COMPLIANCE CONTROL MECHANISMS AND INTERNATIONAL ENVIRONMENTAL OBLIGATIONS

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I. INTRODUCTION

With the appreciable acceleration of international environmental law-making in the late 1980s, and in particular, the flurry of international legal initiatives occasioned by the 1992 United Nations Conference on Environment and Development (UNCED) as well as the post-UNCED legislative follow-up, "treaty congestion"[1] and even more

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1. *See, e.g.*, Brown Weiss, *Environmental Equity: The Imperative for the Twenty-First Century*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 17, 23 (W. Lang, ed., 1995).

so, "compliance control"[2] have become buzz words in international environmental legal discourse. Both terms—two sides of the same coin, really—connote justified concern in the international community over the effectiveness of international environmental obligations, in particular those embodied in legislative treaties.[3]

As a significant international issue, compliance control—the international monitoring and supervision of states parties' implementation of and compliance with international treaty-based obligations[4]—has, of course, arisen with regard to multilateral treaty relations before, most notably in the fields of arms control,[5] human rights[6] and international labor relations.[7] However, an idiosyncratic combination of factors make compliance control a matter of special concern in the context of international environmental law. First, as international environmental regulations become more technical and detailed, therefore more complex,

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2. *See, e.g.*, A. CHAYES & A. HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Günther Handl, *Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio*, 5 COLORADO J. INT'L ENV. L. & POLICY 305 (1994); DAVID G. VICTOR, INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS, THE EARLY OPERATION AND EFFECTIVENESS OF THE MONTREAL PROTOCOL'S NON-COMPLIANCE PROCEDURE ER-96-2 (May 1996).

3. Martti Koskenniemi, a generally perspicacious observer of international legal developments, has noted that "what is needed now is less the adoption of new instruments than more effective implementation of existing ones." Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123 (1993).

4. In general, it might be appropriate to differentiate between "implementation," as the first step towards rendering an international obligation effective domestically, and (subsequent) "compliance" with, or abidance by, the international obligation concerned. Thus, at UNCED the wording of subparagraph (a) of what was then chapter 39, paragraph 7 of Agenda 21 ("Implementation Mechanisms") initially included a reference to "compliance with international legal instruments." However, that reference was deleted and replaced by "effective, full and prompt implementation" as the larger, overarching concept. Similarly, within the context of discussions on the multilateral consultative process under Article 13 of the U.N. Climate Change Convention, "implementation" and "compliance" have been used interchangeably. *See, e.g.*, Questionnaire on the Establishment of a Multilateral Consultative Process Under Article 13, Note by the Secretariat, U.N. Doc. FCCC/AG13/1996/1, para. 6 (ii) (1996) [hereinafter Note by the Secretariat].

"Compliance control" as used in the present Article follows this trend and thus will denote international efforts and procedures aimed at securing both implementation of and compliance with treaty-based obligations.

5. *See, e.g.*, Winfried Lang, *Compliance with Disarmament Obligations*, 55 ZEITSCHRIFT F. AUSLÄNDISCHES ÖFFENLICHTLICHES RECHT U. VÖLKERRECHT 69 (1995).

6. *See, e.g.*, Philip Alston & Bruno Simma, *The First Session of the United Nations Committee on Economic, Social and Cultural Rights*, 81 AM. J. INT'L L. 747 (1987).

7. *See, e.g.*, CESARE P.R. ROMANO, INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS, THE ILO SYSTEM OF SUPERVISION AND CONTROL: A REVIEW AND LESSONS FOR MULTILATERAL ENVIRONMENTAL AGREEMENTS, ER-96-1 (May 1996).

they entail a commensurately greater need for international control of individual states' compliance.[8] Second, as the economic cost of compliance with such environmental regulations rises, states have an increased interest in making sure that other states, subject to the same international regulations, live up to their obligations, thereby ensuring competition on a level playing field.[9] Third, and perhaps most significantly, normative changes within environmental treaty regimes[10] tend to be frequent and often the result of informal steps taken by the conference of the parties (COP),[11] thus are apt to give rise to questions about the scope, if not the very existence, of the obligations at stake.[12] In

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8. *See, e.g.*, Kamen Sachariew, *Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms*, 2 Y.B. INT'L ENVTL. L. 31 (1991). Indeed, the assessment and evaluation of information reported by states parties as evidence of compliance with their obligations will increasingly demand a high degree of technical know-how and sophistication on the part of those members of the institutional mechanism entrusted with the control function.

9. *See* Report of the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N. Doc. UNEP/OzL.Prof.7/INF.1, at 7, para. 27 (1995) (statement of Patrick Széll).

10. To international lawyers, the term "regime" usually signals an international treaty, a shared general interest underlying regulation that aspires to *erga omnes* validity, as well as an institutional mechanism for the promotion of the treaty's objectives. *See* Winfried Lang, *Diplomacy and International Environmental Law-Making: Some Observations*, 3 Y.B. INT'L ENVTL. L. 108, 117 (1992); *see also* Thomas Gehring, *International Environmental Regimes: Dynamic Sectoral Legal Systems*, 1 Y.B. INT'L ENVTL. L. 35, 47 (1990). By contrast, political scientists might define a regime as "principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (S. Krasner ed., 1983).

11. One of the latest and best known examples of such decision-making is Decision II/12 adopted at the Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal in March 1994. Decision II/12, *reprinted in* 5 Y.B. INT'L ENVTL. L. 868 (1994). It aims at banning—with immediate effect—the export from OECD to non-OECD countries of hazardous wastes for final disposal, and to phase out all such exports destined for "recycling" or "recovery operations" by December 31, 1997. A number of countries, however, expressed their reservations about the legal status of such a far-reaching decision, arguing that such a fundamental change to the Basel Convention would require activation of the formal amendment process. Largely in response to these criticisms, in November 1995, the Third Meeting of the Conference of the Parties by Decision III/1, *reprinted in* 6 Y.B. INT'L ENVTL. L. 779 (1995), adopted an almost identical amendment to the Basel Convention which now has to undergo formal ratification, approval, etc. by the parties in accordance with Article 17 of the Convention. *See* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, art. 17, S. Treaty Doc. No. 5, 102d Cong., 1st Sess., 28 I.L.M. 657, 673 (1989), U.N. Doc. UNEP/IG.80/3 [hereinafter Basel Convention].

