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Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements

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Abstract

Due to its remarkable success, the model of the Montreal Protocol's non-compliance procedure (NCP) has been adopted in other environmental regimes, whose primary norms differ considerably. Hence, this article distinguishes different types of global environmental regimes and assesses the performance of NCPs therein as endogenous enforcement mechanisms. In fact, the reciprocal nature of the main conventional obligations in some more recent environmental regimes seems to hamper the effectiveness of compliance procedures. On this basis, it puts forward some tentative considerations from a constitutional perspective. Drawing from the experience gained under environmental regimes in the UNECE region, it explores the feasibility of transplanting some aspects of the model of the Aarhus Convention NCP into the more complex global context. Further, it reflects upon the potential of enhancing synergies between NCPs and national and international judiciaries as a step towards the consolidation of international *public* law in this area.

Keywords: international environmental law, global environmental regimes, non-compliance procedures, dispute settlement, constitutionalism, managerialism.

1. Introduction

International environmental law has been identified as one of the areas of international regulation where the consideration and protection of common interests has visibly shaped the evolution of that particular field of the international legal order, both from a substantive and from an institutional and procedural perspective. In terms of substance on the one hand, the identification of issue areas that are perceived to be of 'common concern of humankind' have led to the incorporation of principles of inter- and intra-generational equity into global environmental law that have profoundly changed the formerly discretionary role of states in their mutual relations, towards a more functional role, according to which '[s]tates are to act in the interest of individuals and groups in society and in the common interest'.¹ The incipient shift from bilateralism towards community interests, which is not unique to the field of global environmental law, has also brought about the emergence of new concepts, such as *jus cogens*

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¹ E Hey, 'Common Interests and the (Re)constitution of Public Space' (2009) 39 *Envtl Pol & L* 152, 154.

or obligations *erga omnes*.² In the particular field of international environmental law, the traditional principles concerning the use and exploitation of shared resources in the context of mutual, bilateral relations of good neighbourliness in classic international law, have been complemented by multilateral treaties addressing the protection of global environmental goods – the so-called multilateral environmental agreements (hereinafter, MEAs) – which are explicitly or implicitly regarded to be of ‘common concern’.³ They constitute the multilateral contractual source for international obligations, compliance with which is no longer based on reciprocity, but is, rather, owed *erga omnes partes*.⁴

On the other hand, from an institutional and procedural perspective, the protection of common interests has also encouraged the evolution from the discretion of states towards the discretion of global institutions. This means that the capacity of decision-making in both, normative development of global environmental law and its implementation in individual situations, is being reallocated from states to international institutions, such as the Conferences of the Parties (COPs) in MEAs, which are not submitted ‘to the checks and balances associated with the exercise of public powers at the national level’.⁵ In this context, moreover, decision-making patterns that unfolded within the (global) MEAs’ treaty bodies for the development and implementation of the conventional provisions are shifting away from classical procedures based on the formal manifestation of consent in response to a general acknowledgment of the need for a more dynamic and flexible approach. As Brunnée has concluded with respect to this phenomenon, ‘The reliance on COP decisions (...) might suggest either that increasingly attenuated consent suffices to produce formally binding obligations, or that a pattern of non-binding regulation is emerging’.⁶ Hence, the MEA’s conventional provisions are more and more implemented through measures of uncertain legal value. In sum, these specific features of environmental regimes underpin their notorious trend towards autonomy or self-containment – in other words regime-specific enforcement solutions – due to the lack of effectiveness of traditional mechanisms of classic international law in this field.⁷ As Fitzmaurice has stressed, this does not mean in any way that international environmental law constitutes a special branch or regime separate from the mainstream of international law, but that:

special features of the environment as a subject-matter of international law have resulted in particular solutions, applications or rules within the general principles of international law which, if not necessarily unique to, are at least particularly characteristic of, environmental law.⁸

Specifically, the Montreal Protocol’s NCP is seen as an innovative endogenous enforcement mechanism that has proven to be quite successful in eliciting compliance among Parties experiencing some sort of difficulties in the implementation process. Within a general context

² S Villalpando, ‘The Legal Dimension of the International Community: How Community Interests Are Protected in International Law’ (2010) 21 EJIL 387, 394.

³ M Fitzmaurice, ‘International Environmental Law As a Special Field’ (1994) 25 Netherlands Ybk Intl L 181, 220-1.

⁴ J Brunnée, ‘Common Areas, Common Heritage and Common Concern’ in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 550, 565-7.

⁵ Hey (n 1) 155-8.

⁶ J Brunnée, ‘Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements’ in R Wolfrum and V Röben (eds), *Developments of International Law in Treaty Making* (Springer 2005) 101, 123.

⁷ J Klabbers, ‘Compliance Procedures’ in Bodansky, Brunnée & Hey (n 4) 996, 1000-3.

⁸ Fitzmaurice (n 3) 182-3.

of what some refer to as a process of ‘commodification’ of international law⁹ inspired by a ‘managerial mindset’,¹⁰ it has served as a model for similar enforcement mechanisms in a number of global MEAs. Yet, this process of continued development and refinement of such non-compliance systems has also been praised as ‘one of the largely untold success stories of international environmental law over the last two decades’, based on a nuanced, incremental response, through intra-treaty innovation, to the existing normative and institutional deficits in this particular body of law.¹¹ While this latter assertion certainly reflects the general picture, a closer look into the operation and performance of the compliance mechanisms in the various regimes reveals a somewhat more differentiated picture. Indeed, the NCP at the Montreal Protocol is operating effectively, having accumulated a significant body of case-law. However, those mechanisms subsequently adopted in other global MEAs do not necessarily show the same record of success.

Accordingly, this article focuses on the suitability of the Montreal Protocol’s NCP as a model of a mechanism to ensure compliance with and enforcement of global MEAs. It aims to elucidate the conditions under which these mechanisms have proven most effective from those under which they show significant flaws, thereby contributing to an appraisal of the performance of international environmental law in establishing strong and effective legal instruments. It is submitted that the disparate record of functionality of NCPs in global MEAs is directly linked to the regulatory approaches applied therein and, consequently, to the legal nature of the obligations undertaken by the Parties.

Indeed, especially with respect to their substance, different sets of environmental regimes may be distinguished on the basis of the underlying regulatory approaches, in which the Parties undertake obligations of a divergent legal nature. Hence, borrowing Hart’s well-known distinction,¹² environmental regimes may be classified according to their primary rules’ specific features. To the extent that they move away from classical bilateralist patterns, they have also involved the emergence of regime-specific secondary rules,¹³ by which we refer in the present context to what Hart called ‘rules of adjudication’, namely those ‘empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken’, and ‘also define the procedure to be followed’.¹⁴ Yet, the disparate degree of success of NCPs in global MEAs raises the question whether the Montreal Protocol model of regime-specific secondary rules actually meets the expectations of effectiveness in any kind of environmental regime. Further, the more fundamental question arises whether NCPs may be considered of as a manifestation of a process of commodification of international law, as Klabbers suggests, by which compliance with international obligations in specific cases is left to the discretion of states and international institutions,¹⁵ or whether on the contrary they contribute to foster anything coming close to the rule of law in international environmental law. Put differently, do NCPs promote international constitutionalism in the field of international environmental law?

⁹ J Klabbers, ‘The Commodification of International Law’ in H Ruiz Fabri, E Jouanet and V Tomkiewicz (eds), *Select Proceedings of the European Society of International Law: Volume 1 2006* (Hart Publishing 2008) 341, 349-50.

¹⁰ M Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’ (2007) 8 *Theoretical Inquiries in Law* 9, 13-4.

¹¹ D French, ‘Finding Autonomy in International Environmental Law and Governance’ (2009) 21 *JEL* 255, 283.

¹² HLA Hart, *The Concept of Law* (Clarendon Law Series, 2nd edn OUP 1961, 1994) ch 5.

¹³ See Fitzmaurice (n 3) 223-4.

¹⁴ Hart (n 12) 96-8.

¹⁵ Klabbers (n 9).

Constitutionalism has been embraced by legal theorists from many different perspectives. However – or precisely for that reason – its content is highly controversial and remains rather unclear.¹⁶ Koskenniemi tries to grasp the essence of constitutionalism by defining it as a ‘mindset’, a project of political and moral regeneration, according to which international lawyers resort to a vocabulary of institutional hierarchies and fundamental values in the application of law, without necessarily being tied to any definite institutional project.¹⁷ Some authors criticise these attempts as a somewhat indiscriminate translation of concepts forged in a socio-historical context dominated by the nation-state to a new, unprecedented reality, which is described as post-modern, post-national, pluralism.¹⁸ Others in turn see it as one of several more recent theoretical approaches to international law that lead to a methodological quagmire, by which law-making by scholarship is being justified contrary to any sort of legal common sense.¹⁹

Be that as it may, Paulus’ substantive (rather than formalistic) conception of international constitutionalism seems to be particularly appropriate in the present context.²⁰ According to this author, to the extent that they are present in international law, principles such as democracy, human rights, equality and solidarity, checks and balances, and the rule of law, may contribute to a theoretical reconstruction of international law in constitutional terms, in order to set up the legal foundation for the allocation of public powers in the international sphere, and to submit them to constraint.²¹ Put differently, such principles provide valuable instruments for the development of a body of international *public* law, in contradistinction to public *international* law, through which to reconfigure the international public space, making international decision-making more legitimate and, as a result, making both states and international institutions more accountable.²²

From this perspective, the characteristic features of conventional obligations in global MEAs are assessed in the following, by distinguishing different sets of regimes according to their underlying regulatory approaches. Against this background, the institutional and procedural structure of NCPs in the different sets of regimes and their performance in practice are briefly analysed. On this basis, their main weaknesses are appraised, and proposals are put forward to enhance their effectiveness. It is submitted that NCPs may increase their performance by opening up to public participation, thereby contributing to an increase in the (democratic) legitimacy of global environmental governance. Furthermore, it is argued that the enhancement of synergies between NCPs and national and international judiciaries may be beneficial to the international rule of law, and the consistent interpretation and application of international law. Both reflections are thought of as a step towards the constitutionalisation of secondary rules in global environmental regimes and the consolidation of an international *public* law in this area.²³

¹⁶ J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (OUP 2009) ch 1.

