Compliance control

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In their highly influential 1995 book on *The New Sovereignty*, Abram Charyes and Antonia Handler Charyes argue for a ‘co-operative, problem-solving approach’ to compliance with international regulatory agreements. Drawing upon examples from the areas of human rights, environmental protection and arms control, Charyes and Charyes assert that States generally enter into commitments with an intention to comply and that non-compliance more often results from norm ambiguities or capacity limitations than from deliberate disregard. Therefore, apart from the fact that ‘sanctioning authority is rarely granted by treaty, rarely used when granted’, sanctions are ‘likely to be ineffective when used’. Compliance strategies should focus instead on the actual causes of non-compliance and ‘manage’ these through positive means, consisting in a blend of transparency (regarding both the regime’s requirements and procedures and the parties’ performance), dispute settlement and capacity-building. The main engine of this ‘managerial’ approach is continuous processes of argument and persuasion, ‘justificatory discourse’ that ultimately ‘jawbones’ States into compliance.

As it turns out, the active treaty management that Charyes and Charyes advocate has indeed established itself as central to compliance strategies in the three areas. While there is considerable variation in the precise configuration of compliance control approaches, strong managerial elements can be found in the practice of virtually all the treaties examined in this book. Focusing upon reporting requirements, monitoring and assessment of compliance, the role of compliance bodies, and the range of outcomes of compliance procedures, this essay will sketch out the contours of treaty management in the three areas. It will highlight the key features of the

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compliance control strategies employed in the regimes under review, and identify the main commonalities and differences among these strategies.

15.1 Reporting

In all three areas, compliance control is anchored in extensive reporting requirements. These can pertain to implementation measures, such as legislative or administrative steps, or to indicators of performance towards a specified outcome, such as emissions or weapons data. The latter type of reporting requirements would appear to be more common in the environmental and arms control areas.

Reporting plays at least two important roles in the context of compliance control. First, the reported information enhances transparency and trust as to parties' performance, an effect that is reinforced by the publication of the reports among parties, or their release to the general public. However, in many treaties today, reporting serves a second crucial function, providing the foundation for compliance assessment processes within the regime.

For both functions it is essential that parties' reports be complete, reliable and comparable. The significance of rigorous reporting in all three areas is illustrated by the progressive standardization and refinement of reporting requirements under most regimes reviewed in this volume. Under some of the treaties, decisions of the plenary body flesh out the basic requirements enshrined in the treaty itself. In other cases, the treaty body

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6 Where relevant, reference will also be made to treaty regimes other than those covered in this book.
7 For example, under the Convention on Long-Range Transboundary Air Pollution (LRTAP Convention), parties report both on strategies and policies to reduce emissions and on emissions data. See Kuokkanen, chapter 7 in this volume, section 7.3.2. Under the Convention on International Trade in Endangered Species (CITES), parties submit annual reports on trade and biennial reports on legislative or administrative implementing measures. See Reeve, chapter 6 in this volume, section 6.2.2.1. Under the Chemical Weapons Convention (CWC), parties must report both on weapons stocks, production facilities and destruction measures, and on the adoption of implementing legislation. See Tabassi, chapter 11 in this volume, section 11.3.1.
9 Note the very differently structured reporting system under the European Convention on the Prevention of Torture (CPT). Rather than by States parties, reports are prepared by a treaty committee on the basis of country visits. These reports then serve as the basis for 'constructive dialogue' with the party concerned. See Kicker, chapter 4 in this volume, section 4.1.1.1.
10 In the environmental area, see e.g. Decision 1/8 on Reporting Requirements (2002) under the Aarhus Convention. See Koester, chapter 8 in this volume, section 8.4.1; Resolution Conf.11.17
entrusted with the review of parties’ reports elaborates on existing requirements through its operating procedures or through its communications with the party concerned. In all three areas, the relevant requirements thus tend to be developed as a matter of evolving practice under a regime. The process is consensual and typically operates without recourse to formal treaty amendments.

In view of the fact that treaty regimes in all three areas have experienced, and continue to experience, shortfalls in parties’ reporting practice, one might ask how compliance with reporting requirements themselves is promoted. A degree of pressure results from the publication not just of reported information as such, but also of information on the extent to which parties meet reporting requirements. This transparency exposes parties to peer pressure and, to the extent that parties place a premium on being seen as trustworthy, it may in itself induce compliance. However, given the foundational importance of reporting for all efforts at compliance control, most regimes today provide for additional steps to ensure that comprehensive and reliable information is provided by parties. Reference was already made to the progressive refinement of reporting requirements. Further, under many treaties, parties with capacity problems receive assistance designed to enable them to meet reporting requirements. In
addition, in cases of persistent non-compliance, various practices have evolved to exert pressure on parties, or even for parties to lose access to certain treaty-based benefits or privileges.