12. Indeed, the complexity of the present legal situation under the Basel Convention's regulation of hazardous waste exports might be characterized as having given rise to different circles of membership in the regime, or different layers of normativity. For a discussion of some of those

such a situation compliance control serves not just verification of a state's abidance by its obligations, but also—preliminarily—ascertainment of the existence of the norm(s) potentially in dispute, as well as of the exact nature and scope of the individual state's obligations flowing therefrom.

An effective system of compliance control is, of course, itself premised on various procedural elements, especially the reporting of basic information by the parties, and its "operational links" with other components of the regulatory regime involved, such as financial mechanism(s), science and technology assessment panels, etc.[13] The present Article, however, does not concern itself with all interrelated aspects of this larger review process. Rather, its focus will be on the typical institutional mechanism, the so-called non-compliance procedure, which has evolved as a keystone in some multilateral environmental agreements (MEAs) and will likely serve as a model for others.

II. NON-COMPLIANCE PROCEDURES IN MULTILATERAL ENVIRONMENTAL AGREEMENTS: GENERAL CONSIDERATIONS

Today, establishment of some form of "internal" compliance control procedure[14] appears generally recognized as an indispensable element of MEAs.[15] Thus, most recent MEAs feature or are likely to feature a free-standing non-compliance procedure (NCP), administered

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issues, see, for example, Louise de La Fayette, *Legal and Practical Implications of the Ban to the Basel Convention*, 6 Y.B. INT'L ENVTL. L. 701 (1995).

13. *See* Hugo Schally, *The Role and Importance of Implementation Monitoring and Non-Compliance Procedures in International Environmental Regimes*, *in* THE OZONE TREATIES AND THEIR INFLUENCE ON THE BUILDING OF INTERNATIONAL ENVIRONMENTAL REGIMES, Österreichische aussenpolitische Dokumentation (Special Issue) 82, 87 (W. Lang ed., 1996).

14. "Internal" procedure refers to a mechanism that is controlled by the parties to the MEA themselves, as against a third party or "external" procedure, such as traditional (third party) dispute settlement. For some of the salient distinguishing features, see, for example, Gehring, *supra* note 10, at 50-54.

15. Thus, Agenda 21 exhorts states to "[e]stablish efficient and practical reporting systems on the effective, full and prompt implementation of international legal instruments." Agenda 21, ch. 39, para. 8(a). In a similar vein, the 1993 Lucerne ECE Ministerial Declaration urges contracting parties to environmental conventions to adopt non-compliance procedures which (1) aim to avoid complexity; (2) are non-confrontational and transparent; (3) leave the competence for taking decisions to the determination of the contracting parties; (4) leave it to contracting parties to consider what technical and financial assistance may be required within the context of the specific agreement; and (5) include a transparent and revealing reporting system and procedures as agreed to by the parties. *See* Declaration by the Ministers of the Environment of the Region of the United Nations Commission for Europe (UN/ECE) and the Member of the Commission of the European Communities Responsible for the Environment, 7, para. 23.1 (April 30, 1993); *see generally* United Nations Economic Commission for Europe, Committee on Environmental Policy, Implementation of and Compliance with Environmental Conventions in the ECE Region, U.N. Doc. CEP/WG.1/R.4/Add. 1 (1995).

by a special, dedicated institutional mechanism.[16] The first such non-compliance procedure was established as part of the Montreal Protocol on Substances that Deplete the Ozone Layer.[17] It has since served as a model for others, such as the 1994 Protocol to the 1979 UN ECE Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions (1994 Sulphur Protocol).[18] It has also inspired agreement on, or calls for, the establishment of similar non-compliance mechanisms or procedures as part of the 1991 ECE Protocol on Volatile Organic Compounds,[19] the UN Framework Convention on Climate Change,[20] the UN Convention to Combat Desertification,[21] the Basel Convention on Transboundary Movement

16. One exception to this trend is the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), which provides only for a compliance procedure centered on the Convention's Commission made up of representatives of each of the contracting parties. *See* Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, art. 23, *reprinted in* 3 Y.B. INT'L ENVTL. L. 759, 779 (1992). Within the context of the UN Economic Commission for Europe Protocol on Volatile Organic Compounds, the Executive Body (EB) of the Convention on Long-Range Transboundary Air Pollution takes on a similar function, albeit, and in contrast to the OSPAR Convention, only "[a]s a first step," until the parties set up a separate mechanism for monitoring compliance. *See* Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, art. 3, para. 3, 31 I.L.M. 573, 577-78 (1992) [hereinafter VOC Protocol].

17. *See* Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N. Doc. UNEP/OzL.4/15 (1992) [hereinafter Montreal Protocol Report], Annex IV, *reprinted in* 3 Y.B. INT'L ENVTL. L. 819 (1992).

18. *See* Protocol to the 1979 UN ECE Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, 33 I.L.M. 1540 (1994) [hereinafter 1994 Sulphur Protocol]; *see also* Decision Taken by the Executive Body at the Adoption of the Protocol, June 14, 1994, on the Structure and Functions of the Implementation Committee, as well as Procedures for its Review of Compliance, *in* Protocol on Further Reduction of Sulphur Emissions, U.N. Doc. ECE/EB.AIR/40 [hereinafter Decision Taken by the Executive Body].

19. *See* VOC Protocol, *supra* note 16, art. 3, para. 3, 31 I.L.M. at 577-78.