¹⁷ Koskenniemi (n 10) 18.

¹⁸ N Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2010).

¹⁹ J Kammerhofer, ‘Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems’ (2010) 23 *Leiden J Intl L* 723.

²⁰ AL Paulus, ‘The International Legal System as a Constitution’ in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 69.

²¹ *ibid* 90-3.

²² E Hey, ‘International *Public* Law’ (2004) 6 *Intl L FORUM du Droit International* 149.

²³ Hey (n 22).

2. Primary Rules in Global Environmental Regimes: Characteristic Features of Multilateral Treaty Obligations

Environmental regimes are typically shaped as dynamic, sectoral legal systems in which a MEA sets the foundational legal instrument that establishes the commonly agreed definition of the specific environmental problem being addressed, as well as the elementary principles, rules and institutions that will serve as a basis for the process of cooperation. These principles and rules constitute the backbone of the regime and are typically defined in relatively open terms, hence allowing their development in the MEA's institutional settings, as scientific and political consensus on the measures necessary to cope with the environmental problem evolve.²⁴ Within this legal framework, the measures foreseen in MEAs are applied through the use of different regulatory approaches, ranging from direct regulation (command-and-control) to the use of different kinds of economic instruments, with an increasing trend towards a more prominent use of systems of economic incentive.²⁵ Conceived as a far more effective means for the internalisation of environmental costs, their implementation by national authorities in the quest for sustainable development is encouraged in Principle 16 of the 1992 Rio Declaration on Environment and Development,²⁶ as an expression of the polluter-pays principle.

These techniques have also permeated international law. Three types of environmental regimes may be distinguished on the basis of the underlying regulatory approaches. In a first group of environmental regimes aiming at the protection of the global commons – such as the ozone²⁷ and climate change regimes²⁸, and also the persistent organic pollutants regime²⁹ – MEAs establish measures of direct regulation, which are combined with such economic incentive systems. These regimes set up global standards, such as the progressive reduction and elimination of controlled substances,³⁰ or the quantified limitation or reduction commitments of certain emissions,³¹ whose implementation is to be incentivised through the use of various market-based instruments, such as restrictions in trade with controlled substances³² or the so-called ‘flexible mechanisms’ under the Kyoto Protocol.³³

In contrast thereto, in a second set of regimes established for the protection of components of the global ecosystem that are natural resources under the jurisdiction of States, such as the biodiversity³⁴ and desertification regimes,³⁵ the measures envisaged by MEAs enhance the

²⁴ T Gehring, ‘Treaty-Making and Treaty Evolution’ in Bodansky, Brunnée and Hey (n 4) 467, 473-5.

²⁵ RB Stewart, ‘Economic Incentives for Environmental Protection: Opportunities and Obstacles’ in RL Revesz, P Sands and RB Stewart (eds), *Environmental Law, the Economy, and Sustainable Development* (CUP 2000) 171, 220-7.

²⁶ UN Doc A/CONF.151/26/Rev.1 (Vol 1) (1992), Annex I.

²⁷ Vienna Convention for the Protection of the Ozone Layer (22 March 1985) 1513 UNTS 293, (1987) 26 ILM 1529; Montreal Protocol on Substances That Deplete the Ozone Layer (16 September 1987) 1522 UNTS 3, (1987) 26 ILM 1541.

²⁸ United Nations Framework Convention on Climate Change (9 May 1992) 1771 UNTS 107, (1992) 31 ILM 851; Kyoto Protocol (11 December 1997) 2303 UNTS 148, (1998) 37 ILM 22.

²⁹ Stockholm Convention on Persistent Organic Pollutants (23 May 2001) 2256 UNTS 119, (2001) 40 ILM 532.

³⁰ Arts 2 and 2A to 2I in relation with Annexes A, B, C and E Montreal Protocol; arts 3,4 and 6 in relation with Annexes A, B and C Stockholm Convention.

³¹ Art 3 and Annex B Kyoto Protocol.

³² Arts 4, 4A and 4B Montreal Protocol; art. 3(2) Stockholm Convention.

³³ Arts 6, 12 and 17 Kyoto Protocol.

³⁴ Convention on Biological Diversity (5 June 1992) 1760 UNTS 79, (1992) 31 ILM 822; International Treaty on Plant Genetic Resources for Food and Agriculture (3 November 2001) 2400 UNTS 379.

³⁵ Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (17 June 1994) 1954 UNTS 3, (1994) 33 ILM 1328.

application of principles and duties of general international law³⁶ within their respective scopes of application through economic instruments of a more general nature. As developed by the 2010 Nagoya Protocol,³⁷ the Convention on Biological Diversity establishes instruments for the equitable participation in the benefits and charges derived from the utilisation of genetic resources, as a way to incentivise the conservation and sustainable use of the components of biological diversity,³⁸ whereas the UN Convention to Combat Desertification envisages the sustainable use of soil by offering financial, scientific and technical development aid to developing countries.

A third group of environmental regimes – such as the hazardous wastes,³⁹ the biosafety⁴⁰ and the pesticides⁴¹ regimes – specifically regulate international movements of products that pose a risk to the environment and human health in a way consistent with the WTO agreements, by submitting them to a prior informed consent procedure.⁴² Complementary thereto, strict liability regimes for environmental damage are to be developed as a means to implement the polluter-pays principle. However, none of the international legal instruments necessary to put them in place is yet in force. The Cartagena Protocol's COP-MOP just adopted the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress in October 2010,⁴³ and the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes has so far failed to obtain the required number of ratifications.⁴⁴ As for the pesticides regime, the Rotterdam Convention does not foresee the adoption of liability rules. Efforts made within the Conference of Plenipotentiaries to set in motion a process to close this loophole prior to the Convention's entry into force did not succeed and were abandoned.⁴⁵

The legal analysis of global MEAs reveals a decreasing degree of constitutionalisation of the primary rules in the three mentioned types of regimes. The core of the treaty obligations in the first group of regimes is certainly of a collective nature. As the problems addressed therein affect the global commons and are considered to be a 'common concern of humankind',⁴⁶ Parties to these MEAs have agreed to a combination of direct regulation measures with economic instruments. Consequently, these MEAs establish global standards that are binding for all Parties, despite the differential treatment accorded to them in view of their diverging degree of economic development.⁴⁷ Parties to these regimes actually undertake obligations *erga omnes partes*, as – paraphrasing Special Rapporteur Crawford in his third report on State Responsibility – all States parties have an expressed or necessarily implied common legal

³⁶ Art 3 CBD; Preamble, §15 UNCCD.

³⁷ COP Decision X/1, Annex I. UN Doc UNEP/CBD/COP/10/27 (2011).

³⁸ The same approach is followed in the International Treaty on Plant Genetic Resources for Food and Agriculture, which is linked both to FAO and the CBD.

³⁹ Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal (22 March 1989) 1673 UNTS 57, (1989) 28 ILM 649.

⁴⁰ Cartagena Protocol on Biosafety to the Convention on Biological Diversity (29 January 2000) 2226 UNTS 208, (2000) 39 ILM 1027.

⁴¹ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (10 September 1998) 2244 UNTS 337, (1999) 38 ILM 1.

⁴² See generally C Hilson, 'Information Disclosure and the Regulation of Traded Product Risks' (2005) 17 JEL 305.

⁴³ COP-MOP Decision BS-V/11. UN Doc UNEP/CBD/BS/COP-MOP/5/17 (2010).

⁴⁴ See <<http://www.basel.int/ratif/protocol.htm>> accessed 27 June 2011.

⁴⁵ A Daniel, 'Civil Liability Regimes as Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?' (2003) 12 RECIEL 225, 234-5.

⁴⁶ Preamble, §1, UNFCCC.

⁴⁷ See generally, L Rajamani, *Differential Treatment in International Environmental Law* (OUP 2006).

interest in the maintenance and implementation of the international regime.⁴⁸ In a merely descriptive way, I will henceforth refer to them as ‘collective regimes’. MEAs in the second set of regimes also address global environmental problems considered to be of ‘common concern to humankind’.⁴⁹ However, as they relate to natural resources that are to a great extent under State jurisdiction, developed and developing countries have opposed – for different reasons – the establishment of direct regulation measures.⁵⁰ In this second set of environmental regimes, MEAs reinstate the principle of sovereignty in their respective scope of application, as well as the prevention principle (*sic utere tuo ut alienum non laedas*). Hence, these MEAs establish a conventional framework for the application of collective obligations arising out of general international law in relation to the sustainable use of the natural resources concerned. However, the economic instruments for their application, that make the core of the conventional regimes, are bilateral and reciprocal in nature. In the following, I will refer to them as ‘mixed regimes’. Finally, with respect to the third group of regimes, MEAs regulating international movements of hazardous products that pose a risk to the environment and human health, also contribute to the protection of the global environment. Nevertheless, by regulating transboundary movements of these products between specific Parties, the provisions of these treaties are indeed multilateral, but contain a bundle of bilateral obligations of a reciprocal nature. For the purpose of this article, I will call them ‘bilateralised regimes’.