### 15.2 Monitoring and assessment of compliance

#### 15.2.1 Reporting

At least in the environmental field, reporting (and subsequent publication) of performance-related information by parties was the primary tool for compliance monitoring in many earlier treaties. Only in the early 1990s, with the creation of a compliance regime under the Montreal Protocol on Substances that Deplete the Ozone Layer, was there a significant shift in the practice of multilateral environmental agreements (MEAs) towards more active compliance assessment.

#### 15.2.2 Implementation review

Under some treaties, the reported information is utilized for reviews of overall implementation patterns. Such surveys are prepared, for example, under the Montreal Protocol or the Convention on Long-Range Transboundary Air Pollution (LRTAP Convention), where they can assist in determining the overall success of the regime. In both the

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14 Under the LRTAP Convention, the Implementation Committee applies gradual pressure on States that fail to report. See Kuokkanen, chapter 7 in this volume, section 7.3.2. Under CITES, parties that persistently fail to submit annual reports receive warnings and may be subject to recommendations for trade suspensions. See Reeve, chapter 6 in this volume, section 6.3. Under the ICCPR, the Human Rights Committee may decide to schedule a session during which the implementation performance of a party is examined, notwithstanding its failure to submit a report. See ICCPR, 'Working Methods of the Human Rights Committee'.

15 For example, under the Montreal Protocol, developing country parties or parties with economies in transition may not be eligible for grace periods in implementation requirements or for financial assistance unless they meet specified reporting requirements. See Raustiala, *Reporting and Review Institutions*, pp. 34 and 37. Similarly, under the Kyoto Protocol, parties’ eligibility for participation in international emissions trading will be contingent upon compliance with emissions monitoring and reporting requirements. See Jutta Brunnée, 'The Kyoto Protocol: Testing Ground for Compliance Theories' (2003) 63 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 255 and 271.

16 A notable exception is the extensive compliance control practice that developed early on under the 1973 CITES.


18 On the Montreal Protocol, see Raustiala, *Reporting and Review Institutions*, pp. 25 and 34. On the LRTAP Convention, see Kuokkanen, chapter 7 in this volume, section 7.3.4, commenting on in-depth reviews.
environmental and the arms control fields, performance assessment tends to focus on implementing measures as well as compliance with substantive commitments.  

In the human rights field, where compliance with treaty commitments and implementation through various governmental measures are closely connected, implementation review is a central compliance control technique. For example, under the International Covenant on Civil and Political Rights (ICCPR) or the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), parties must report on legislative, judicial and administrative measures adopted to implement the convention. The respective treaty bodies, the Human Rights Committee for the ICCPR and the Committee for the Elimination of Discrimination Against Women for CEDAW, will then engage individual parties in ‘constructive dialogue’ regarding their performance. While these processes serve similar functions as compliance assessments, and proceed in comparable fashion, they do not make explicit determinations regarding a party’s compliance with treaty commitments. For example, under the ICCPR, the dialogue with a party about its report leads to ‘concluding observations’, in which the Human Rights Committee highlights positive aspects of the party’s implementation efforts, flags subjects of concerns, and offers recommendations for improved performance.

15.2.3 Compliance assessment and control

In the environmental and arms control areas, performance reviews appear to be more explicitly cast as compliance assessment. Careful analysis of party reports is usually the first step in this process. Frequently, efforts are made to de-politicize these initial analyses by stressing their technical focus and placing them in the hands of neutral or expert bodies. However, in many cases, they do provide the basis for compliance assessment by a designated treaty body or the treaty’s plenary body. For example, the Kyoto Protocol to the Climate Change Convention provides for expert review teams to scrutinize parties’ reports and to raise ‘questions of implementation’, which can

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19 See note 7 above.
21 See ICCPR, ‘Working Methods of the Human Rights Committee’. A similar process takes place under CEDAW.
then trigger a compliance assessment by the treaty’s compliance committee.22 The compliance procedure, in turn, specifically provides that the tasks of this committee will include ‘determining whether a Party . . . is not in compliance’ with emission reduction and related inventory and reporting commitments.23 Under the Convention on International Trade in Endangered Species (CITES), the treaty Secretariat reviews the reports submitted by parties, identifies implementation problems and makes recommendations to a Standing Committee of the treaty’s plenary body. This committee then makes suitable determinations and recommendations.24 Under the Chemical Weapons Convention (CWC), the Secretariat acts as an impartial fact-finder and identifies potential compliance problems. But it is the treaty’s Executive Council that ultimately considers ‘doubts or concerns regarding compliance and cases of non-compliance’.25