20. *See* U.N. Framework Convention on Climate Change, May 9, 1992, arts. 10, 13, S. Treaty Doc. No. 38, 102d Cong., 2d Sess., 31 I.L.M. 849, 863, 866 (1992), U.N. Doc. A/AC 237/18, *reprinted in* 3 Y.B. INT'L ENVTL. L. 684, 694, 696 (1992) [hereinafter Climate Change Convention]. As regards the multilateral consultative process envisaged in Article 13, the First Meeting of the Conference of the Parties established an ad hoc open-ended working group of technical and legal experts "to study all issues relating to the establishment of a multilateral consultative process and its design." *See* Decision 20/CP.1, para. 1, U.N. Doc. FCCC/CP/19995/7/Add.1, 59.

21. *See* Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, *opened for signature* Oct. 14, 1994, 33 I.L.M. 1328 (1994), U.N. Doc. A/AC 241/15/Rev. 7. This Convention calls upon the Conference of the Parties to "consider and adopt procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention." *See id.* art. 27, 33 I.L.M. at 1354.

of Hazardous Wastes and Their Disposal,[22] and the international convention on the mandatory application of the prior informed consent principle whose text is expected to be finalized in 1997.[23]

The NCP offers a number of very significant advantages as regards the "management" of legal relations among the parties to the MEA. Typically, the NCP aims less at branding a state party as "defaulting on its obligations," and at imposing sanctions or providing remedies for past infractions, than at helping the incriminated party come into compliance and protecting the future integrity of the regime against would-be defectors. The NCP is hence forward- rather than backward-looking. It embodies a quintessentially collective approach, rather than being steeped in the traditional paradigm of bilateralism—the relationship between the non-complying state and the directly injured other state or states.

These characteristics are of major importance, because normative provisions of an environmental regulatory regime undergo frequent adaptation and expansion in response to new scientific insights or technological developments.[24] Compliance issues, therefore, can be expected to be relatively common and differ vastly in their individual significance for the regime as a whole. The routine invocation of traditional dispute settlement procedures to deal with such a range of issues of non-implementation and non-compliance thus will not be a realistic option either legally or politically. After all, the process of invoking principles of international state responsibility and liability is cumbersome and essentially confrontational, and, therefore, can be employed only occasionally and as an avenue of last resort. Indeed, invocation of state responsibility may be an inappropriate response because non-compliance might be as much due to a state's lack of

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22. *See* Basel Convention, *supra* note 11, art. 19; *see also* Decision III/11 of the Third Conference of the Parties calling upon the Consultative Sub-group of Legal and Technical Experts, "to study all issues related to the establishment of a mechanism for monitoring implementation of and compliance with the Basel Convention . . . and to report its findings to the fourth meeting of the Conference of the Parties. . . ." Decision III/11, Monitoring the Implementation of and Compliance with the Obligations Set Out by the Basel Convention, *reprinted in* 6 Y.B. INT'L ENVTL. L. 786 (1995).

23. *See* Tentative Draft Key Articles for a PIC Instrument (bracketed) art. 17 (on "Compliance Measures"), U.N. Doc. UNEP/FAO/PIC/INC.26.

24. At the same time, MEAs become increasingly technical in nature (in the sense of establishing ever more specific conduct-related obligations) as latent conceptual ambiguities are redressed through further refinement of technical provisions. Note, for example, on-going efforts at defining reliably "waste" as against "non-waste," a key parameter for the operationalization of the Basel Convention. *See, e.g.*, Hazardous Waste Characterization Under the Basel Convention, U.N. Doc. UNEP/CHW/WG.4/7/3 (1995).

capacity, as it might be the result of its intentional or negligent disregard of its obligations.[25] Similarly, in the context of most international environmental treaties, the absence of appropriate reciprocity between injuring and injured state(s) will make reliance on traditional compliance strategies unworkable. For example, suspension of the operation of a multilateral agreement for the protection of the environment, as one of the permitted sanctions for a material breach of the treaty by a party,[26] would make little sense, and indeed might be counterproductive.

There is, finally, also the important issue of standing that arises in connection with claims of state responsibility. From a traditional perspective on the international law of state responsibility, non-compliance with obligations arising under a multilateral treaty presents itself as entailing essentially a bilateral legal relationship between the wrongdoer and the (directly) injured state(s), a fact that is emphasized, inter alia, by the restrictive view of "injured state" in the practice of international courts.[27] As a result, the vindication of international community interest in protecting environmental resources may be beyond the individual state's ability to invoke the defaulting state's international responsibility to obtain redress for non-compliance, unless the incriminated conduct rises also to the level of infringing the rights of the complaining state concerned.[28] Admittedly, recent state practice

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25. *See, e.g.*, A. Handler Chayes et al., *Active Compliance Management in Environmental Treaties*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 75, 80 (W. Lang ed., 1995).

26. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 60, para. 2, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331 (1969) (entered into force on Jan. 27, 1980).

27. *See, e.g.*, South West Africa cases (Second Phase), [1966] I.C.J. 4, 34, paras. 50-52; Case Concerning Military and Paramilitary Activities in and Against Nicaragua, [1986] I.C.J. 14, 127, para. 249.

Indeed, during debates in the International Law Commission (ILC) on a closely related issue—the concept of the "injured state" for the purpose of determining the legal consequences of acts characterized as crimes in draft Article 19 of Part One of the draft Articles on State Responsibility—several members of the Commission objected to the Special Rapporteur's view that all states were injured by an international crime. They insisted that "a clear differentiation between States directly injured and those acting as *defensores leges* was called for." Report of the International Law Commission on the Work of Its Forty-Seventh Session, U.N. GAOR, 50th Sess., Supp No. 10, at 112, para. 279, U.N. Doc. A/50/10 (1995). *A fortiori*, as regards the consequences flowing from a mere delict of a state, this distinction should carry weight.