3. Secondary Rules in Global Environmental Regimes: Seeking Endogenous Enforcement through NCPs

Having examined the primary rules in global MEAs, we now shall enter the realm of secondary rules, in particular, those concerned with regime-specific enforcement. Academic literature generally acknowledges that traditional approaches to international law enforcement, such as state responsibility and liability, and adjudicative dispute settlement (hereinafter, ADS) do not fully suit the specificity of MEAs. Two main groups of arguments are generally put forward to sustain this assertion. First, according to the mainstream discourse on this issue, the complexity and dynamism of environmental problems addressed in environmental regimes, as well as their inter-related character, demand a holistic, proactive approach in their *management*, rather than classical reactive enforcement mechanisms.⁵¹ In this context, an intrinsic inability of ADS to cope with the multidimensionality or polycentricity of environmental disputes is pointed out.⁵² On the other hand, as existing practice demonstrates, this multidimensionality of international environmental disputes is also connected to fragmentation, as States engage in forum shopping, submitting the various aspects of the dispute to different available dispute settlement mechanisms that they deem most favourable to their claims. Moreover, according to the standard managerialist discourse,

⁴⁸ Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur. UN Doc A/CN.4/507 (2000), §106.b.

⁴⁹ Preamble, §3, CBD and Preamble, §§1 and 3, UNCCD.

⁵⁰ F Burhenne-Guilmin and S Casey-Lefkowitz, ‘The Convention on Biological Diversity: A Hard Won Global Achievement’ (1992) 3 Ybk Intl Envtl L 43, 47.

⁵¹ A Chayes, AH Chayes and RB Mitchell, ‘Managing Compliance: A Comparative Perspective’ in E Brown Weiss and HK Jacobson (eds), *Engaging Countries. Strengthening Compliance with International Environmental Accords* (The MIT Press 1998) 39. See also Bodansky, Brunnée & Hey (n 4) 7.

⁵² S Ohlhoff, *Methoden der Konfliktbewältigung bei grenzüberschreitenden Umweltproblemen im Wandel. Überwindung der Grenzen herkömmlicher Streitbeilegung durch systeminterne Flexibilität und systemexterne Innovation* (Springer 2003) 8-14. This assertion is critically discussed in T Stephens, *International Courts and Environmental Protection* (CUP 2009) 458, 95-102.

ADS – at least in its traditional configuration – is too slow and cumbersome to deal appropriately with the issues at stake in environmental disputes.⁵³ Finally, the reactive approach underlying ADS in ascertaining breaches of or non-compliance with international environmental standards is also seen as a disadvantage, as environmental damage is frequently irreparable and remedial obligations arising out of state responsibility or liability regimes hardly provide for restitution or compensation.⁵⁴

Second, deeply related to the problems that arise from the specific features of the problems addressed in environmental regimes, the collective, non-reciprocal nature of conventional obligations in some, makes it hard to identify any injured or specially affected state as a consequence of their breach or non-compliance. In his aforementioned third report on State Responsibility, the Special Rapporteur Crawford specifically referred to the obligation arising for the parties under the Montreal Protocol not to omit excess CFCs into the atmosphere as an example of a ‘purely solidary obligation’, where ‘there will never be a demonstrable connection with any particular breach and the impact on any particular State party’.⁵⁵ This specific feature of collective obligations poses particular difficulties with regard to the suspension or termination of the MEAs by any Party individually,⁵⁶ and to the invocation of state responsibility.⁵⁷ Furthermore, the collective nature of these obligations also raises the question of *locus standi* before international courts. Yet, even if the legal interest of not directly affected Parties were to be considered by an international court as sufficient to ground their standing, the essentially consensual nature of the jurisdiction of international courts adds further difficulties to the matter. Therefore, one may agree with the much quoted assertion by Vice-President Weeramantry in his separate opinion in the case concerning the Gabčíkovo-Nagymaros Project, according to which ‘[i]n addressing such problems, which transcend the individual rights and obligations of the litigating states, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation’.⁵⁸

Under these circumstances global MEAs have developed endogenous enforcement mechanisms, which are similar to those established in other areas of international legal regulation for the protection of community interests.⁵⁹ Based on the model of the procedure developed under the Montreal Protocol, these mechanisms follow a managerial approach and are conceived of as non-confrontational, non-adversarial mechanisms that do not aim to brand a Party as defaulting its obligations or providing for remedies, but rather to elicit Parties experiencing ‘problems’ back into compliance through assistance.⁶⁰ Designed to induce and promote compliance with the treaty obligations, their aim is to avoid the emergence of disputes and, thus, the resort to adjudicative settlement. Furthermore, as mechanisms that are collectively operated through the MEAs’ autonomous institutional arrangements, they evade

⁵³ Chayes, Handler Chayes & Mitchell (n 51) 54.

⁵⁴ T Scovazzi, ‘State Responsibility for Environmental Harm’ (2001) 12 Ybk Intl Env’tl L 43, 51. See also J Brunnée, ‘Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection’ (2004) 53 ICLQ 351, 364.

⁵⁵ UN Doc A/CN.4/507 (2000), §108.

⁵⁶ Art 60 (2) and (3) VCLT. See M Fitzmaurice and C Redgwell, ‘Environmental Non-Compliance Procedures and International Law’ (2000) 31 Netherlands Ybk Intl L 35, 59-62, and M Koskeniemi, ‘Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol’ (1992) 3 Ybk Intl Env’tl L 123, 138.

⁵⁷ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (UN Doc A/56/10) arts 42 and 48.

⁵⁸ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7, 118.

⁵⁹ See generally, G Ulfstein, T Marauhn and A Zimmermann (eds), *Making Treaties Work. Human Rights, Environment and Arms Control* (CUP 2007).

⁶⁰ G Handl, ‘Compliance Control Mechanisms and International Environmental Obligations’ (1997) 5 Tulane J Intl & Comp L 29, 34.

the difficult question of the invocation of state responsibility, particularly in the context of collective regimes.⁶¹ Finally, NCPs are better suited to enforce dynamic environmental regimes, in which the basic legally binding treaty-based principles and rules are fleshed out through COP decisions, the legal nature of which is not always easily determined.⁶²

In fact, after the adoption and early success of the Montreal Protocol's NCP⁶³ - the first of its kind - it has served as a model of an endogenous enforcement procedure in other global MEAs. So far, similar procedures have been established in the Basel Convention⁶⁴ and the Cartagena Protocol,⁶⁵ as well as in the Kyoto Protocol⁶⁶ and, very recently, in the International Treaty on Plant Genetic Resources for Food and Agriculture.⁶⁷ On the contrary, negotiations for the adoption of such a procedure in the Rotterdam⁶⁸ and Stockholm Conventions,⁶⁹ although quite advanced, are stagnated and those for the adoption of the Desertification Convention's NCP are still in their preliminary stages.⁷⁰ In order to complete the picture, the 2010 Nagoya Protocol to the Convention on Biological Diversity also provides for such a mechanism,⁷¹ and the ongoing intergovernmental negotiations for a legally binding global instrument on mercury also seem to envisage a NCP.⁷²

Where they have been established, NCPs are typically entrusted to small-sized treaty bodies, the so called Compliance Committees, which are incorporated in the MEAs' autonomous institutional arrangements.⁷³ Yet, even if their composition and powers are generally quite homogeneous across the different MEAs, a significant distinction can be drawn between such Committees, regarding their respective functions, in collective and in bilateralised regimes. While the Committees in collective regimes are charged with compliance control functions,⁷⁴ those established under bilateralised regimes are further mandated to review general questions related to the implementation of and compliance with the conventional provisions.⁷⁵ However, this additional, more general function does not amount to the assessment of specific compliance issues concerning a Party. Instead, it allows these Committees to identify general trends in the overall implementation, in a similar way as the Committee for the Review of the Implementation of the Convention does under the desertification regime.⁷⁶

⁶¹ C Nègre, 'Responsibility and International Environmental Law' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 803, 810.

⁶² Klabbers (n 7) 1008.

⁶³ MOP Decision IV/5 and Annexes IV and V. UN Doc UNEP/OzL.Pro.4/15 (1992).

⁶⁴ COP Decision VI/12, Appendix. UN Doc UNEP/CHW.6/40 (2003).

⁶⁵ COP-MOP Decision BS-I/7, Annex. UN Doc UNEP/CBD/BS/COP-MOP/1/15 (2004).

⁶⁶ Decision 27/CMP.1, Annex. UN Doc FCCC/KP/CMP/2005/8/Add.3.

⁶⁷ GB Resolution 2/2011, Annex. See <itpgrfa.net/International/content/resolution-22011-procedures-and-operational-mechanisms-promote-compliance-and-address-issues> (last accessed 27 June 2011).

⁶⁸ Draft in COP Decision RC-4/7, Annex. UN Doc UNEP/FAO/RC/COP.4/24 (2008).

⁶⁹ Draft in COP Decision SC-4/33, Annex. UN Doc UNEP/POPS/COP.4/38 (2009).

⁷⁰ The UNCCD Secretariat submitted a first draft to the open-ended ad hoc group of experts during the last session of the COP. See UN Doc ICCD/COP(9)/13 (2009), Annex.

⁷¹ Art 30 Nagoya Protocol.

⁷² UN Doc UNEP(DTIE)/Hg/INC.2/3 (2010), §17.

⁷³ R Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 AJIL 623, 644-7.

⁷⁴ Montreal Protocol NCP, §7; Kyoto Protocol NCP, §§IV.4 and V.4-6.