15.2.4 Inspections

A final tool for compliance monitoring and assessment consists in various types of inspections undertaken in the territories of individual parties. Such in-country inspections are the exception in the environmental field.26 Environmental agreements tend to be preoccupied with the transboundary implications of a State’s performance, leaving the details of how to meet commitments to the discretion of the party. In addition, to the extent that the sources of emissions or other types of pollution are highly diffuse, inspections would be difficult if not impossible.27

By contrast, human rights treaties are concerned precisely with the specifics of domestic performance and compliance that may be difficult to

22 See art. 7 of the Kyoto Protocol. And see Brunnée, ‘The Kyoto Protocol’, p. 272.
24 See Reeve, chapter 6 in this volume, section 6.2.3.1.
25 See art. VIII(36) of the CWC; and Tabassi, chapter 11 in this volume, section 11.3.4.
26 Of the environmental agreements reviewed in this volume, only CITES appears to have an actual inspection practice. The CITES Secretariat undertakes at least a limited number of ad hoc country visits to investigate compliance problems: see Reeve, chapter 6 in this volume, section 6.2.3.3. The compliance mechanism of the LRTAP Convention contemplates country visits, but only at the invitation of the party concerned. See UN Doc. ECE/EB/AIR/79, Annex V(6)(c). A similar arrangement exists under the Espoo Convention: see Koivurova, chapter 9 in this volume, section 9.2.2.
27 But note that there are exceptions. For example, the ‘in-depth reviews’ of national implementation of the UNFCCC involves country visits by expert review teams. See Raustiala, Reporting and Review Institutions, pp. 43–4.
verify without country visits. Nonetheless, due to the sensitivity of direct scrutiny of a country’s actions, inspection systems remain rare in the human rights field as well. Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the ‘Convention Against Torture’), an Optional Protocol that would permit in-country inspections of places of detention was adopted in 2002, but has not entered into force.\(^{28}\) The European Convention for the Prevention of Torture, however, does have an active system of country visits.\(^{29}\) The Convention attempts to strike a balance between the sensitivity of inspections and their importance as a compliance tool by casting the goals of the ‘visits’ as preventative. Thus, country visits are not intended to inquire into a State’s compliance or non-compliance, but aim to create an opening for the development of recommendations and an ongoing dialogue towards progressive improvement of conditions in the country.\(^{30}\)

It is in the arms control area that inspection systems are most common. The old adage of ‘trust but verify’ encapsulates the importance of inspection regimes to the mutual reassurance that is crucial to the strategic considerations underlying arms control agreements. Accordingly, all of the arms control treaties surveyed in this volume provide for inspections, although there appear to be significant differences in the degree to which inspections are actually carried out.\(^{31}\) The most extensive inspection practice would seem to have evolved under the Conventional Forces in Europe (CFE) treaty, which may be all the more remarkable in view of the fact that the inspections in one State party are actually carried out by another. According to one expert, around 200 intrusive and largely unhampered on-site inspections are undertaken by the parties every year, providing accurate and reliable information on the performance of parties under the treaty.\(^{32}\)

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\(^{28}\) To date, the protocol has received only eight of the twenty ratifications required for its entry into force. See www.ohchr.org/english/countries/ratification/9_b.htm.

\(^{29}\) As of May 2005, the Convention has seen 193 country visits, including 123 periodic visits and 70 \textit{ad hoc} visits. See www.cpt.coe.int/en/about.htm.

\(^{30}\) See Kicker, chapter 4 in this volume, sections 4.1.1.1 and 4.1.1.4.

\(^{31}\) Inspections are carried out under the Non-Proliferation Treaty (NPT): see Rockwood, chapter 12 in this volume, sections 12.2 and 12.4.2. Under the CWC, the Secretariat carries out routine inspections: see Tabassi, chapter 11 in this volume, section 11.3.2. To date, no party has initiated a ‘challenge inspection’: see \textit{ibid.}, section 11.3.4. Under the Landmines Treaty, the compliance procedure, which would entail fact-finding missions, remains untested: see Lawand, chapter 13 in this volume, section 13.3.1.3.

\(^{32}\) Presentation by Wolfgang Richter, Senior Military Adviser, German Mission to the Organization of Security and Co-operation in Europe, Kiel, 22 January 2005 (notes on file with the author).
15.3 Compliance bodies

15.3.1 Mandate

In very general terms, it can be said that the various types of compliance bodies operating within human rights, environmental and arms control agreements are mandated to establish facts, facilitate compliance, and assess performance. However, within this spectrum of tasks, a considerable variety of approaches can be found.