28. Kamen Sachariew rightly points to the fact that multilateral treaties often do have bilateral (as opposed to "integral") structures, or in other words, represent treaties which set up rules essentially for bilateral application. *See* Kamen Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and Its Legal Status*, 35 NETHERLANDS INT'L L. REV. 273, 277 (1988). A much-cited example of such a treaty is the 1982 Law of the Sea Convention, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), 21 I.L.M. 1261.

indicates, as Gaetano Arangio-Ruiz, the International Law Commission's Special Rapporteur on State Responsibility, has emphasized, that

> there are rules [of international law] apparently escaping the . . . pattern of bilateralism[,] . . . rules which, in the pursuit of 'general' or 'collective' interests, create obligations compliance with which is in the legally protected interest—and in that sense the legal right—of all States to which the rule is addressed.[29]

However, such universalization of "injured state" as the reflection of a legally recognizable collective interest of states, is—according to the International Law Commission—dependent on there being an express stipulation to this effect in the MEA concerned.[30] Not every MEA, however, gives expression to such an entitlement. A case in point is the Basel Convention which is not self-evidently a MEA specifically designed to protect the global environment,[31] thus expressing the collective interest of states parties thereto. In short, non-compliance with the provisions of an MEA cannot automatically be equated with an infringement of a legally recognizable interest of any and all parties to the convention concerned.

Moreover, even if one were to assume that a breach of an obligation arising under any MEA inevitably entailed also a breach of the rights of all states parties (other than the authoring state),[32] the problem would simply resurface in terms of what remedies these differently affected or injured states might be entitled to. In the end, the judgment of the International Court of Justice in the *Nicaragua* case[33] leaves little room for doubt that, as a general rule, there continues to exist a legal

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29. Gaetano Arangio-Ruiz, Fourth Report on State Responsibility, U.N. Doc. A/CN.4/444/Add.2, at 22, para. 132 (1992).

30. *See, e.g.*, Draft Articles on State Responsibility, Part 2, art. 5, para. 2(f) (as provisionally adopted by the ILC in 1985); [1985] 2 Y.B. INT'L L. COMM'N (part 2) 25; *see also id.* at 27, para. 24 (the ILC commentary).

31. On the other hand, while the Basel Convention ostensibly aims principally at protecting public health and the environment in would-be importing countries, there is no denying, of course, that it fosters and protects also a collective interest of states in minimizing any potential long-term transnational repercussions of untoward local impacts associated with transboundary movements of hazardous wastes and their disposal.

32. This is, however, the view taken by Gaetano Arangio-Ruiz, who considers multilateral "treaties on the environment" to be covered by Article 5, paragraph 2(f) of the Draft Articles on State Responsibility. *See, e.g.*, Gaetano Arangio-Ruiz, Third Report on State Responsibility, [1991] 2 Y.B. INT'L L. COMM'N (part 1) 27, para. 91.

33. *See* Case Concerning Military and Paramilitary Activities in and Against Nicaragua, [1986] I.C.J. 14, 127, para. 249.

difference in the status of the state that suffers material damage[34] as a result of non-compliance by another state with its obligations,[35] and that of states which would be "affected" by the simple fact of being parties to the agreement concerned.[36] On that difference, however, turns the position of the (not directly) "affected state," with regard to both substantive secondary rights (flowing from the fact of non-compliance) and the right to take counter-measures against the non-complying state.[37]

In the final analysis, the non-compliance procedure's major attraction lies in the fact that it enables the meeting of the parties to fine-tune "enforcement" of the various normative standards of the MEA. Such flexibility however, comes also at a price:[38] A possible perception among parties that the details, if not the principle, of compliance with obligations arising under the MEA might be negotiable, a perception which could work at cross-purposes with compliance control efforts. However, in assessing costs and benefits, it should be remembered that while the NCP might well contribute to the "softening" of the international normativity of individual rules and regulations of the MEA, it keeps intact the regime as a whole. Indeed, the NCP might well be characterized as "an effort at continued consensus building . . .;" or, in other words, "a process that straddles traditional law-making and law-enforcement functions."[39] Moreover, it should be posited right away that a NCP would not supplant, but rather would compliment traditional dispute settlement procedures.[40] In this supplementary capacity, then, it is an indispensable mechanism of peer review for the vindication of the collective interest of state parties, provided the procedure is invocable informally, and is reasonably open and transparent.

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34. A state injured in this sense might involve the state of import or, conceivably, of transit, or a third state neighboring the state of import.

35. Reference here is, of course, to wrongful non-compliance, since non-intentional and non-negligent non-compliance would not trigger the state's international responsibility.

36. Report of the International Law Commission on the Work of Its Forty-Fourth Session, U.N. GAOR, 47th Sess., Supp No. 10 at 97, para. 271, U.N. Doc. A/47/10 (1992) (summary of the ILC's discussion of draft Article 5*bis* proposed by the ILC's special rapporteur on state responsibility).

37. *See* Arangio-Ruiz, Third Report on State Responsibility, *supra* note 32, at 28, paras. 94-95.

38. For a critical review, see Koskenniemi, *supra* note 3, at 123.

39. *See* Handl, *supra* note 2, at 329.

40. For further details, see *infra* Part IV.

III. TYPICAL FEATURES OF THE NON-COMPLIANCE PROCEDURE

A. Initiation of the Review Process

The central role in an MEA's compliance control system will be played by a standing body,[41] such as the Montreal Protocol's "Implementation Committee." Typically, review by such a committee will be initiated either by a complaint by one party against another, or by the secretariat of the MEA in any situation where it suspects a party of non-compliance. A third way to initiate the review process envisaged in the Montreal Protocol's procedure is self-reporting by a party defaulting on its obligations despite its best bona fide efforts to the contrary. In a first such case instance, in 1995 Belarus, Bulgaria, Poland, and Russia jointly made a submission pursuant to paragraph 4 of the Protocol's non-compliance procedure.[42]

Additionally, it might be advisable to authorize the implementation committee to initiate a review sua sponte if, upon its own periodic review of the secretariat's analytical summaries of information provided by the parties in fulfillment of the latters' reporting obligations under the MEA concerned,[43] the committee concludes there is evidence of possible non-implementation or non-compliance and provided neither a party, nor the convention secretariat on its own, has taken the necessary steps to bring the case formally before the implementation committee. Such authorization would appear particularly desirable in light of experience with the Montreal Protocol's NCP which suggests that the respective convention secretariat, or any other intermediate body authorized to receive such information, might not always be able or

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41. Although ad hoc panels of review have at times been under consideration as an alternative to the standing committee structure, to date existing or proposed implementation/compliance procedures of MEAs incorporate the latter rather than the former institutional approach. *See* Jacob Werksman, *Designing a Compliance System for the Climate Change Convention*, FIELD Working Paper, 10-11 (undated).