⁷⁵ Basel Convention NCP, §§19-21; Cartagena Protocol NCP, §III; Rotterdam Convention Draft NCP, §§ 18-9 and 25. Among collective regimes, if its present draft was adopted, only the Stockholm Convention NCP would vest its Committee with this function (§ 32).

⁷⁶ See its recently revised mandate in UNCCD, COP Decision 11/COP.9, Annex, §I. UN Doc ICCD/COP(9)/18/Add.1 (2009).

In this general framework, NCPs may be initiated on a Party-to-Party basis. Furthermore, a Party that is not able to comply with its commitments despite its best efforts to do so can make a self-submission. In addition, the Secretariat (or other entitled treaty body) has powers to trigger the procedure in defence of the common interest. However, this latter trigger mechanism is only fully recognised in the context of collective regimes based on *erga omnes partes* obligations.⁷⁷ In bilateralised regimes, the Secretariats' triggering-powers are materially limited to compliance issues regarding procedural and institutional obligations – viz, reporting requirements.⁷⁸ Under the Cartagena Protocol's NCP, the Secretariat had no such capacity at all. Only very recently, following the process of review set in motion by the Protocol's Compliance Committee, has some sort of triggering-capacity been accorded to the Secretariat, and even to the Committee itself, as it may now consider providing advice or adopting assistance measures:

in a situation where a Party fails to submit its national report, or information has been received through a national report or the Secretariat, based on information from the Biosafety Clearing-House, that shows that the Party concerned is faced with difficulties complying (...).⁷⁹

4. Assessing the Performance of NCPs

Coming now to the crucial point, how have NCPs been performing so far in global MEAs? Practice reveals that their respective records are quite disparate in collective and bilateralised regimes. On the one hand, NCPs in the Montreal Protocol, and – as the still limited practice of its Compliance Committee suggests – that of the Kyoto Protocol, are operating on a regular basis and seem to perform effectively. On the other hand, NCPs in the Basel Convention and Cartagena Protocol are rarely resorted to.

Practice in the Montreal Protocol's NCP shows that the vast majority of cases submitted to the Implementation Committee concern issues of non-compliance by developing states. Cases concerning countries with economies in transition have been less frequent and those concerning developed countries have been merely testimonial.⁸⁰ Accordingly, the average outcome of the procedure is bespoke technical and financial assistance. Whenever this is the case, the Multilateral Fund of the Montreal Protocol and the executing agencies (UNIDO, UNEP and UNDP) that are responsible for the implementation of *ex ante* technical and financial assistance to Parties operating under article 5 of the Montreal Protocol, have to review their policies with respect to a non-compliant Party in accordance with the recommendations of the Implementation Committee and the relevant decisions of the Meeting of the Parties.⁸¹ On the other hand, the Bureau of the Kyoto Protocol's Compliance Committee has so far not allocated any compliance issues to its Facilitative Branch.

⁷⁷ Montreal Protocol NCP, §3; Kyoto Protocol NCP, §VI.1. In the Stockholm Convention Draft NCP, this issue is still controversial and subject to negotiation (§17 (c)).

⁷⁸ Basel Convention NCP, §9 (c). In the Rotterdam Convention Draft-NCP(§12) and the Draft NCP of the International Treaty on Plant Genetic Resources (§V.1), this issue continues to be controversial and subject to negotiation.

⁷⁹ COP-MOP Decision BS-V/1, § 1(b). See above n 43.

⁸⁰ In fact, the only developed state so far that has been cautioned by the Meeting of the Parties under item B of the Indicative List of Measures was Greece in 2007. However, no assistance measures were provided under the institutional arrangements of the Montreal Protocol. See Montreal Protocol, MOP Decision XIX/21, §4. UN Doc UNEP/OzL.Pro.19/7 (2007).

⁸¹ Financial and technical assistance to countries with economies in transition has been provided mainly through the Global Environmental Fund. L Boisson de Chazournes, 'Technical and Financial Assistance and Compliance: the Interplay' in U Beyerlin, PT Stoll and R Wolfrum (eds), *Ensuring Compliance with*

The analysis of the so-called ‘sanctions’ adopted in the context of the NCPs of the Montreal and Kyoto Protocols reveals their rather exceptional character. The unique decisions adopted in the middle 1990s by the Montreal Protocol’s MOP with respect to the non-compliance of certain countries with economies in transition – particularly that concerning the Russian Federation in 1995⁸² – were quite controversial, partly because of the severe trade restrictions imposed, which can hardly be qualified as a suspension of rights and privileges under the Protocol, according to item C of the Indicative List of Measures of the NCP.⁸³ However, the suspension of rights and privileges might appear to be the regular outcome of the decisions of the Compliance Committee’s Enforcement Branch in the Kyoto Protocol, as it has so far suspended Greece,⁸⁴ Croatia⁸⁵ and Bulgaria⁸⁶ from participation in the so-called ‘flexible mechanisms’. Nevertheless, with respect to these cases, doubts have also been expressed as to whether these decisions may actually be considered as a suspension of rights and privileges under the Kyoto Protocol, or whether the Enforcement Branch in fact restrained itself to declaring the non fulfilment of the eligibility criteria to participate in the flexible mechanisms under articles 6, 12 and 17 Kyoto Protocol by the Parties concerned.⁸⁷ Be that as it may, practice under the Kyoto Protocol NCP is still too scarce to draw any significant conclusions, especially if one considers that the aforementioned cases do not concern compliance with the Protocol’s central obligations.

The picture varies dramatically in the context of bilateralised regimes. The activity of Compliance Committees in this latter set of regimes has been limited to the general assessment of the respective MEA’s implementation by all the Parties, but no compliance control has been undertaken in specific cases concerning a particular country. Established in 2003, the Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention has only very recently dealt with specific submissions by the Secretariat and by one Party with respect to its own non-compliance. These cases mainly concern structural difficulties of developing countries in complying with their reporting requirements.⁸⁸ As for the Compliance Committee of the Cartagena Protocol, so far the only attempts to trigger the NCP have been made by NGOs, whose submissions were nevertheless rejected, as the Committee considered not to be mandated to consider them under its terms of reference. However, no submissions have been made by the Parties since the establishment of the NCP in 2004. Due to the short period of time which has elapsed since the adoption of the COP-MOP’s decision BS-V/1, no references are available regarding possible submissions to the Compliance Committee under the revised triggering-conditions. However, it is submitted that the changes introduced are likely to encourage resort to the compliance mechanism in the future.

Multilateral Environmental Agreements. A Dialogue Between Practitioners and Academia (Martinus Nijhoff 2006) 273, 284-6.

⁸² Montreal Protocol, MOP Decision VII/18, §8. UN Doc UNEP/OzL.Pro.7/12 (1995).

⁸³ M Fitzmaurice, ‘Non-Compliance Procedures and the Law of the Treaties’ in T Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009) 453, 473.

⁸⁴ UN Doc CC-2007-1-8/Greece/EB, 17 April 2008. Greece was reinstated in its eligibility to participate in the flexible mechanisms later that year (doc. CC-2007-1-13/Greece/EB, 13 November 2008).

⁸⁵ UN Doc CC-2009-1-8/Croatia/EB, 26 November 2009. Croatia has announced that it intends to appeal the final decision of the Enforcement Branch under §XI.1 Kyoto Protocol NCP (doc. CC-2009-1-9/Croatia/EB, 4 January 2010).

⁸⁶ UN Doc CC-2010-1-8/Bulgaria/EB, 28 June 2010.

⁸⁷ Fitzmaurice (n 83) 478-80.

⁸⁸ UN Doc UNEP/CHW/CC/8/25 (2011).

The preceding analysis demonstrates that NCPs have only offered a more effective alternative to traditional approaches to international law enforcement in collective regimes. So far, the operation of NCPs in global MEAs shows that they only perform as endogenous enforcement mechanisms in this specific type of environmental regime, where Parties undertake obligations *erga omnes partes*. In this context, the COP and the Compliance Committee channel the institutionalised collective action of the Parties in order to elicit compliance from non-compliant states through bespoke assistance. In this way, they contribute to strengthening of the regime by managing a generalised and satisfactory level of compliance, thus protecting collective interests of the international community in areas which are of common concern for humankind. So far, it remains largely to be seen how NCPs will operate and perform in what has previously been described as mixed regimes, such as the ITPGRFA, where collective obligations concerning the sustainable use of specific resources are implemented through instruments based on reciprocity, such as the material transfer agreements under the regimes' multilateral system of access and benefit-sharing.⁸⁹ Yet, the analysis also reveals that NCPs do not seem to add as much value to the enforcement of bilateralised regimes, where they do not seem to properly foster community interests and promote compliance. Why is this so?

First, as Fitzmaurice suggested some time ago, the effectiveness of NCPs as centralised, regime-specific enforcement mechanisms seems to be intrinsically linked to the collective nature of the conventional obligations,⁹⁰ whereas regimes that set up a bundle of bilateral obligations do not meet the ideal conditions under which NCPs attain their optimal functionality. Apparently, there is a dissonance between these regimes' primary and secondary rules. Other than in collective regimes, the injured or specially affected state can more easily be identified in case of non-compliance or breach of obligations arising from bilateralised regimes. Hence, the conditions to trigger the NCP are similar to those for the invocation of state responsibility and of *locus standi* in available ADS procedures.