In the context of fact-finding, the mandates of MEA compliance bodies are noteworthy in that they explicitly encompass identification and consideration of the causes of compliance problems.33 Similarly, while technical or other assistance appears to be provided to parties with compliance problems in all three areas,34 the mandates of MEA compliance bodies tend to specifically include assistance functions. Indeed, MEA-based compliance bodies are in the business of ‘co-operative problem-solving’ as much as in the business of compliance control, and MEA compliance procedures are usually cast as facilitative exercises.35 Of course, whether specifically mandated or not, facilitative rather than adversarial approaches are also common in the practice under human rights and arms control treaties.36

When it comes to the tasks of assessing parties’ performance, compliance bodies must typically tread lightly. As previously noted, in the human

33 See e.g. UNEP, Report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Annex II: Non-Compliance Procedure, UNEP Doc. OzL.Pro.10/9, 3 December 1998, para. 7(d).
34 For example, the Landmines Treaty envisages that parties in a position to do so provide assistance to non-complying parties: see Lawand, chapter 13 in this volume, section 13.2.
35 See Jutta Brunnée, ‘Enforcement Mechanisms in International Law and International Environmental Law’, in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia (Leiden: Brill Academic Publishers, 2006), notes 79–82. To date, the compliance procedure under the Kyoto Protocol is the exception in that its mandate is to ‘facilitate, promote and enforce’ compliance (emphasis added); see UNFCCC, Procedures and Mechanisms on Compliance, para. I.
36 See for example ICCPR, ‘Working Methods of the Human Rights Committee’ and CEDAW, ‘Overview of the Current Working Methods’ on the ‘constructive dialogue’ to promote implementation of the ICCPR and CEDAW. In some cases, financial assistance appears to be provided to CPT parties: see Kicker, chapter 4 in this volume, section 4.5. See also note 34 above on the Landmines Treaty. Under the CWC, parties are encouraged to assist each other in implementing their commitments, and an Action Plan was adopted in this context: see Tabassi, chapter 11 in this volume, section 11.4.2. Under the CFE Treaty, technical and financial assistance seems to be provided only rarely: see Presentation by Wolfgang Richter (note 32 above).
rights field, the conclusions drawn by the treaty committees do not explicitly focus on compliance with treaty commitments but on the implementation efforts of parties. In the environmental field, while the relevant treaty bodies do focus on compliance, they normally do not make final determinations. As in the arms control field, while their conclusions may amount *de facto* to findings of non-compliance, MEA compliance body mandates are usually limited to recommendations to the treaty’s plenary body. The blending of pragmatic, political and quasi-judicial features that is typical for the mandates of MEA compliance bodies is nicely captured in the Montreal Protocol compliance procedure, which is aimed at ‘securing an amicable solution . . . on the basis of respect for the provisions of the Protocol’.

15.3.2 Composition

In keeping with the different tasks undertaken by compliance bodies, and the different combinations of such tasks, the bodies entrusted with compliance-control-related mandates also display some variation. Indeed, a variety of treaty institutions may discharge compliance-control-related tasks, including both bodies with general tasks and bodies specifically established as compliance bodies.

As to treaty bodies with general tasks, in most regimes, treaty secretariats are in one way or another involved in compliance matters. In human rights regimes, the role of the secretariat is usually limited to neutral, technical tasks (e.g. receipt and forwarding of party reports; convening and assisting of meetings). The same is true for certain MEA secretariats, while others

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37 In the arms control area, see e.g. the CWC, where compliance assessments are left to the Council (see Tabassi, chapter 11 in this volume, section 11.3.3), or the NPT, where conclusions concerning non-compliance are drawn by the Board (see Rockwood, chapter 12 in this volume, section 12.6). In the environmental field, see e.g. the LRTAP Convention, where the Implementation Committee submits recommendations to the Executive Body (see Kuokkanen, chapter 7 in this volume, section 7.3.1), or the Aarhus Convention, where the Compliance Committee makes recommendations to the Conference of the Parties (see Koester, chapter 8 in this volume, section 8.6). An exceptional case is the Compliance Committee to be established under the Kyoto Protocol’s compliance procedure: its enforcement branch will both make determinations of compliance and apply relevant consequences. See UNFCCC, Procedures and Mechanisms on Compliance, paras. V.4–V.6.

38 UNEP, Montreal Protocol Non-Compliance Procedure, para. 8.

39 See e.g. ICCPR, ‘Working Methods of the Human Rights Committee’, para. V.

40 See e.g. Koivurova, chapter 9 in this volume, section 9.2.2.
may refer cases involving individual parties for compliance assessment. The particularly active role of the CITES Secretariat in the review of national reports and identification of implementation problems is unusual in the environmental field. An active role is also played by the Secretariat under the CWC, including even in-country inspections.