42. *See* Report of the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N. Doc. UNEP/OzL.Pro.7/12, paras. 39-44 (1995).

43. As to the various MEAs' reporting procedures and the essential role the convention secretariats play thereunder, see, for example, Article 13 of the Basel Convention and Decision I/16 of the Conference of the Parties. Decision I/16, Transboundary Movements of Hazardous Wastes Destined for Recovery Operations, *available in* 3 Y.B. INT'L ENVTL. L. Documentation Diskette (Doc. 21); Intergovernmental Negotiating Committee on the Elaboration of an International Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Procedures for Communication of Information and Review of Implementation, U.N. Doc. A/AC.241/49/Rev.1 (1996); Climate Change Convention, *supra* note 20, arts. 8, 12.

willing to follow through on evidence suggestive of non-compliance and formally submit the "case" for review by the implementation committee.

B. The Implementation Committee/Mechanism

1. Size and Composition

Factors of significant import to the effectiveness of the NCP are the size and composition of the implementation committee. The Montreal Protocol's Implementation Committee is limited to ten parties, elected for two years by the meeting of the parties.[44] The Climate Change Convention's Subsidiary Body of Implementation (SBI) is open to participation by all parties (Article 10, paragraph 1). However, the institutional structure for the multilateral consultative process that is most likely to emerge from on-going discussions within the Ad Hoc Group on Article 13—a subsidiary body of the Conference of the Parties[45]—is likely to feature a limited membership.[46] Though the size of the 1994 Sulphur Protocol's Implementation Committee still remains to be determined, the parties are expected to follow the lead taken by the Convention's Executive Body at the adoption of the Protocol in 1994,[47] and establish a limited membership committee.

In any event, it is self-evident that the effectiveness of the committee is inversely proportional to its size, as a smaller committee is more likely to be able to take appropriate action in response to a non-compliance situation than a committee of unlimited membership. A larger committee membership might, of course, ensure better reflection of the various interests at stake. Moreover, if the committee addresses matters affecting the rights or interests of state parties globally or the international community at large, an expanded, even open-ended committee might make sense. Thus, regarding the Climate Change Convention's Article 13, it has been suggested that questions of implementation that concern all parties directly "should be discussed at an open-ended forum. . . ."[48] Conversely, if the issues before the committee tend to be of a primarily bilateral nature, a small committee structure would likely be the most appropriate model.

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44. *See* Montreal Protocol Report, *supra* note 17, Annex IV, art. 5.
45. *See* Note by the Secretariat, *supra* note 4, para. 9.
46. *See id.* para. 18.
47. *See* Decision Taken by the Executive Body, *supra* note 18.
48. Note of the Secretariat, *supra* note 4, para. 8.

Of similar importance is the committee's composition which may affect the credibility of its action in individual cases, indeed its very institutional authority. On top of "equitable geographical representation" which is specifically mentioned as a requirement for the make-up of the Montreal Protocol's Implementation Committee,[49] special attention might also have to be accorded to providing for adequate representation of those countries whose interests are likely to be most significantly affected by the MEA. For example, as regards the prospective non-compliance procedure for the Basel Convention, major hazardous waste producing/exporting as well as importing parties ought to be represented on the committee. Finally, given the fact that attendance at the meeting of the Montreal Protocol's Implementation Committee has proved problematical, it might be desirable to have members of the MEA's implementation committee serve in their individual capacities rather than as representatives of their states.[50] The only other conceptually advanced NCP, that of the 1994 Sulphur Protocol, provides for members of its implementation committee to serve as country representatives.[51] No consensus has yet emerged on this issue from the Climate Change Convention debates.[52]

Apart from the specifics of state representation on the committee, the question arises also as to whether non-governmental organizations (NGOs) and others should be given observer status. The Montreal Protocol itself does not envisage participation by non-state actors in the work of its Implementation Committee. One reason for exclusive state representation on the Montreal Protocol's Implementation Committee lies in the confidentiality problems posed by the sensitive technical and commercially valuable information that the Committee has to handle. Indeed, it appears unlikely that in the context of other MEAs correspondingly sensitive issues are likely to arise as a matter of necessity. Nevertheless, the granting of such status to NGOs could lead to an undue politicization of the committee's proceedings—the very risk that the

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49. *See* Montreal Protocol Report, *supra* note 17, Annex IV, art. 5. Presently, the Committee includes representatives of Austria, Bulgaria, Canada, Peru, Philippines, Sri Lanka, Tanzania, Ukraine, Uruguay, and Zambia.

50. *See* Patrick Széll, *Implementation Control: Non-Compliance Procedure and Dispute Settlement in the Ozone Regime*, *in* THE OZONE TREATIES AND THEIR INFLUENCE ON THE BUILDING OF INTERNATIONAL ENVIRONMENTAL REGIMES, *supra* note 13, at 49 (pointing out the likelihood that a committee composed of individuals would display more independence, whilst "demonstrable subservience to the Meeting of the Parties" is a major factor for the Montreal Committee's acceptability); *see also* Schally, *supra* note 13, at 86-87.

51. *See* Decision taken by the Executive Body, *supra* note 18, para. 1.

52. *Cf.* Note of the Secretariat, *supra* note 4, para. 19.

choice of a small, limited-membership committee seeks to minimize. Thus, while making room for non-state observers on the implementation committee might detrimentally affect the nature of the proceedings as well as its outcome, any such "undue" impact would have to be weighed against the gain in legitimacy of the decision-making process itself.