In fact, the capacity to trigger the the NCP varies greatly depending on the legal nature of the main obligations. As already seen, in environmental regimes whose central conventional obligations are due *erga omnes partes*, the procedure may be initiated by any Party having difficulty with compliance, and by any other Party or entitled treaty body. Here, the triggering-capacity of the Parties with respect to another Party and that of the treaty body is not submitted to any material limitations, such as the condition of being affected by non-compliance.⁹¹ A similar approach is taken in mixed regimes such as the ITPGRFA's, where the only difference – albeit a remarkable one – lies in the treaty body able to trigger the procedure. Here it is the regime's political body *par excellence*, the Governing Body,⁹² and not a more independent one such as the Secretariat, which may refer compliance issues to the Committee.⁹³ In the context of collective and mixed regimes, some degree of institutionalisation of the common interest seems to have been attained, as the treaty body entitled to trigger the procedure may be considered to hold the institutional representation of the Parties in the MEA for the protection of their common interest in the due level of compliance.

⁸⁹ Arts 10, 12 and 13 ITPGRFA.

⁹⁰ Fitzmaurice (n 3) 224. On this point, even though only considering the Kyoto Protocol's NCP, see also J Pauwelyn, *Optimal Protection of International Law. Navigating between European Absolutism and American Voluntarism* (CUP 2008) 187.

⁹¹ See n 73 above.

⁹² This is how art 19 ITPGRFA denominates its plenary decision-making body, which equals the COP in other MEAs.

⁹³ ITPGRFA NCP, § VI.1(c).

In contrast, in the context of bilateralised regimes, the capacity to trigger the procedure is limited to the Party finding itself in difficulties complying with its obligations and to any other Party affected or likely to be affected by non compliance. In some of them, such as the NCP of the Basel Convention and the Draft NCP of the Rotterdam Convention, the terms of reference also grant triggering-powers to the Secretariat, albeit these are limited to alleged cases of non-compliance by the Parties with their reporting obligations. In the Cartagena Protocol's NCP, the Secretariat had no such powers at all until very recently.⁹⁴ At best, the signs of institutionalisation of the common interest in this latter context are rather weak.

Practice thus strongly suggests that only in those cases where the Secretariat has full triggering-powers do NCPs operate effectively. Moreover, it has been the only way used to initiate the procedure, except for a small number of self-submissions in the context of the Montreal Protocol and the Basel Convention. Furthermore, recent practice indicates that Parties actually prefer to handle compliance issues arising in bilateralised regimes through negotiations within the MEAs' institutional arrangements, or refer them to otherwise more effective dispute settlement procedures. Two rather recent examples seem to corroborate this assessment.

The first – to which we shall return later – is the Probo Koala incident, more recently also known as the Trafigura case, where toxic and dangerous products and wastes were dumped in several sites around Abidjan (Ivory Coast) leading to the loss of human life in several cases and to serious consequences for human health and the environment. The products causing such damage arrived in August 2006 in a shipment having its origin in the port of Amsterdam.⁹⁵ Interestingly, Ivory Coast did not trigger the Basel Convention NCP, but requested assistance from the Convention's Technical Cooperation Trust Fund, under which an ad hoc technical commission was established in order to assist that country in the assessment of the damage to human health and the environment arising from the dumping.⁹⁶ After its in-country visit, the commission found that it was 'unable, at this stage, to establish whether or not the discharging of waste from the Probo Koala constituted illegal transboundary movement of hazardous wastes as defined by the Basel Convention', but stated that:

[w]ithout prejudging which international body is competent to rule on the case, serious lapses ha[d] occurred in the application of the relevant regulations, whether under the Basel Convention, the MARPOL Convention or the Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.⁹⁷

During the eighth meeting of the Basel Convention's COP held while the commission was in Ivory Coast, the Parties did not refer the matter to the Compliance Committee either, but merely called for countries and stakeholders to provide technical and financial assistance to Ivory Coast to implement its emergency plan for the clean up and assessment of the damage on the ecosystems, its follow-up, and the investigation to establish responsibilities.⁹⁸ Eventually, the Netherlands contributed with €1 million to the fund established by the

⁹⁴ See n 75 above.

⁹⁵ On the factual background of the case and its various ramifications, see A Hindman and R Lefeber, 'General Developments. International/Civil Liability and Compensation' (2010) 20 Ybk Intl Envtl L 239, 244-7.

⁹⁶ L Pineschi, 'Non-Compliance and the Law of State Responsibility' in Treves and others (n 83) 483, 495.

⁹⁷ Report of the Basel Convention Secretariat's technical assistance mission to Côte d'Ivoire (20 November 2006–1 December 2006) in the context of decision V/32. UN Doc UNEP/CHW/OEWG/6/2 (2007), Annex, §3 (d) and (e).

⁹⁸ COP decision VIII/1, § 1. UN Doc UNEP/CHW.8/16 (2007).

executive director of UNEP under decision VIII/1, without expressly recognising any sort of responsibility in the matter.⁹⁹

More recently, the incident between Brazil and the UK concerning the illegal shipment of hazardous wastes hints in a similar direction. In July 2009, Brazilian port authorities detected a significant number of containers with origin in British ports that were mislabelled as recyclable plastic while they actually carried hazardous wastes. Brazil immediately informed the Secretariat and the UK under article 19 of the Basel Convention of what it deemed to be a case of illegal traffic and requested formal consultations. In August Brazil further announced its intention to request consultations with the UK at the WTO's Dispute Settlement Body.¹⁰⁰ However, the quick response by British authorities under article 9(2) of the Basel Convention allowed them to settle the issue bilaterally. By September that year, most of the containers had already been returned to the UK, where enforcement action had been initiated against responsible persons.¹⁰¹ Of course, one can raise the point of whether Brazil actually would have been entitled to request consultations under the WTO's dispute settlement system, as only the UK could voice 'representations (...) concerning measures affecting the operation of any covered agreement taken within the territory of the former'.¹⁰² Still, this example – like the previous one – strongly suggests that the Basel Convention NCP is not considered by the Parties as an effective mechanism at all. Instead, states seem to be desperately looking for alternative political or quasi-judicial mechanisms whenever serious problems arise. To the current author's knowledge, no similar cases have so far arisen between Parties to the Cartagena Protocol. However, a former chairperson of its Compliance Committee has expressed his personal opinion according to which Parties may actually prefer to resort to the WTO dispute settlement system, rather than to the Protocol's NCP '... in cases of serious non-compliance implicating real economic interests'.¹⁰³

5. Advancing Towards the Constitutionalisation of Secondary Rules in Global Environmental Regimes

In the previous section, the performance of NCPs has been appraised, and structural weaknesses have been identified, particularly in bilateralised regimes. Inspired by a 'constitutional mindset',¹⁰⁴ in the present section, some thoughts will be put forward on possible ways to overcome the difficulties encountered in the operation of compliance mechanisms, in order to enhance their effectiveness and embeddedness in international law.

There are indeed significant sceptical voices about constitutionalism in this particular field of the international legal order. According to Bodansky, 'some prominent features of international environmental law, such as the use of politically-oriented non-compliance procedures, cut strongly against the concept of constitutionalism',¹⁰⁵ as they reflect the states'

⁹⁹ UN Doc UNEP/SBC/BUREAU/8/1/7 (2007), §12.

¹⁰⁰ See ICTSD, 'Brazil Takes Action over UK Waste Shipment' (2009)13 Bridges Trade BioRes 1.

¹⁰¹ Environmental Agency, 'Chief Executive's Update on Key Topics. Open Board Paper. Item No. 7' (15 September 2009) 1.

¹⁰² Art 4(2) Understanding on Rules and Procedures Governing the Settlement of Disputes, in Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1869 UNTS 401, (1994) 33 ILM 1226.

¹⁰³ V Koester, 'The Compliance Mechanism of the Cartagena Protocol on Biosafety: Development, Adoption, Content and First Years of Life' (2009) 18 RECIEL 77, 90.

¹⁰⁴ Koskenniemi (n 17).

¹⁰⁵ D Bodansky, 'Is There an International Environmental Constitution?' (2009) 16 Indiana Journal of Global Legal Studies 565, 579.

interest in flexibility, rather than in constitutional constraints.¹⁰⁶ Still, it should be acknowledged that there are actual and potential elements within NCPs which certainly are relevant to an eventual process of constitutionalisation of secondary rules in global environmental regimes, so as to submit states and international institutions to the international rule of law in the ultimate benefit of individuals,¹⁰⁷ and to make global environmental governance more participatory and, hence, legitimate.

5.1 Refining the Trigger-Mechanism and the Compliance Bodies' Interaction with NGOs

A first set of thoughts concerns the refinement of the trigger-mechanism in NCPs and the compliance bodies' interaction with NGOs. With respect to the procedural ways to refer an issue to the compliance mechanism, it seems quite obvious that the effectiveness of NCPs could be greatly improved if more powers were given to treaty bodies to act in defence of community interests. Arguably, vesting the Secretariat with (materially unlimited) capacity to submit compliance issues to Committees under bilateralised regimes would render NCPs therein more operational and effective.¹⁰⁸ In this manner, the accountability of states before international institutions would be improved and, hence, significant progress would be made in the constitutionalisation of these regimes, without fundamentally changing the reciprocal basis of their primary norms. Admittedly, from a legal perspective, the bilateral structure of the treaty obligations in these regimes may underpin states' reluctance to confer such powers to a treaty body. However, as the reform of the Cartagena Protocol's NCP shows,¹⁰⁹ this should not be regarded as a fundamental obstacle for the attribution of such powers to the Secretariat or other relevant body of the MEA's institutional arrangements, in view of the non-adversarial character of these mechanisms, and the soft and facilitative nature of its outcomes. Yet, contrary to the revision of the Cartagena Protocol's compliance mechanism, where the Committee – if seized by the Secretariat – can only adopt facilitative measures, the predominantly soft approach would also need to be complemented with the possibility of adopting hard enforcement measures as a last resort.¹¹⁰

Furthermore, the effectiveness of NCPs could generally be improved if accreditation conditions of NGOs were better regulated, and their interaction with the MEA's institutional arrangements along the different stages of the procedure refined. As the experience under the Cartagena Protocol NCP suggests, NGOs are potentially dynamic factors that may contribute to boosting the operation of compliance mechanisms, not only in regional, but also in global environmental regimes. In fact, the design of NCPs established in MEAs adopted in the UNECE region actually provides quite interesting insights in this respect from a constitutional perspective. Particularly the compliance mechanisms developed under the 1998 Aarhus Convention¹¹¹ and its 2003 Kiev Protocol on Pollutant Release and Transfer Registers,¹¹² as

¹⁰⁶ *ibid* 584. See also Klabbers (n 9).