In the environmental and arms control areas, the plenary bodies of treaties too usually discharge some compliance-related functions. Indeed, these political bodies normally retain ultimate control over compliance matters. Upon the recommendation of the relevant treaty body, the COP or other plenary body reviews compliance assessments, makes determinations of non-compliance and adopts decisions on suitable responses.

For present purposes, the creation of specific compliance control bodies may be the most significant institutional distinction between MEAs and treaties in the other two areas. To be sure, human rights treaties too can be said to have designated compliance bodies. However, as noted earlier, the work of these treaty committees tends to be cast as implementation review rather than as explicit compliance control. Of course, whether a treaty body engages in constructive dialogue about implementation issues or engages in co-operative solving of compliance problems may at times be a fine distinction to draw. In any case, most MEAs now contemplate a designated compliance body operating alongside other treaty bodies. This fact may account in part for the relatively more limited, technical role that MEA secretariats play in compliance control matters. It may also account for the sensitive nature of questions relating to the composition of MEA compliance bodies. Unlike the human rights treaty committees, they tend to be composed of party delegates (usually representing a mix of geographical

41 See notes 59–62 below and the accompanying text.
42 Even more unusual is the fact that the CITES Secretariat contracts some of the assessment work out to NGOs: see Reeve, chapter 6 in this volume, section 6.2.2.1.
43 See note 31 above.
44 Human rights treaties, such as the ICCPR, the Convention Against Torture or CEDAW, do not have plenary bodies that would be comparable to those of MEAs or of the arms control agreements reviewed in this volume. See note 37 above.
45 See ICCPR, ‘Working Methods of the Human Rights Committee’. And see CEDAW, ‘Overview of the Current Working Methods’. See also the text accompanying notes 20–1 above.
46 See note 37 above.
47 Brunnée, ‘Enforcement Mechanisms in International Law’.
48 The ICCPR’s Human Rights Committee is a representative example, being composed of ‘18 independent experts who are persons of high moral character and recognized competence in the field of human rights’. See www.ohchr.org/english/bodies/hrc/members.htm.
backgrounds, and of legal, technical and diplomatic expertise) rather than independent experts. Given the blend of political and legal considerations that characterizes compliance assessment, MEA parties appear to be more comfortable with peer review processes than reviews by expert bodies, notwithstanding the fact that final decision-making is generally left to the treaty’s plenary body.

If the creation of specific compliance bodies is the rule rather than the exception in MEAs today, it should be noted that this fact represents a remarkable shift over a relatively short period of time. The non-compliance procedure of the Montreal Protocol, adopted in 1992, is generally seen as marking the turning point in MEA design in this respect. The relatively recent vintage of the MEA compliance body phenomenon may explain in part why the compliance machinery of CITES does not fit the emerging MEA pattern. Under CITES, compliance-related tasks are shared between treaty bodies with general mandates – the Secretariat and a Standing Committee of the COP.

15.3.3 Triggers: standing to raise compliance issues

15.3.3.1 States parties

MEAs usually allow parties both to raise concerns about the compliance of other parties and to bring themselves before the compliance body when they are experiencing compliance problems. The latter possibility must be understood against the backdrop of the collective action problems that MEAs typically address. As a result, the primary objective of compliance regimes is not to lay the blame for violations of treaty commitments but to achieve the greatest possible degree of compliance by the largest possible number of treaty parties. The self-triggering option is in line with the pragmatic emphasis of MEA compliance regimes on facilitation and collective problem-solving, especially when it comes to parties that experience non-compliance procedures.

49 The compliance body under the Aarhus Convention is the exception, as its members serve in a personal capacity. Perhaps even more unusual is the fact that expert members can be drawn from States that have only signed and not ratified the Convention: see Koester, chapter 8 in this volume, section 8.5.3.1. 50 See note 37 above.


52 See Reeve, chapter 6 in this volume, section 6.2.3.1.

53 See e.g. UNEP, Montreal Protocol Non-Compliance Procedure, paras. 1 and 4. And see the compliance mechanisms of the LRTAP Convention (Kuokkanen, chapter 7 in this volume, section 7.3.1) and the Aarhus Convention (Koester, chapter 8 in this volume, section 8.5.3.2).
capacity limitations. Indeed, in the practice of MEA compliance procedures to date, procedures have been initiated by States parties primarily with respect to their own performance.\(^{54}\) The dearth of complaints about other parties’ performance, in turn, is in keeping with the general desire to conduct compliance proceedings in a co-operative rather than adversarial manner. The pattern is hardly surprising, given that the formal party-to-party dispute settlement processes provided for in most MEAs have also remained unused.\(^{55}\)

In the human rights and arms control areas, there does not appear to be any comparable practice of parties triggering compliance proceedings regarding their own performance. Arguably, this fact is rooted in the nature and sensitivity of the commitments in each of these areas. One might also expect that there would be no instances of States initiating compliance control processes with respect to other parties. This expectation appears to be borne out in the human rights field, where available inter-State complaint options remain unutilized, for example, under the ICCPR, CEDAW or the Convention Against Torture.\(^{56}\) Under the European Convention on Human Rights, there have been some inter-State complaints, but they have remained rare. While party complaints also seem to be relatively rare in the arms control field,\(^{57}\) there is one striking exception. Under the CFE treaty,

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54 See e.g. Raustiala, *Reporting and Review Institutions*, p. 36, on the practice under the Montreal Protocol.

