production at baseline levels and support the phase-out.'

[75] Savaşan (n 65) 382.

3.6 Conclusions

The legal character and the different objectives of NCPs have evolved and fundamentally changed. Previous, classical procedures relied frequently on harsh methods, such as the CITES NCP regime under which States face suspension of trade rights. The new generation of NCPs have a different *ethos* and *telos*. Their structure, functions and measures are different and are based on the premise of facilitation. Such an evolution warrants a different approach in ascertaining the legitimacy of decisions adopted by compliance bodies, and COPs/MOPs, which have all become more facilitative bodies. In calculating the legitimacy of such new generation NCPs, procedural aspects come to the fore, focussing on transparency, and the participation of civil society, and so on, rather than more exclusively on State consent.

It is submitted that the diametrically different character of the new generation of NCPs should also be reflected in the change of the names of 'Non-Compliance Committees' into 'Implementation Committees' (a nomenclature already used in many MEAs). The new generation of NCPs are in fact implementation and facilitation bodies, whose functions are very different from the classical ones. A new classification of NCPs should be established, as the traditional approaches do not reflect the substantively divergent phenomenon of the new and facilitative NCPs. It may also be noted that despite the quite detailed and at times far-reaching obligations imposed on States by certain MEAs (such as the Montreal Protocol and the Aarhus Convention), COPs/MOPs have refrained from the imposition of harsh measures to ensure compliance, thus confirming the general trend of co-operation and understanding.