¹⁰⁷ J Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 EJIL 315.

¹⁰⁸ This would also apply to the draft NCP of the Rotterdam Convention, where this issue remains under consideration (n 78).

¹⁰⁹ See n 75 above.

¹¹⁰ T Kolari, 'Constructing Non-Compliance Systems into International Environmental Agreements: A Rise of Enforcement Doctrine with Credible Sanctions Needed?' (2003) 14 Finnish Ybk Intl L 205.

¹¹¹ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998) 2161 UNTS 447, (1999) 38 ILM 517.

well as the 1999 Protocol on Water and Health to the Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes,¹¹³ allow for communications from the ‘public’, meaning any ‘natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups’.¹¹⁴ In allowing its Implementation Committee to act on its own initiative, the 1991 Espoo Convention¹¹⁵ also provides for indirect access of NGOs to the NCP.¹¹⁶

These MEAs are certainly on the cutting edge of the development of public participation standards in international environmental law, even if their scope of application so far remains largely regional.¹¹⁷ Yet, they share some of the fundamental features of global environmental regimes that have been described earlier in the article as collective, as these regional MEAs stand for the evolution from the formerly discretionary, towards a more functional role of states under international (environmental) law,¹¹⁸ where ‘the relevant rules and standards no longer, as in classical international law, have the characteristics of contractual undertakings between states (...) [but] more closely resemble general legislative acts of a public law nature’.¹¹⁹ Playing a pivotal role among those treaties, the 1998 Aarhus Convention has been qualified as ‘a new kind of environmental agreement’, ‘the most ambitious venture in environmental democracy’, and ‘a major step forward in international law’.¹²⁰ By providing for access to information, public participation in decision-making procedures and access to justice in environmental matters, the Aarhus Convention integrates participatory rights into international environmental law, hence reinstating first generation human rights as a way to foster respect for a third generation right, namely that of the environment.¹²¹ Thus, the aforementioned MEAs adopted in the UNECE region actually promote public participation in the enforcement of environmental law, both at the national and international level, a fact that is, in itself, relevant to constitutionalism.¹²²

However, too prominent an intervention of NGOs in compliance control also spurs considerable amount of anxiety. Governments tend to regard active NGO intervention in NCPs as jeopardising these mechanisms’ cooperative and non-controversial nature. More specifically, so the argument goes, allocating triggering powers to NGOs would risk overloading the institutional capacities of Compliance Committees. Moreover, at the global level, the perception of an over-representation of NGOs from developed countries pursuing a

¹¹² Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Kiev (21 May 2003) UN Doc MP.PP/2003/12 (2003).

¹¹³ Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (17 June 1999) 2331 UNTS 202, (1999) 38 ILM 1708.

¹¹⁴ Art 2(4) Aarhus Convention, and MOP Decision I/7, Annex §18. UN Doc ECE/MP.PP/2/Add.8 (2004).

¹¹⁵ Espoo Convention on Environmental Impact Assessment in a Transboundary Context (25 February 1991) 1989 UNTS 309, (1991) 30 ILM 802.

¹¹⁶ See COP Decision III/2, Appendix §6, in relation with Rule 15(1) Operating Rules of the Implementation Committee, in COP Decision IV/2, Annex IV. UN Docs ECE/MP.EIA/6 (2004) and ECE/MP.EIA/10 (2008), respectively.

¹¹⁷ J Ebbesson, ‘Public Participation’ in Bodansky, Brunnée and Hey (n 4) 682, 685-6.

¹¹⁸ Hey (n 1).

¹¹⁹ E Hey, ‘Distributive Justice and Procedural Fairness in Global Water Law’ in J Ebbesson and P Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009) 351, 367.

¹²⁰ Lucca Declaration (adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002) §§ 4 and 5. UN Doc ECE/MP.PP/2/Add.1 (2004).

¹²¹ C Larssen, ‘La convention d’Århus: ‘avancée majeure du droit international?’ in J Crawford and S Nouwen (eds), *Select Proceedings of the European Society of International Law: Volume 3 2010* (Hart Publishing 2011) (forthcoming).

¹²² A Peters in Klabbers, Peters & Ulfstein (n 16) 233-5.

West-centric agenda, further stimulates the opposition of developing countries to their participation in compliance procedures.¹²³

Yet, except perhaps for the latter point, the operation of the Aarhus Convention NCP seems to demonstrate that the aforementioned concerns about enhanced NGO involvement in these mechanisms are largely unfounded.¹²⁴ Since 2004, the Aarhus Compliance Committee has received fifty nine communications from the public, one Party submission and no referrals at all by the Secretariat.¹²⁵ Out of all submitted communications, forty six have already been resolved and only thirteen are pending resolution - this latter figure amounting to the number of submissions of 2008 (so far the year in which the Committee received the highest number of communications). Interestingly, among all resolved cases, sixteen were rejected as not admissible and in 30 cases the Committee was able to reach findings on the merits. As some authors have pointed out, these raw data suggest first of all that NGOs do make a careful use of the mechanism. But should they fail to do so, the wise and transparent application that the Compliance Committee has so far made of admissibility criteria has also prevented any situation coming close to an excessive workload.¹²⁶

In a similar way, since the adoption of its revised operating rules in 2008,¹²⁷ the Implementation Committee of the Espoo Convention has maintained an exchange of correspondence with three Parties on the basis of information on alleged situations of non-compliance that had been provided by NGOs. However, in two of them, the Committee was satisfied with the response offered by the States concerned and did not initiate proceedings, whereas the third one – regarding the alleged violation of obligations arising for Belarus out of articles 2 and 3 of the Espoo Convention in relation with its authorities decision on the construction of a nuclear power plant – is still under consideration.¹²⁸ In this case, the number of indirect submissions by NGOs is admittedly fairly low. Furthermore, the Implementation Committee would seem to be well-equipped in order to deal effectively and transparently with a higher number of cases, filtering out abusive or manifestly ill-founded submissions.¹²⁹ Yet, the fact that the Espoo Convention Committee is composed by governmental representatives and not by independent members as in the Aarhus Convention, may also provide space for more political instead of purely technical considerations in the Committee's decisions in this regard.

Returning to global environmental regimes, authors like Tanzi fear that an overemphasised role of non-state actors at the global scene typical of constitutional-cosmopolitan conceptions of the international community, bears considerable risks in terms of their legitimacy and accountability, and may also discard too easily the lasting importance of state sovereignty.¹³⁰

¹²³ C Pitea, 'The Legal Status of NGOs in Environmental Non-Compliance Procedures: An Assessment of Law and Practice' in PM Dupuy and L Vierucci (eds), *NGOs in International Law. Efficiency in Flexibility?* (Edward Elgar 2008) 181, 195-7.

¹²⁴ *ibid.* See also S Kravchenko, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements' (2007) 18(1) *Colorado J Intl Envtl L & Pol* 1.

¹²⁵ Data retrieved from <unece.org/env/pp/> (last accessed 27 June 2011).

¹²⁶ C Pitea, 'NGOs in Non-Compliance Mechanisms under Multilateral Environmental Agreements: From Tolerance to Recognition?' in T Treves and others (eds), *Civil Society, International Courts and Compliance Bodies* (TMC Asser Press 2005) 205, 221.

¹²⁷ See above n 116. See also J Jendroška, 'Practice and Relevant Cases that Emerged in the Context of the Espoo Convention Implementation Committee' in Treves and others (n 83) 319, 330-1.

¹²⁸ See files EIA/IC/INFO/1 (Romania), EIA/IC/INFO/4 (Belgium) and EIA/IC/INFO/5 (Belarus), at <unece.org/env/eia/implementation/implementation_committee_letters.htm> (27 June 2011).

¹²⁹ Rule 15(2) Operating Rules (n 116).

