

TREVES, Tullio, PINESCHI, Laura, TANZI, Attila, PITEA, Cesare, RAGNI, Chiara, ROMANIN JACUR, Francesca (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, T.M.C. Asser Press, The Hague, 2009, 586 p. ISBN 978-90-6704-273-4

Over the past twenty years, Parties to multilateral environmental agreements (MEAs) have increasingly devoted attention to the traditional compliance deficit and, thus, the lack of effectiveness of international instruments in the field of International Environmental Law. Accordingly, one of the characteristic phenomena in the institutional and procedural development of MEAs within this period is the emergence and consolidation of so-called non-compliance procedures. As typical regime-specific enforcement mechanisms, they are set out to raise the general compliance record of States following a pragmatic, managerial approach. Yet, while the enforcement mechanisms of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and, more recently, also that of the 1997 Kyoto Protocol, have overwhelmingly attracted academia's attention, comprehensive contributions aiming to encompass the vast array of existing or envisaged non-compliance procedures have been rather scarce¹. Therefore, the volume edited by Tullio Treves, Laura Pineschi, Attila Tanzi, Cesare Pitea, Chiara Ragni and Francesca Romanin Jacur, presenting the results of a common research project of the Universities of Milan, Bologna and Parma, promises to fill an important gap in academic literature.

The coherent methodological approach to the research is indeed one of the strongholds of this volume. It starts from the assumption that the outstanding variety in the configuration of non-compliance procedures and mechanisms does not only depend on the basic substantive obligations established in each MEA, but also on their political and geographical context. According to this approach, what may be considered as the first part of the volume (the first two sections) is devoted to the empirical legal analysis of non-compliance procedures and the practice deployed therein by the treaty bodies, whereas the second part (sections three to five) provides for an inductive appraisal of the characteristic features of these mechanisms.

¹ For one of the few and more recent contributions of this kind, see BEYERLIN, U., STOLL, P.T. & WOLFRUM, R. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, Martinus Nijhoff, Leiden, 2006.

Hence, in the first section, several authors set out the formal analysis of the non-compliance procedures adopted, or currently under consideration in universal (chapters 1 to 8) and regional MEAs (chapters 9 to 15). In so doing, they follow a harmonized structure that addresses the basic conventional obligations in each MEA, and the legal basis and negotiating history of the non-compliance procedure, before providing an in-depth assessment of the various institutional and procedural aspects in each such mechanism. The legal analysis is further complemented in each chapter with a brief survey of practice of the treaty bodies involved in the procedure.

Complementary thereto, leading practitioners have contributed to the volume by providing valuable insight into the practice of compliance bodies in the second section (chapters 16-19). In particular, they deal with the activity deployed by the Compliance Committees of the 2000 Cartagena Protocol on Biosafety and the 1998 Aarhus Convention, the 1997 Kyoto Protocol, the 1991 Espoo Convention, and also by the Independent Recourse Mechanism established in 2003 within the European Bank of Reconstruction and Development. However, in our opinion this second section partially overlaps with the survey of practice contained in the chapters under the previous section. Moreover, it falls a bit short of case-studies. As its title indicates, it only contains a ‘selection’ thereof. Still, it would have been very useful to include further case-studies concerning already well-established compliance bodies, such as the Montreal Protocol’s Implementation Committee. It’s quantitatively significant amount of accumulated case-law might well have made the object of a qualitative assessment of the mechanism’s contribution to that regime’s effectiveness, based on a broad ‘historical’ perspective. Ultimately, such an appraisal would also contribute to the wider evaluation of ‘non-compliance procedures and the effectiveness of international environmental agreements’.

On the basis of this empirical part of the research, the following contributions – which make out the core of the analytical work underlying this volume–, induce the fundamental institutional and procedural features of non-compliance procedures (third section). Furthermore, they address their embedment in international law, by assessing their relationship with the law of the treaties, the law of state responsibility and dispute settlement (forth section).