55 There appear to be only three exceptions, one relating to compliance assessment, the others to dispute settlement. First, in 1985, several Latin American countries raised the issue of Bolivia’s non-compliance with CITES obligations. See Reeve, chapter 6 in this volume, section 6.2.3.1. Secondly, Ireland triggered the OSPAR Convention’s dispute settlement procedure in the context of its differences with the United Kingdom in relation to British nuclear installations on the Irish Sea coast. See *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (*Ireland v. United Kingdom of Britain and Northern Ireland*), Permanent Court of Arbitration, 2 July 2003 (available at www.pca-cpa.org). Thirdly, Poland relied on the Espoo Convention’s dispute settlement procedure to request that Germany begin negotiations regarding management of the River Oder. However, Germany does not appear to consider the negotiations to be a matter of dispute settlement under the Espoo Convention. See Koivurova, chapter 9 in this volume, section 9.1.1.

56 See Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Human Rights Bodies – Complaints Procedures’ (available at www.ohchr.org/english/bodies/petitions/index.htm). Under the European Convention on Human Rights, there have been some inter-State complaints, but they have remained rare. There have been twelve such complaints since the Convention’s adoption in 1950: see Villiger, chapter 3 in this volume, section 3.2.4. However, as this complaints process is a form of judicial dispute settlement, it is not further reviewed in the present discussion.

57 The CWC permits parties to raise concerns about other parties’ performance and to seek short-notice ‘challenge inspections’ of other parties’ facilities. No challenge inspection has been
parties regularly request and even conduct inspections of other parties’ operations.\footnote{Presentation by Wolfgang Richter (note 32 above).}

15.3.3.2 Treaty secretariats

Within MEAs, given the reluctance of States to complain about other parties’ performance, treaty secretariats might be expected to play a significant role. Indeed, many MEA compliance procedures do provide for a secretariat trigger.\footnote{See e.g. UNEP, Montreal Protocol Non-Compliance Procedure, para. 3. And see the compliance mechanisms of the LRTAP Convention (Kuokkanen, chapter 7 in this volume, section 7.3.1) and of the Aarhus Convention (Koester, chapter 8 in this volume, section 8.5.3.2).} However, MEA secretariats exercise these triggering options to varying degrees. As previously noted, under some agreements, parties appear to prefer a neutral, largely technical role for the treaty secretariat.\footnote{For example, under the Espoo Convention, a stronger role for the Secretariat was contemplated, but ultimately rejected by the parties. Under the Espoo Convention, compliance proceedings can be triggered only by submissions from States parties (Koivurova, chapter 9 in this volume, section 9.2.2).} By contrast, in the practice of the two longest-standing MEA compliance procedures, those under the Montreal Protocol and the LRTAP Convention, the secretariat trigger appears to have become well established.\footnote{Under the Montreal Protocol, the secretariat analyzes the national reports submitted by parties, prepares a synthesis report for the MoP, and refers questions regarding the performance of individual parties to the treaty’s compliance body, the Implementation Committee. See Raustiala, Reporting and Review Institutions, pp. 34 and 37. Similarly, under the LRTAP Convention, the secretariat has triggered compliance reviews on a number of occasions, bringing the performance of individual parties before the treaty’s Implementation Committee. See Kuokkanen, chapter 7 in this volume, section 7.3.3, Table 7.1.} The CITES secretariat is an atypical case in this context, given that it plays a central compliance control role, leaving only final determinations and recommendations regarding measures to address non-compliance to a Standing Committee of the COP.\footnote{See Reeve, chapter 6 in this volume, section 6.2.3.1.}

Although they may not be explicitly cast as ‘triggers’, some treaty secretariats in the arms control area seem to play roughly comparable roles in initiating individual compliance reviews. For example, the CWC secretariat plays a significant fact-finding and verification role and, in the process, brings potential compliance problems to the attention of the CWC.
Council. However, not all arms control treaties envisage a secretariat role in the triggering of compliance procedures, or even have a secretariat that could undertake that function. Finally, in the human rights area, secretariats play no role in initiating reviews of party performance.