¹³⁰ A Tanzi, 'Remarks on Sovereignty in the Evolving Constitutional Features of the International Community' (2010) 12 *Intl Community L Rev* 145, 148-9. When alluding to constitutional-cosmopolitan doctrines, the author

While these risks have to be acknowledged, it seems undeniable that an enhanced participation of public interest NGOs in NCPs – by granting them a quasi-prosecutorial role – would definitely contribute to increase their effectiveness, thereby fostering the Parties’ accountability as well as the regimes’ legitimacy.¹³¹ At present, only the Kyoto Protocol NCP comes close to this, as NGOs – despite lacking triggering-capacity – implicitly may provide relevant data to the expert review teams while conducting the in-country visit in the context of the review under the Protocol’s article 8, which may eventually lead to the submission of a question of implementation to the Compliance Committee.¹³² While the transplantation of the Aarhus NCP model to the global level may prove to be difficult, the model of the Kyoto Protocol may be of particular relevance to other global environmental regimes. By implicitly allowing the expert review teams to interact with *local* NGOs, it seems to be particularly respectful and integrative not only of the international and transnational dimensions, but also of what Onuma has called the multi-civilisational dimension of the contemporary world.¹³³ With this in mind, and in the absence of direct capacity to trigger the procedure, a more cautious regulation of the accreditation conditions for NGOs would contribute to improving their interaction with the MEAs’ treaty bodies, as it would enhance their legitimacy to act as an alternative and complementary source of technical and practical data for the assessment of the Parties’ compliance.¹³⁴

5.2 Enhancing complementarities with national and international judiciaries

A second set of thoughts on the constitutionalisation of secondary rules in global environmental regimes concerns the enhancement of complementarities between NCPs and national and international judiciaries. In fact, it is submitted that significant potential for the improvement of the NCPs’ effectiveness in global environmental regimes would lie in enhanced coordination (and cooperation) with national and international judiciaries. As previously seen, the effectiveness of NCPs as endogenous enforcement mechanisms in collective regimes has contributed significantly to provide them with a fairly high degree of self-containment. Conversely, weak NCPs under bilateralised regimes seem to be

refers non-exhaustively to C Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law’ (1993) 4 EJIL 447; G Teubner, *Global Law Without a State* (Ashgate 1997); and R Macdonald and D Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff 2005).

¹³¹ Peters (n 122) 235.

¹³² In the context of the review under art 8, Annex I Parties should provide the review team appropriate working facilities and ‘access to information necessary to substantiate and clarify the implementation of their commitments’. See decision 22/CMP.1, Annex, §6. UN Doc FCCC/KP/CMP/2005/8/Add.3 (2002).

¹³³ In several of his writings Onuma Yasuaki upholds the fundamental importance of civilisational factors for a thorough, more nuanced and comprehensive understanding of international law in the contemporary globalised society. He argues that the international and transnational perspectives under which international law has been predominantly looked at need to be complemented by a third, transcivilisational perspective, as a way to overcome analytical approaches flawed by West-centrism and state-centrism. Yet, the author does not conceive of the transcivilisational perspective as an alternative theory or methodology of international law. Rather, he defines it as a ‘perspective from which we see, sense, recognize, interpret, assess, and seek to propose solutions to ideas, activities, phenomena and problems transcending national boundaries, by developing a cognitive and evaluative framework based on the recognition of plurality of civilizations and cultures that have long existed in human history’; see Y Onuma, *A Transcivilizational Perspective on International Law. Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (Martinus Nijhoff 2010) 81.

¹³⁴ A Epiney, ‘The Role of NGOs in the Process of Ensuring Compliance with MEAs’ in Beyerlin, Stoll & Wolfrum (n 81) 319, 343. See also Peters (n 122).

circumvented either in favour of *ad hoc* solutions, as in the Probo Koala/Trafigura incident, or – as Koester has suggested with respect to serious controversies implying compliance issues under the Cartagena Protocol – might be referred to exogenous dispute settlement systems such as the WTO's.¹³⁵ Be that as it may, so far NCPs do not constitute effective endogenous enforcement mechanisms in these bilateralised regimes. Bearing in mind that they regulate transboundary movements of products posing a risk to human health and the environment, the centre of gravity of the compliance control and enforcement functions is thus displaced in a very significant proportion from the inter-state level to the national level, where not only the administration, but also the judiciary has an increasing role to play.¹³⁶ As Nollkaemper has pointed out, these regimes require the Parties to enact implementing legislation and 'seek enforcement *vis-à-vis* private parties that act in contravention of the provisions of the convention (or, rather, in contravention of the national provisions that give effect to the convention)',¹³⁷

The aforementioned Trafigura case is quite illustrative in this respect. As a matter of fact, independently from the action taken by the states concerned and the rest of the Parties in the institutional framework of the Basel Convention, this case has involved different developments before various national jurisdictions.¹³⁸ Of particular importance in the present context, the District Court of Amsterdam convicted Trafigura in July 2010, ordering the payment of €1 million, as it considered that the concealment of the hazardousness of the Probo Koala wastes to the port authorities in Amsterdam, and their subsequent exportation to an ACP country, violated article 18(1) of Council Regulation (EEC) 259/93, implementing the Basel Convention.¹³⁹ Thereby, the Dutch judiciary has certainly performed international control functions by way of what Georges Scelle called functional duplication (*dédoublement fonctionnel*),¹⁴⁰ the Netherlands hence acquitting its obligation to 'take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention'.¹⁴¹ However, does the central role that falls upon national courts in the enforcement of the Basel Convention mean that its compliance procedure is completely out of place? It certainly corroborates the previous assessment of its inherent weakness. Still, ideally, once triggered the NCP would certainly contribute to exert pressure on Parties that may not prove to be as willing or capable of taking due enforcement action as the Dutch courts were in the Trafigura

¹³⁵ Koester (n 103).

¹³⁶ D Bodansky and J Brunnée, 'The Role of National Courts in the Field of International Environmental Law' (1998) 7 RECIEL 11.

¹³⁷ A Nollkaemper, 'Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order' (2002) 13 Ybk Intl Env'tl L 165, 170.

¹³⁸ In November 2006 several thousand affected Ivorians brought a civil law suit to the High Court of Justice in London seeking compensation in excess of £100 million, which was nevertheless settled with the payment of £28 million, against the release of a joint statement by Trafigura and the claimants, according to which the exposure to the dumped wastes could not have caused any serious injury or death. It is also relevant to state that Trafigura was able to neutralise judicial actions in Ivory Coast by paying approximately \$200 million to governmental authorities for the removal of the hazardous wastes and as compensation for damage. In return, Ivorian authorities would not instigate any further criminal or civil proceedings against them. Hindman & Lefeber (n 95) 245.

¹³⁹ [2010] Court of District, Amsterdam, Judgment of 23 July 2010. Case number 13/846003-06. See <zoeken.rechtspraak.nl/detailpage.aspx?ljn=BN2149> (retrieved 27 June 2011).

¹⁴⁰ G Scelle, *Précis de droit des gens. Principes et systématique - Première partie. Introduction. Le milieu intersocial* (Sirey 1932), 59.

¹⁴¹ Basel Convention, art 4(4).

case.¹⁴² By ascertaining non-compliance with the Convention in specific cases, the Committee would not only contribute to clarifying the extent of secondary obligations under general law of state responsibility,¹⁴³ it would also provide national courts with valuable criteria for consistent interpretation of national with international law.¹⁴⁴ Moreover, in the context of the assisting measures that may be adopted in the compliance procedure, a cooperative relationship between the Committee and national courts in the collection of evidence concerning specific incidents may also be worth exploring. Therefore, an arguable way to enhance the effectiveness of the Basel Convention's NCP – and also for that under the Cartagena Protocol – could lie in seeking interaction and complementarity with national judiciaries, as a way to foster consistency in international public law, and more importantly, as a way to strengthen the international rule of law.¹⁴⁵

Nonetheless, coordination between NCPs and internal jurisdictions is highly significant for the sake of compliance control not only in bilateralised, but also in the context of collective regimes. This has been highlighted particularly with respect to the interaction of domestic and international compliance systems under the climate change regime, where the complementary economic incentive measures – such as the Kyoto Protocol's flexible mechanisms – potentially concern private parties. As Tabau and Maljean-Dubois have recently pointed out with respect to the incorporation of the climate change regime's guidelines concerning the flexible mechanisms into EU legislation, the Union has been particularly keen in 'linking' its Emissions Trading Scheme (EU-ETS) to the Kyoto system,¹⁴⁶ hence allowing the climate change regime 'to impact on private entities directly within the EU-ETS beyond the realm of the state'.¹⁴⁷ In turn, this linkage has brought about a tight interconnection of the system of compliance control set up by the EU with the Kyoto Protocol's own system, with respect to reporting, verification and enforcement.¹⁴⁸

Precisely because of this interconnection between both systems, a clear potential exists for conflicting case-law between the Kyoto Protocol Compliance Committee and the European Court of Justice (ECJ). The ECJ certainly considers itself to have exclusive competence over any dispute arising between Member States concerning the interpretation and application of

¹⁴² Yet, in April 2011 the Court of Appeal in The Hague rejected the suit of Greenpeace Netherlands seeking to oblige the Dutch public prosecutor to initiate criminal proceedings against Trafigura for homicide, bodily harm and environmental crimes committed in Ivory Coast in connection with the Probo Koala incident. Interestingly, the Court found that, as an environmental NGO according to its statutes, Greenpeace lacked the capacity to seek the prosecution of offences other than environmental crimes. Even with respect to the latter, the complexities of the inquiry that would have to be carried out in cooperation with Ivory Coast, in combination with the compensation that Trafigura had already paid to local authorities in 2007 were found reasonable grounds not to prosecute. See [2011] Court of Appeal, The Hague, Decision of 12 April 2011. Case number K09/0334. <zoeken.rechtspraak.nl/detailpage.aspx?ljn=BQ1012> and W.T. Douma. 'Trafigura not prosecuted for dumping of chemical waste in Ivory Coast', at <asser.nl/Default.aspx?site_id=7&level1=12218&level2=12255&level3=13072> (last accessed 27 June 2011).

¹⁴³ L Pineschi, 'Non-Compliance and the Law of State Responsibility' in Treves and others (n 83) 483, 496.

¹⁴⁴ Nollkaemper (n 137), 179-81.

¹⁴⁵ G Ulfstein, in Klabbers, Peters & Ulfstein (n 16) 143-6.

¹⁴⁶ Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms [2004] OJ L338/18. See J Lefevre, 'Linking Emissions Trading Schemes: The EU ETS and the 'Linking Directive'' in D Freestone and C Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms. Making Kyoto Work* (OUP 2005) 511, 517-20.