2. Powers and Jurisdiction

The committee which would receive, consider, and report on submissions bearing on non-implementation or non-compliance, as well as, possibly, situations it has identified on its own as giving rise to concern, should be entitled to request additional information, as necessary, either through the secretariat or directly from the party or parties concerned. The Montreal Protocol's NCP limits its Committee to information-gathering through the offices of the Secretariat.[53] It provides, however, also for information-gathering by the Committee in the territory of the party suspected of non-compliance, albeit only upon the invitation of the latter.[54] This fact-finding option might be especially important to verifying parties' compliance with obligations arising under other environmental regulatory regimes.

Upon completing its review of a situation of possible non-implementation or non-compliance, the implementation committee will report its findings, including any recommendations, to the meeting of the parties. For example, paragraph 9 of the Montreal Protocol's NCP and Article 7, paragraph 1 of the 1994 Sulphur Protocol specifically authorize the respective implementation committees to formulate recommendations for the attention of the meeting of the parties.[55] Similarly, the Climate Change Convention's SBI is called upon to make recommendations to the Conference of the Parties on possible responses to the findings of its own review of the adequacy of key provisions of the Convention and their implementation.[56] More pertinently, there appears to be substantial agreement on the idea that "the committee, institution or body that is to be established to implement the Article 13 process would provide

53. *See* Montreal Protocol Report, *supra* note 17, Annex IV, art. 7(c).

54. *See id.* art. 7(d).

55. Indeed, Hugo Schally, the President of the Montreal Protocol's Implementation Committee, calls these recommendation the "*raison d'être* of the NCP." *See* Schally, *supra* note 13, at 88.

56. *See* Conclusion of Outstanding Issues and Adoption of Decisions, Draft Decision on Agenda Item 5(a)(v) submitted by the Chairman of the Committee of the Whole, Conference of the Parties, 1st Sess., Annex I, para. B(3)(b), at 7, U.N. Doc. FCCC/CP/1995/L.5/Rev.1 (1995) [hereinafter Conclusion of Outstanding Issues and Adoption of Decisions].

recommendations that would ultimately be presented to the COP for adoption."[57] Moreover, under the Montreal Protocol, the review by the Implementation Committee is to aim at "securing an amicable settlement . . . on the basis of respect for the provisions of the Protocol,"[58] thereby authorizing the Committee to broker its very own settlement of the issue prior to consideration by the meeting of the parties.[59]

As regards the Committee's powers of review, it would be preferable not to limit it to matters of compliance in the narrow sense only.[60] The 1994 Sulphur Protocol entrusts a broad review function to its Implementation Committee.[61] By the same token, although the Montreal Protocol's special review process is identified as a "non-compliance procedure," its Implementation Committee's jurisdiction would appear to extend well beyond "mere" compliance issues to matters of non-implementation of the Protocol.[62] There is no denying, at any rate, that the general trend is towards giving the implementation committee wide powers of review. For example, the First Meeting of the COP of the Climate Change Convention significantly strengthened the SBI's role of review.[63] More significantly still, in their responses to the Secretariat questionnaire about the Article 13 process, responding states parties and NGOs seem to indicate a clear preference for a broad mandate for the implementing body/committee to be established.[64]

C. Access to and Transparency of the Proceedings before the Committee

Maximizing transparency of the Committee proceedings without endangering the non-confrontational nature of the procedure should be an inalienable feature of the system of review, as greater transparency enhances the credibility not just of the NCP, but of the

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57. Note by the Secretariat, *supra* note 4, para. 24.

58. Annex IV, *supra* note 17, para. 8.

59. *See* Winfried Lang, *Compliance Control in Respect of the Montreal Protocol* (Apr. 1995) (paper delivered at Massachusetts Institute of Technology on file with author).

60. *See supra* note 4.

61. *See* 1994 Sulphur Protocol, *supra* note 18, art. 7, para. 1.

62. Thus, the initiation of the review procedure, Annex IV, para. 1, refers to "reservations regarding another Party's implementation of its obligations under the Protocol;" in paragraph 2 to "implementation of a particular provision of the Protocol . . . at issue;" and in paragraph 3 to "possible non-compliance by any Party with its obligations under the Protocol." Montreal Protocol Report, *supra* note 17, Annex IV.

63. *See* Conclusion of Outstanding Issues and Adoption of Decisions, *supra* note 56, Annex I, para. B(3)(b) & Annex II, para. B.

64. *See* Note of the Secretariat, *supra* note 4, paras. 6-8.

MEA as a whole. It poses, however, also a major challenge. If the implementation committee is one of limited membership (as it should be), it goes without saying that, as a matter of procedural fairness, a party that is not a member of the Committee but whose conduct is under review should be entitled to participate in the consideration of the relevant submission before the Committee. Conversely, that party should not have any say in the subsequent elaboration and adoption of recommendations on the matter. A provision expressly to this effect is part of the Montreal Protocol's NCP,[65] as well as of the proposed procedure for the 1994 Sulphur Protocol.[66]

Access to and openness of the proceedings are a matter of considerable sensitivity. So is, specifically, the question of access to information upon which the implementation committee bases its recommendations. The Montreal Protocol expressly provides for Committee reports to "be made available to any person upon request."[67] This requirement, however, limits the availability of "information exchanged by or with the Committee that is related to any recommendation" to requesting parties only. On the other hand, as alluded to before, the sensitivity of access to information subject to routine review and analysis, clearly varies from MEA to MEA. For example, in the context of the Basel Convention or the Desertification Convention, the degree of sensitivity of the information involved is likely to be substantially lower, and thus might not justify anything less than full disclosure of all pertinent information, subject only to restrictions necessary to protect bona fide expectations of confidentiality of information that was received in confidence.

Moreover, given the extremely important role that NGOs have traditionally played in monitoring compliance with MEAs (for example, CITES or the Basel Convention), it would be highly conducive to maximizing the effectiveness of the proceedings to permit NGOs to submit pertinent information directly to the implementation committee concerned. If prior screening of NGO-supplied information were necessary, submissions could be routed through the convention secretariat or a similar intermediate body which in turn could summarize such information (and information on its own action thereto) and transmit these summaries to the implementation committee.