As a matter of fact, non-compliance procedures in the various MEAs are arranged according to quite divergent structural and institutional designs, depending on factors such as the legal nature of the conventional obligations, the legal basis for the adoption of such a mechanism foreseen in the treaty provisions, or the universal or regional political context they stem from. Yet, the added value provided by this volume lies precisely in the attempt it makes to induce some of the general features that non-compliance procedures indeed do share. From the institutional perspective, Alessandro Fodella's contribution (chapter 20) provides an interesting transversal analysis of the incidence that the legal basis for the adoption of non-compliance procedures, and the legal nature of the conventional obligations established in MEAs, do have on the institutional design of compliance bodies. In relation with the soft 'assisting' competences of these bodies, or the hard 'sanctioning' powers they eventually may exert, Enrico Milano's contribution to this section (chapter 23) provides an appraisal of the outcomes of non-compliance procedures and their legal effects. This formal analysis is then complemented by Francesca Romanin Jacur's assessment (chapter 24) of the institutional and budgetary arrangements within MEAs aimed at assisting compliance bodies and the Conference of the Parties in the fulfilment of their compliance promotion functions among Parties lacking the capacity to do so. From the procedural perspective, Francesca Romanin Jacur's and Massimiliano Montini's contributions (chapters 21 and 22) provide an in-depth assessment of the triggering-mechanisms and the procedural safeguards in non-compliance procedures across the various universal and regional MEAs. Cesare Pitea closes this section with a highly innovative paper (chapter 25) that addresses different possibilities to enhance coordination between an ever increasing number of such mechanisms with potentially overlapping mandates.

Once having induced the characteristic institutional and procedural features of non-compliance procedures, the next section is devoted to their embedment in international law. Accordingly, Malgosia Fitzmaurice's contribution (chapter 26) deals with their relationship with the law of the treaties. In particular, two issue areas make the object of a comprehensive assessment. At first, taking into account that MEAs typically set up dynamic sectoral regimes, which are fleshed out by the Conference of the Parties on the basis of different types of enabling clauses and decision-making procedures, the chapter looks into the legal nature of the Parties' decisions, as

compliance with conventional obligations and connected COP/MOP decisions make the very object of non-compliance procedures. Moreover, the chapter appraises comprehensively the relationship of the actions taken by the MEAs' bodies under non-compliance procedures with article 60 of the 1969 Vienna Convention on the Law of the Treaties. Fitzmaurice's chapter concludes with a particularly interesting assessment of the practice concerning the suspension of rights and privileges under the Montreal Protocol's non-compliance procedures and a first appraisal of the incipient practice of the Kyoto Protocol's Enforcement Branch of the Compliance Committee.

The next paper (chapter 27), authored by Laura Pineschi, addresses the relationship between non-compliance procedures and the law of state responsibility. Pineschi's contribution in this section provides a highly interesting discussion on the nature of environmental regimes as self-contained regimes, in which she depicts non-compliance procedures as mechanisms designed to avoid the resort to general rules of state responsibility. Nevertheless, in the author's opinion, they do not preclude them as a fall-back category in the event of regime-‘failure’. Her chapter moreover introduces a so far rather innovative distinction regarding the degree of the regimes' autonomy with respect to the general rules of state responsibility, according to the collective or bilateral nature of the basic conventional obligations undertaken by states, which is backed with ample illustrative examples drawn from practice in various sets of MEAs.

The section on the embedment of non-compliance procedures in international law is closed with Tullio Treves' contribution on their relationship with dispute settlement (chapter 28). The author reviews dispute-settlement provisions in MEAs providing for non-compliance procedures. He then analyzes the relationship between both types of mechanisms and reflects on the causes for the lack of resort to adjudicative settlement of environmental disputes or, in other words, the preference for non-compliance procedures shown by states in practice. However, even if he considers it to be more relevant in theory than in practice, the perhaps most interesting and innovative part of Treves' contribution is his assessment of the relationship between both mechanisms under the ‘without-prejudice clause’ of non-compliance procedures.

In identifying potential ways of coordination, his reflections on this issue certainly shed new light on it, going beyond the previous works on the topic².

Finally, the last section of this volume concludes by elucidating the relationship between non-compliance procedures and EU law (chapters 29 to 31), taking particularly account of the specificities arising out of the MEAs' nature of 'mixed agreements' under EU law. More specifically, the contributions by Antonino Ali (chapter 29) and Nicola Notaro (chapter 30) also address the relationship and interaction between non-compliance procedures in MEAs, and the European Commission acting under article 258 of the Treaty on the Functioning of the European Union (TFEU) (former article 226 EC), and the exclusive jurisdiction of the ECJ based on article 344 TFEU (former article 292 EC). Leonardo Massai's paper (chapter 31) concludes by addressing the issue of the possible consequences for non-compliance to be applied to the European Union and its Member States under the climate change regime from the perspective of both international and European law, in the light of article 4 of the Kyoto Protocol and the EU Burden Sharing Agreement, as amended after the EU's last enlargement in 2007.