¹⁴⁷ AS Tabau and S Maljean-Dubois. 'Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union' (2010) 21 EJIL 749, 755.

¹⁴⁸ Commission Decision 2004/156/EC of 29 January 2004 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council [2004] OJ L59/1.

EU law, including multilateral treaties to which both the Member States and the EU itself are parties (mixed agreements),¹⁴⁹ whereas the Kyoto Protocol NCP for its part operates ‘without prejudice’ to other dispute settlement mechanisms.¹⁵⁰ Therefore, as the aforementioned authors point out, the coordination of domestic (taking the EU as such) and international compliance control systems is of vital importance for their consistency and effectiveness.¹⁵¹

Two sorts of cases exemplify this. Whereas the European Commission fully exerts its functions under article 258 TFEU in minor cases concerning non-compliance with formal obligations under the EU-ETS¹⁵² (viz reporting in this context) by referring them to the ECJ, it does not so in cases where available data suggest more substantial issues of non-compliance. Here, as in the non-compliance issues concerning Greece and Bulgaria, the Commission has shown significant self-restraint. Despite sending letters of formal notice to the Member State concerned in those cases, thereby initiating the infringement procedure under EU law, the Commission refrained from bringing the case to the Court before the Enforcement Branch of the Kyoto Protocol’s Compliance Committee had reached its final decision, and also thereafter. In these cases, the Protocol’s NCP was given pre-eminence for the sake of consistency between international, European, and arguably also national law. Hence, both systems – the international and the European – were able to interact constructively. As Tabau and Maljean-Dubois suggest, ‘even if the balance between the two courses of action for non-compliance remains fragile, it seems that the two complement one another rather than stand in direct competition’.¹⁵³

The latter example brings us to the last point, namely, the opportunity to further explore and enhance the interactions and complementarities of NCPs not only with domestic, but also with international courts. As stated above, there are intrinsic factors that may explain the relatively scarce referral of international environmental disputes to adjudicative settlement mechanisms, even where bilateral or reciprocal obligations are at stake.¹⁵⁴ Moreover, where they operate effectively, compliance procedures have contributed to this general evolution. Hence, despite the increasing number of cases with an environmental dimension that have been recently submitted to judicial bodies, the preference of States for allocating compliance control and enforcement in global environmental regimes to technical and bureaucratic structures such as NCPs, rather than to adjudicatory mechanisms, does not suggest any prospects for change in the future – as the continuous efforts in the development of new compliance mechanisms, and the refinement of existing ones, suggests. Yet, as Stephens has convincingly argued, in contrast to compliance procedures, international courts are ‘more authoritative sites for independent decision-making, and therefore are potentially more useful for assisting in the principled development of the law’.¹⁵⁵ From a constitutional perspective, the question arises whether a synergistic interaction between both types of mechanisms may contribute to more effective compliance control in global environmental regimes.

As a matter of fact, the legal relationship between NCPs and ADS is all but clear. Nevertheless, despite the absence of practice, scholars would generally agree that they are independent, so that resort to one does not rule out simultaneous or subsequent resort to the

¹⁴⁹ Arts 19 TEU and 344 TFEU. See Case C-459/03, *Commission v Ireland* [2006] ECR I-4635 [123].

¹⁵⁰ Kyoto Protocol NCP, §XVI.

¹⁵¹ Tabau and Maljean-Dubois (n 147) 762-3.

¹⁵² See n 148.

¹⁵³ *ibid* 763. See also A Ali, ‘Non-Compliance Procedures in Multilateral Environmental Agreements: The Interaction between International Law and European Union Law’ in Treves and others (n 83) 521, 533-4.

¹⁵⁴ Fitzmaurice and Redgwell (n 56) 44.

¹⁵⁵ Stephens (n 52) 364.

other.¹⁵⁶ Not only do the terms of reference of NCPs typically include a *without prejudice*-clause, but the different purpose and object of both kinds of procedures – managing compliance issues and regime effectiveness through a cooperative approach, or ascertaining the breach of international legal obligations and their legal consequences – also rule out the identity of the suit. Moreover, operational NCPs are most often triggered not by one Party against another, but by treaty bodies or by a Party with respect to itself. Thus, even in the unlikely event of two Parties referring their differences to parallel ongoing non-compliance and ADS procedures, neither procedure would preclude the other on the basis of *lis pendens*. Instead, as Treves has pointed out, an opportunity for inter-institutional coordination and cooperation would seem to open up. In such a setting, the final decision of the international judicial organ would certainly be *res judicata* for the Compliance Committee and the Conference of the Parties to the MEA. Yet, the NCP could well be used as a means to manage the enforcement of the international court's ruling. Conversely, prior to its ruling, the non-binding decisions issued by the Compliance Committee and the Conference of the Parties as a result of the NCP may well be taken into consideration by the international judicial organ as '...subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.¹⁵⁷ Admittedly, these general reflections have a purely theoretical value, as there is no practice against which to test them. However, even if such a scenario of simultaneous or subsequent resort to NCPs and adjudicatory mechanisms seems difficult to imagine, it cannot be excluded, as the previous example concerning parallel compliance control under the Kyoto Protocol and EU environmental law demonstrates. However, also in that situation there seems to be a potential for a coordinated operation of NCPs and adjudicatory mechanisms, as a way to foster consistency in the case-law of the different technical, quasi-judicial and judicial bodies in the interpretation and application of international (environmental) law.¹⁵⁸

6. Conclusion

Admittedly, drawing from managerialism, NCPs do not amount to judicial review, as one of the elements being generally regarded as intrinsic to global constitutionalism. Nevertheless, to the extent that traditional adjudicative mechanisms are perceived as unsuitable and very rarely resorted to in this particular field, compliance mechanisms are certainly to be regarded as an effective alternative to promote and ensure compliance, particularly in areas where primary rules are intended to protect collective interests of states. Taking the Montreal Protocol as a model of inspiration, NCPs in MEAs have been fine-tuned – with greater or lesser degrees of success – to satisfy the enforcement needs arising out of their primary rules' specific features in each environmental regime. Therefore, their institutional and procedural configurations are not uniform, but range from tendentially more diplomatic mechanisms, such as the Montreal Protocol's, in which the Implementation Committee is composed of representatives of the Parties and acts following a fairly informal procedure, to quasi-judicial mechanisms, such as the Kyoto Protocol's NCP, whose Compliance Committee consists of independent experts and exercises its powers according to a highly formalised procedure.¹⁵⁹ Yet, even in the

¹⁵⁶ Fitzmaurice and Redgwell (n 56).

¹⁵⁷ Art 31(3)(b) VCLT. See T Treves, 'The Settlement of Disputes and Non-Compliance Procedures' in Treves and others (n 83) 505, 507-9.

¹⁵⁸ See G Ulfstein in Klabbers, Ulfstein and Peters (n 16) 138.

¹⁵⁹ See eg, L Boisson de Chazournes and MM Mbengue, 'À propos du caractère juridictionnel de la procédure de non-respect du Protocole de Kyoto' in S Maljean-Dubois (ed), *Changements climatiques, les enjeux du contrôle international* (Documentation Française 2007) 73, 89.

former example, the Implementation Committee does have the mandate to consider submissions ‘... with a view to securing an amicable solution of the matter *on the basis of respect for the provisions of the Protocol*’.¹⁶⁰ Moreover, as its performance over the past twenty years has shown, despite some highly controversial cases in its early phase of operation, it has managed to keep a low political profile, by functioning more as a technical and administrative, rather than politicised mechanism. The few cases dealt with in the Kyoto Protocol’s Compliance Committee also hint in this direction. In the specific context of what this article has called collective regimes, NCPs may be regarded as nuanced, incremental and innovative responses to the perceived deficits of traditional bilateralist patterns, which are in fact displacing traditional enforcement mechanisms of classic international law.¹⁶¹ In contrast thereto, bilateralised regimes actually offer considerable space for traditional approaches to their enforcement, which enter into competition with endogenous compliance mechanisms. Even more, the relevant practice suggests that state responsibility for the breach of international obligations undertaken in these regimes, and the enforcement of its implementing legislation through national courts so far seem to be eclipsing NCPs in this context.

On the basis of the preceding assessment, two rather general reflections have been made in this article. First, drawing on the experience gained under environmental regimes set up in the UNECE region, it has been submitted that opening up compliance mechanisms to public participation would contribute to increasing their effectiveness. While the direct translation of the model of the Aarhus Convention’s NCP into the global context may prove to be difficult, practice developed under the Kyoto Protocol compliance system may provide a suitable model for other global regimes, as it appears to be particularly respectful not only of the international and transnational, but also of the multi-civilisational dimension of contemporary international society. Second, it has been argued that compliance control under global environmental regimes would benefit greatly from enhancing complementarities with national and international judiciaries. Such coordination between compliance bodies and national and international courts would contribute to the international rule of law, allowing the international (constitutional) legal order to come to terms with its own heterarchy and pluralism, by promoting systemic integrity and the respect for structural, transversal values.¹⁶² These rather general and tentative reflections may be the basis for an eventual attempt of a constitutional reconstruction of secondary rules in global environmental regimes, as a way to reconfigure the international public space in this particular field, making states and international institutions more accountable and, thus, global environmental governance more legitimate.¹⁶³

¹⁶⁰ Montreal Protocol NCP, §8 (emphasis added).

¹⁶¹ See above n 11.

¹⁶² Klabbers in Klabbers, Ulfstein and Peters (n 16) 43-4.

¹⁶³ Hey (n 1).