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65. *See* Montreal Protocol Report, *supra* note 17, Annex IV, paras. 10-11.

66. *See* 1994 Sulphur Protocol, *supra* note 18, paras. 9-10; *see also* Decision Taken by the Executive Body, *supra* note 18.

67. *See* Montreal Protocol Report, *supra* note 17, Annex IV, para. 16.

D. Setting Outer Parameters for the Non-implementation/Non-compliance Procedure

If the NCP is apt to raise concerns about the degree to which the procedure might politicize the application of the legal norms and standards of the regime, an authoritative stipulation to what situations might indicate possible non-implementation and non-compliance, as well as any in advance clarification of what measures the parties in toto might wish to take in response, might go a long way towards assuaging some of these concerns.

1. Situations Indicative of Non-implementation/Non-compliance

One question that cannot be readily answered by extrapolation from any one environmental regime is whether a review procedure should be guided by a list of "possible situations of non-implementation/non-compliance." As is well known, in 1992 the Fourth Meeting of the Conference of the Parties to the Montreal Protocol failed to agree on an "indicative list" of situations of non-compliance, although the Ad Hoc Working Group of Legal Experts on Non-Compliance had drawn up a provisional list that identified seven such situations.[68] The specifics of the respective NCP of the 1994 Sulphur and VOC Protocols await clarification by the parties upon entry into force of the Protocols[69] (Article 7, paragraph 3 and Article 3, paragraph 3, respectively), while the modus operandi of the Climate Change Convention's SBI, and, more significantly, that of the multilateral consultative process of Article 13, are still evolving. As a result, in none of these regimes has the issue of such a guiding document been authoritatively addressed.

Because a non-compliance procedure is generally perceived as a highly flexible mechanism, an indicative list of possible situations of non-compliance might be viewed as introducing an undue constraining factor. However, such concern would be misplaced. While flexibility may be a defining characteristic of the "response" phase, flexibility is not and should not be the hallmark of the assessment and evaluation phase in the

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68. The COP's failure may have been due to concern over the desirability and feasibility of qualifying *ex ante* situations of non-compliance; or, more likely, it may have been due to disagreement over whether non-payment of contribution under Article 10 of the Montreal Protocol should be included in the list.

69. However, the VOC Protocol lays down some procedural parameters of the mechanism for monitoring compliance that the parties are to adopt. *See* VOC Protocol, *supra* note 16, art. 3, para. 3.

non-compliance process. Rather, the nature of the tasks involved during the latter is quasi-judicial. The increasingly technical standards that help define states' obligations under most MEAs, moreover, contribute to making this phase an intrinsically less flexible, less "political" part of the procedure.

When seen in this light, it should be evident that the compilation of such a list of non-compliance indicators could actually benefit the effectiveness of the NCP. Regulatory demands on parties to an MEA can be expected to continue to grow and, in particular, to vary increasingly in terms of their significance to the fundamental objectives of the regime. In view of this, it may be essential for the credibility of this phase of the NCP as a non-politicized, unbiased review of state conduct—as well as convenient for the parties themselves—to highlight which conduct would prima facie be deemed irreconcilable with obligations arising under the MEA, and which conduct—infractions in a technical sense only—might not rise to the level of sufficient concern to subject it to the NCP.

2. Measures in Response to Non-implementation/Non-compliance

Annex V of the Report of the Fourth Meeting of the Parties to the Montreal Protocol sets forth the measures that the meeting of the parties might take in respect of non-compliance: Provision of appropriate assistance to the non-complying party, issuance of cautions, or imposition of sanctions (suspension of rights and privileges under the Protocol).[70] So far, none of the other MEA's NCPs has evolved to a corresponding level of detailed regulation.

As previously noted, the Montreal Protocol's flexible response is ultimately an expression of the intrinsic multilateral nature of the interests affected by a party's non-compliance: Rather than focusing on restoring the rights of the individual party or parties injured, the "remedies" listed aim at protecting the future integrity of the regime by encouraging the non-complying party to return to good standing. The Montreal Protocol's indicative list of measures also represents the symbolic reaffirmation of the overriding community interest in controlling the sanction process: Unilateral counter-measures, if not altogether preempted, must at least cede precedence to multilateral responses to non-compliance.

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70. *See* Montreal Protocol Report, *supra* note 17, Annex V ("Indicative List of Measures that Might be Taken by a Meeting of the Parties in Respect of Non-compliance with the Protocol").

IV. DISPUTE SETTLEMENT AND NON-COMPLIANCE PROCEDURE

A key assumption underlying the adoption of a NCP is that rather than replacing the traditional dispute settlement provisions of the MEA concerned, the NCP will merely provide an additional procedure for resolving differences about the interpretation and application of the agreement. Thus the Montreal Protocol, as well as the 1994 Sulphur Protocol, consider the NCP as a distinct and separate process without prejudice to the operation of the respective dispute settlement procedure (DSP).[71] Similarly, Article 13 of the Climate Change Convention (the multilateral consultative process) and Article 14 (dispute settlement) are not mutually exclusive.[72]

Nevertheless, the interrelationship of the NCP and dispute settlement provisions raises a number of conceptual issues. First, whereas each state party could successfully initiate the NCP by communicating its reservation about another party's implementation/compliance to the Secretariat,[73] the complaint by a state not suffering a material prejudice may be inadmissible in dispute settlement proceedings pursuant to the MEA. The reason for this, as noted before, is that the MEA concerned may not vest a legal right or interest in state parties generically in respect of non-compliance by another party.

Second, the question arises whether the specific remedies provided by the NCP would prevent a party from resorting to the dispute settlement provisions of the MEA to vindicate rights or legal interests under general international law. Most MEAs' NCPs feature an express reservation clause regarding traditional dispute settlement procedures.[74] Presumably, a state party would thus not be prevented from having recourse to the dispute settlement provisions irrespective of the stage of the proceedings pending before the implementation committee, the only exception being the case where the party invoking the DSP had itself

71. *See id.* Annex IV, pmbl.; 1994 Sulphur Protocol, *supra* note 18, art. 7, para. 4.