15.3.3.3 Individuals or non-governmental organizations

Individuals or non-governmental organizations (NGOs) cannot initiate compliance reviews in the so quintessentially sovereign domain of arms control. The Landmines Treaty, which was initiated and shaped to a significant degree through NGO involvement, is an atypical case in this context. Under the treaty, non-State actors cannot trigger compliance proceedings. But NGOs nonetheless make important informal contributions to compliance control. Most notably, the International Campaign to Ban Landmines releases an influential annual country-by-country review of implementation of and compliance with the Landmines Treaty.

It may be more surprising that, by and large, environmental agreements too take a restrictive approach to non-State actor involvement in compliance matters. It is worth bearing in mind, however, that the procedures that have been emerging under MEAs, their facilitative language notwithstanding, do scrutinize the performance of States in relation to their binding treaty commitments. So, just as that scrutiny has been acceptable only when undertaken by peers and with appropriate regard for the need to blend political and legal considerations, States have sought to keep the triggering functions in State, or at least intergovernmental, hands. Therefore, although – or precisely because – individuals or NGOs could be expected to bring a much wider range of compliance problems to the attention of treaty bodies than is uncovered and addressed through existing reporting and monitoring channels, the role

63 See art. VIII(36) of the CWC; and Tabassi, chapter 11 in this volume, section 11.3.4.
64 Under the Landmines Treaty, the formal compliance procedure can be triggered only by a request of States parties. The procedure remains untested. See Lawand, chapter 13 in this volume, section 13.3.1.3.
65 Under the CFE Treaty, compliance control remains in the hands of individual parties, albeit coordinated within the forum of the Joint Consultative Group: see the presentation by Wolfgang Richter (note 32 above).
66 See e.g. the practice under the CWC (Tabassi, chapter 11 in this volume, section 11.3.4) and under the NPT (Rockwood, chapter 12 in this volume, section 12.6).
67 See Lawand, chapter 13 in this volume, sections 13.3.1.2 and 13.3.1.4.
68 This is borne out, for example, through the experience of the citizen complaints process under the North American Agreement for Environmental Co-operation. See Kal Raustiala, 'Police
of non-State actors in MEA compliance procedures remains relatively limited. It may involve the option to submit ‘factual and technical information’ relevant to the compliance review, access to meetings of the compliance bodies unless parties object, and access to the findings of the compliance body. Only under the Aarhus Convention may individuals or NGOs actually make submissions to the compliance body. Of course, given its concern with access to environmental information and decision-making by individuals, the Aarhus Convention arguably has more in common with human rights agreements than with the typical MEA.

And, indeed, it is under the various human rights treaties that the triggering of proceedings by individuals is most common. However, it is not the case that individuals or NGOs could trigger the previously discussed implementation reviews, such as those under the ICCPR, CEDAW or the Convention Against Torture. Rather, through optional protocols or other devices through which parties can opt in, these and other human rights treaties allow the treaty committees to consider complaints or communications from individuals. But, in view of the fact that these proceedings deal with individual cases and lead to determinations regarding the violation of non-State actors in MEA compliance procedures remains relatively limited. It may involve the option to submit ‘factual and technical information’ relevant to the compliance review, access to meetings of the compliance bodies unless parties object, and access to the findings of the compliance body. Only under the Aarhus Convention may individuals or NGOs actually make submissions to the compliance body. Of course, given its concern with access to environmental information and decision-making by individuals, the Aarhus Convention arguably has more in common with human rights agreements than with the typical MEA.

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human rights by a State party in that case, they are more appropriately seen as dispute settlement than as compliance control.  

15.4 Outcomes

For the purposes of this book, questions of dispute settlement, compliance control and enforcement were divided into distinct analytical categories. In practice, of course, these categories blend into one another. In particular, the topics of compliance control and enforcement overlap to a considerable extent. The possible outcomes of compliance control processes encompass a wide spectrum, ranging from measures designed to prevent non-compliance, to determinations of non-compliance, to measures to address causes of non-compliance, to more enforcement-oriented measures designed to respond to cases of non-compliance.\(^{76}\) In the analytical framework of this book, all of these measures are grouped under the rubric of ‘enforcement’, and so are not treated in any detail in this essay.