All in all, this volume represents one of the most recent and comprehensive pieces of research on non-compliance procedures in MEAs, developed as a more pragmatic alternative to traditional enforcement mechanisms of international law, better suited to foster regime effectiveness. As such, it is an indispensable piece of academic literature for any researcher dealing with international and European environmental law, and more generally, also for those academics interested in the new enforcement mechanisms being developed in contemporary international law.

Individual Contributions:

Francesca ROMANIN JACUR, *The Non-Compliance Procedure of the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the Ozone Layer*

Alessandro FODELLA, *Mechanism for Promoting Implementation and Compliance with the 1989 Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal*

² See FITZMAURICE, M. & REDGWELL, C., "Environmental Non-Compliance Procedures and International Law", *Netherlands Yearbook of International Law*, Vol. 31, 2000, pp. 35-65; KOSKENNIEMI, M., "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol", *Yearbook of International Environmental Law*, Vol. 3, 1992, pp. 123-162.

- Seline TREVISANUT, *The Compliance Procedures and Mechanisms of the 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*
- Sabrina URBINATI, *Procedures and Mechanisms Relating to Compliance under the 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change*
- Stefano BRUGNATELLI, *Draft Procedures and Mechanisms on Compliance with the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*
- Chiara RAGNI, *Procedures and Mechanisms on Compliance under the 2000 Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity*
- Giulia BIGI, *Draft Non-Compliance Procedure under the 2001 Stockholm Convention on Persistent Organic Pollutants*
- Luigi CREMA, *Draft Procedures and Operational Mechanisms to Promote Compliance and to Address Issues of Non-Compliance under the 2001 International Treaty on Plant and Genetic Resources for Food and Agriculture*
- Irini PAPANICOLOPULU, *Procedures and Mechanisms on Compliance under the 1976/1995 Barcelona Convention on the Protection of the Mediterranean Sea and its Protocols*
- Enrico MILANO, *Procedures and Mechanisms for Review of Compliance under the 1979 Long-Range Transboundary Air Pollution Convention and its Protocols*
- Elena FASOLI, *Procedures and Mechanisms for Review of Compliance under the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context and its 2003 Protocol on Strategic Environmental Assessment*
- Laura PINESCHI, *The Compliance Mechanism of the 1991 Convention on the Protection of the Alps and its Protocols*
- Cesare PITEA, *Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*
- Cesare PITEA, *Procedures and Mechanisms for Review of Compliance under the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*
- Cesare PITEA, *Procedures and Mechanisms for Review of Compliance under the 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention*
- Veit KOESTER, *The Compliance Mechanisms of the Aarhus Convention and the Cartagena Protocol on Biosafety: A Comparative Analysis of the Negotiation Histories and their Outcomes*
- René LEFEBER, *The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006-2007)*
- Jerzy JENDROŠKA, *Practice and Relevant Cases that Emerged in the Context of the Espoo Convention Implementation Committee*
- Francesco SEATZU, *In Search of New Ways to Ensure Effective Compliance with Environmental Procedures and Policies: The Experience of the European Bank for Reconstruction and Development with its Internal Recourse Mechanism*
- Alessandro FODELLA, *Structural and Institutional Aspects of Non-Compliance Mechanisms*
- Francesca ROMANIN JACUR, *Triggering Non-Compliance Procedures*
- Massimiliano MONTINI, *Procedural Guarantees in Non-Compliance Mechanisms*
- Enrico MILANO, *The Outcomes of the Procedure and their Legal Effects*
- Francesca ROMANIN JACUR, *Controlling and Assisting Compliance: Financial Aspects*
- Cesare PITEA, *Multiplication and Overlap of Non-Compliance Procedures and Mechanisms: Towards Better Coordination?*
- Malgosia FITZMAURICE, *Non-Compliance Procedures and the Law of the Treaties*
- Laura PINESCHI, *Non-Compliance Procedures and the Law of State Responsibility*
- Tullio TREVES, *The Settlement of Disputes and Non-Compliance Procedures*
- Antonino ALÌ, *Non-Compliance Procedures in Multilateral Environmental Agreements: The Interaction between International Law and European Law*
- Nicola NOTARO, *The Policy and Practice of the European Union on Compliance Mechanisms under Multilateral Environmental Agreements*
- Leonardo MASSAI, *Obligations of the European Community and its Member States under the Kyoto Protocol*

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