72. For the common perception that the two procedures overlap but are clearly different in nature and scope, see, for example, Note of the Secretariat, *supra* note 4, at paras. 33-40 and Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Note by the Interim Secretariat, Consideration of the Establishment of a Multilateral Consultative Process for the Resolution of Questions Regarding Implementation (Article 13), U.N. Doc. A/AC.237/59, at 9, para. 26 (1994).

73. *See* Montreal Protocol Report, *supra* note 17, Annex IV, para. 1.

74. As regards the Montreal Protocol's NCP, see *supra* note 70.

initiated the NCP.[75] This follows not only from the reservation clause, but also from the fact that a matter before the implementation committee as a political organ, "is not sub judice if discussed, nor res judicata if decided."[76]

A third question is whether the NCP could be invoked, and more specifically, collective counter-measures imposed by the COP (upon recommendation of the implementation committee), only upon the exhaustion of the dispute settlement remedies. The text of the Montreal Protocol's NCP, for example, does not provide specific guidance on this issue, but its paragraph 12 clearly envisages parallel proceedings.[77] Indeed, it should be self-evident that by adopting a NCP, the parties to an MEA waive their right to have differences over non-compliance settled exclusively pursuant to dispute settlement procedures.[78] Martti Koskenniemi has persuasively argued that parallel proceedings before the Montreal Protocol's Implementation Committee and under the dispute settlement provisions would not be problematic, except for the situation in which a de facto determination of a party's compliance with its obligations is being made by the Committee while the matter has also been submitted to binding arbitration or decision by a court. In that latter situation, the jurisdictional conflict would have to be resolved in favor of the dispute settlement procedure.[79]

The question of prior exhaustion of DSP remedies is brought into even sharper focus when the COP (as the most likely institution to which the implementation committee will report) considers the adoption of "measures in response" to non-compliance. In a situation in which an injured individual state contemplates counter-measures for breach of a treaty which itself provides for a third-party dispute settlement mechanism, prior exhaustion of the DSP is quite possibly a prerequisite

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75. In this situation the party would be estopped from invoking the DSP while the Implementation Committee remains seized of the complaint. *See* Koskenniemi, *supra* note 3, at 158.

76. *Id.* at 157 (citing D. CIOBANU, PRELIMINARY OBJECTIONS TO THE JURISDICTION OF THE UNITED NATIONS POLITICAL ORGANS 131 (1975)).

77. "The Parties involved in a matter referred to in paragraphs 1, 3, or 4 [i.e., the initiation of the non-compliance procedure] shall inform . . . the Meeting of the Parties of the results of proceedings taken under Article 11 of the [Vienna] Convention [the dispute settlement provision] regarding possible non-compliance. . . ." Montreal Protocol Report, *supra* note 17, Annex IV, para. 12.

78. *See* Koskenniemi, *supra* note 3, at 158.

79. Koskenniemi suggests that in such a case the NCP ought to be merely suspended, not terminated, to allow the committee to make a recommendation to the Conference of the Parties on the basis of the findings by the arbitral or judicial organ. *See id.* at 159.

for a permissible recourse to unilateral retaliatory measures.[80] The same cannot be said of a multilateral treaty which, while expressly envisaging the possibility of collective counter-measures by the parties, also provides for a binding third-party dispute settlement procedure. Rather, only if proposed measures amount to collective counter-measures,[81] and provided a judicial or arbitral tribunal is seized of the matter as well, will *lis pendens* bar the taking of counter-measures. The parties' collective response pursuant to the NCP would have to be stopped, or at least suspended, until after DSP remedies have been exhausted should the DSP prove ineffective.

Quite obviously, the relationship between dispute settlement procedure and the non-compliance procedure raises some intractable issues that need to be taken into account in devising any compliance control mechanism. Although it might not be necessary or even desirable to spell out in detail how NCP and DSP would interrelate, the parties would do well to set out in writing their understanding of the basic principles involved.

V. CONCLUSION

As MEAs evolve progressively into regulatory regimes that circumscribe in detailed fashion state conduct bearing on the realization of the respective MEA's key objectives, the need for effective implementation/compliance control becomes a matter of urgency. To

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80. Bruno Simma, for example, claims that "[i]t is obvious that in these cases, the requirement of *ex ante* recourse to third-party settlement must be upheld under any circumstances (made more palatable, if need be, by the possibility of resorting to interim measures of protection)." Simma, *Counter-Measures and Dispute Settlement: A Plea for a Different Balance*, 5 EUR. J. INT'L L. 102, 104 (1994). *See also* Derek W. Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1, 11 (1972).

In should be noted, however, that this deference to the DSP is not a total one. For example, in the *Case Concerning the Air Services Agreement of 27 March 1946*, the Tribunal, addressing the issue of the permissibility of reprisals while the case was *sub judice*, noted:

> To the extent that the tribunal has the necessary means to achieve the objectives justifying the countermeasures, it must be admitted that the right of the parties to initiate such measures disappears. . . . As the object and the scope of the power of the tribunal to decide . . . may be defined quite narrowly, however the power of the parties to initiate or maintain countermeasures, too, may not disappear completely.

Case Concerning the Air Services Agreement of 27 March 1946 Between the United States and France, 54 I.L.R. 304, para. 96 (1978).

81. In other words, such a the situation presents itself where the only proposed measures represent sticks (e.g. suspension of the rights of the non-complying party), rather than carrots (e.g. financial incentives or assistance to encourage or enable compliance).

be effective, compliance control—review of information reported by states parties as to adequacy and veracity, assessment of the exact legal requirements of the MEA, and evaluation of information reported against the MEA's standards—must match the increasingly technical complexity of the regime and must be seen as being carried out impartially and objectively. Such control efforts are conceivable only within a special, dedicated institutional framework.