However, for the sake of a reasonably complete account of compliance control processes, at least brief reference must be made to the range of possible outcomes. It would be misleading to leave the reader with the impression that compliance control processes lead merely to more or less explicit determinations of non-compliance, possibly coupled with recommendations for improvement of a party’s performance. Of course, as the preceding discussion suggested, even such determinations and recommendations are sensitive matters in the three areas under review, and their significance should not be underestimated.\(^{77}\)

However, findings of non-compliance and recommendations for improved performance alone are unlikely to bring a party into compliance where capacity limitations are at the root of its failure. Various forms of advice and assistance are therefore among the possible outcomes of

\(^{75}\) See also Kicker, chapter 4 in this volume, section 4.2 at note 43 (citing Steiner and Crawford). Of course, such procedures nonetheless serve compliance control functions. See Kicker, \textit{ibid.}\ See also Raustiala, ‘Police Patrols and Fire Alarms’, p. 59, highlighting the ‘fire alarm’ function that individual complaints can serve in compliance control strategies.

\(^{76}\) For a detailed discussion of ‘enforcement’ and ‘compliance’ mechanisms, see Brunée, ‘Enforcement Mechanisms in International Law’.

\(^{77}\) See e.g. Kicker, chapter 4 in this volume, section 4.4, on the positive impact of the ‘ongoing dialogue’ with treaty parties regarding their implementation of committee recommendations under the CPT; and Kuokkanen, chapter 7 in this volume, section 7.5, on the ‘gentle, but persistent, pressure’ that the LRTAP Convention Implementation Committee has been able to exert on parties through its findings of non-compliance and recommendations.
compliance processes in all three areas. Similarly, facilitative approaches alone may not suffice to induce compliance where strong countervailing interests are at play. Environmental agreements, for example, can engage significant financial and competitiveness considerations. In such cases, enforcement-oriented outcomes may be required, both to induce a party’s compliance and to assure other parties of a level playing field. Accordingly, notwithstanding their emphasis on facilitation and co-operation, most MEA compliance regimes do have enforcement-oriented features, at least in the wider sense of creation of costs or removal of benefits. Compliance regimes usually allow for the publication of parties’ compliance records, or the issuance of ‘cautions’ to non-complying parties. Some compliance regimes also envisage the suspension of certain ‘privileges’ under the MEA (such as access to funds) when a party fails to meet its commitments. Finally, while rare, under some MEAs non-compliance may result in trade restrictions, such as under CITES, or in other hard-edged consequences.

One more point is worth making: arguably, none of the outcomes of the compliance control processes reviewed in this volume, be they findings of compliance bodies, recommendations for improvement, or even decisions on trade restrictions, are legally binding. Compliance control, it seems, operates on the basis of two contradictory but also mutually reinforcing phenomena. On the one hand, it would seem that the non-legally binding nature of the compliance control enterprise is what makes it acceptable to treaty parties. One can surmise that few, if any, of the compliance processes reviewed in this volume would operate if their outcomes were legally binding. Yet, on the other hand, it also appears that their non-binding nature does not make them any less effective than binding measures might be. Trade measures under CITES seem to operate quite well, notwithstanding the fact that they are based on non-binding recommendations. And the findings of non-compliance under the various compliance procedures appear to derive their force from the ongoing interactions in which they are anchored, not from legal status. The studies in this volume suggest that it is these interactions – continuous cycles of deliberation, justification and

78 See notes 34 and 36 above, and the accompanying text.
80 See Reeve, chapter 6 in this volume, section 6.3.
81 Under the Kyoto Protocol, if a party fails to meet its emissions target, its excess emissions will be deducted (at a penalty rate of 1.3) from future emission allowances. See UNFCCC, Procedures and Mechanisms on Compliance, para. XV.5(a).
judgment – that power compliance control, and develop and legitimate the specific contours of a regime’s responses to non-compliance, be they facilitative or enforcement-oriented.

15.5 Conclusion

This book offers in-depth accounts of the compliance control strategies that have evolved within treaties in the human rights, environmental and arms control areas. What they reveal is that, in all three areas, compliance control builds on what Chayes and Chayes referred to as active treaty management. Of course, many questions lurk beneath the surface of this conclusion. It does not provide an answer to the big theoretical questions about why States comply with international law (or not). Nor does it illuminate exactly why the managerial approach works, or under what circumstances it may work more or less well. Answering these questions would require engagement with the rich theoretical literature on compliance. It would also require the formulation and empirical testing of hypotheses and specific research questions. Indeed, some of managerialism’s critics have suggested that its central weakness is precisely that it provides policy advice without sufficient attention to the conditions under which it is likely to succeed, and without sufficient evidence. The studies of treaty practice assembled in this volume might help fill this gap. They show that managerial approaches operate in a wide variety of settings, and can be configured in a variety of ways to suit the needs of the regime in which they operate. To be sure, what the case studies offer is ‘raw material’ for further empirical and theoretical investigation, not ‘evidence’. But one is tempted to surmise that the engine that ultimately makes treaties work is just that – the hard work of collective deliberation, justification, persuasion and judgment.


