

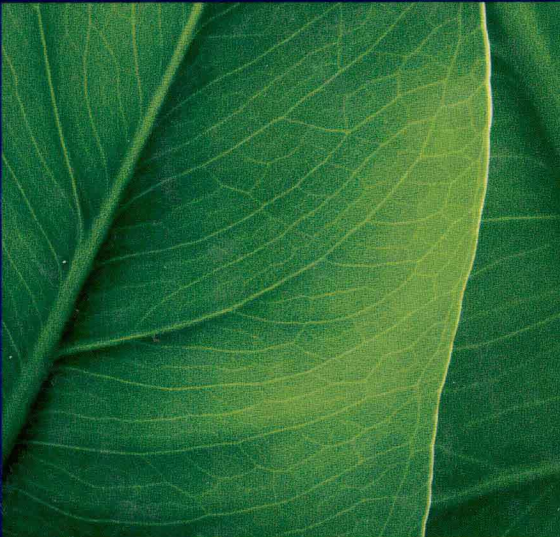


Edited by

**LeRoy Paddock • Du Qun • Louis J. Kotzé
David L. Markell • Kenneth J. Markowitz
Durwood Zaelke**

Compliance and Enforcement in Environmental Law

Toward More Effective Implementation



IUCN Academy of
Environmental Law Series



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PART I

Compliance with Multi-Lateral Environmental Agreements

1. Interlinkages between Multi-Lateral Environmental Agreements: International Compliance Cooperation

Gregory Rose*

1. INTRODUCTION

This study surveys current international institutional cooperation to strengthen the implementation of multilateral environment agreements (MEAs) by means of interlinkages between their compliance mechanisms. Ultimately, this should create synergies that increase the efficiency of implementation.

The 19 global MEAs examined here are those that are considered ‘major’ because they have entered into force and have a large number of Parties. The MEAs are organised for examination here into groups that cover common, overlapping or related subject matter. For example, those with objectives that concern primarily an aspect of nature conservation are clustered together. This approach might be contested because all aspects of the natural environment are inter-related and because interlinkages between MEAs could be strongly determined by factors other than their environmental subject matter. For example, factors such as common servicing by the same United Nations (UN) organisation might be a sensible basis for categorisation. Nevertheless, there is a tendency for MEAs with similar subject matters to be serviced by the same UN body. For example, United Nations Environment Programme (UNEP) services most of the hazardous substances conventions (concerning waste, persistent organic pollutants and aspects of genetically modified organisms, although regulated chemicals are administered jointly with the UN Food and Agriculture Organisation). Ultimately, however, this study also undertakes a comparative analysis of the MEAs across clusters. Therefore, the issue of clustering of MEAs according to primary subject matter is not of central importance as it does not predicate the outcome of the comparative analysis.

The four clusters of MEAs are: (1) nature conservation; (2) hazardous substances management; (3) atmospheric emissions controls; and (4) marine

environment protection. The major global MEAs that have been selected for analysis in the four clusters are:

1.1 Nature Conservation

- a. Wetlands – Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 ('Ramsar Convention')
- b. Heritage – Convention for the Protection of World Cultural and Natural Heritage 1972 ('World Heritage Convention')
- c. Endangered species – Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 ('CITES')
- d. Migratory species – Convention on the Conservation of Migratory Species of Wild Animals 1979 ('CMS')
- e. Biological diversity – Convention on Biological Diversity 1992 ('CBD')
- f. Deserts – United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa 1994 ('UNCCD')
- g. Plant genetic resources – International Treaty on Plant Genetic Resources for Food and Agriculture 2001 ('ITPGRFA')

1.2 Hazardous Materials

- a. Hazardous wastes – Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 ('Basel Convention')
- b. Dangerous chemicals – Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998 ('PIC Convention')
- c. Biosafety – Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 5 June 1992, 2000 ('Biosafety Protocol')
- d. Persistent organic pollutants – Stockholm Convention on Persistent Organic Pollutants 2001 ('POPs Convention')

1.3 Atmospheric Emissions

- a. Ozone layer – Vienna Convention for the Protection of the Ozone Layer 1985 ('Vienna Convention')
- b. Ozone depleting substances – Montreal Protocol on Substances that Deplete the Ozone Layer 1987 ('Montreal Protocol')
- c. Climate change – United Nations Framework Convention on Climate Change 1992 ('UNFCCC')

- d. Greenhouse gas emissions reductions – Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 ('Kyoto Protocol')

1.4 Marine Environment

- a. Whaling – International Convention for the Regulation of Whaling 1946 ('Whaling Convention')
- b. Sea dumping – Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 ('London Convention')
- c. Marine pollution and conservation – United Nations Convention on the Law of the Sea 1982 ('UNCLOS')
- d. Fish Stocks – Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 ('Fish Stocks Agreement')

2. COMPONENTS OF COMPLIANCE MECHANISMS

To compare compliance mechanisms across MEAs, it is necessary to first identify what it is that we wish to compare. Therefore, compliance mechanisms need to be analysed into their detailed components, which are then described and categorised. The components of the compliance mechanisms within each MEA are categorised here under four headings:

- 1. Performance Review Information – requirements for information reviewing national performance of MEA obligations;
- 2. Multilateral Non-Compliance Procedures – institutionalised multilateral procedures to consider apparent instances of non-compliance;
- 3. Non-Compliance Response Measures – multilateral measures adopted to respond to non-compliance; and
- 4. Dispute Resolution – dispute settlement procedures.

2.1 Performance Review Information

Many MEAs require their Parties to exchange information as part of their primary operational obligations. For example, they might be required to provide information on proposed environmentally sensitive trade transactions or industrial developments, on ambient environmental conditions or on environmental technologies. This operational information is to be distinguished from MEA requirements for performance review information that is necessary to determine a Party's compliance situation. Therefore, in examining compliance, this study focuses on performance review information.

In a similar fashion, monitoring information can be either primary operational in nature – concerning scientific and technical aspects of environmental conditions – or related to performance of MEA obligations. The type of monitoring that is the focus of this paper is that of national performance in implementing MEA obligations. Nevertheless, operational and performance information are often inter-related, as data from operational information exchanges are fed into performance review.

In relation to their performance reviews, Parties are often required to report on the measures they have taken to implement a particular MEA, usually by submitting annual reports on their relevant laws or policies. Some MEAs provide for a third Party, such as a Secretariat, to monitor or verify the performance and require the Parties to cooperate with such monitoring or verification of their performance. Verification is a process to test the accuracy of information provided by a Party to the MEA Secretariat. The process is undertaken by a third Party, such as the Secretariat or a non-governmental organisation (NGO), or by them in combination with other Parties to the treaty.

A related form of performance review is regime review, which concerns review of the regime's performance overall, rather than of individual Party performance. For example, statistical data processed from sources including the Parties' operational information exchanges and their performance information can help the Secretariat and the Conference of the Parties (COP) to assess whether targets have been met and to identify future priorities.

Figure 1.1 sets out the stages in the MEA information cycle, from baseline to operational to performance information. Baseline information is needed to design the regime. Operational information concerns the effectiveness of the regime in meeting its technical objectives. Performance information reviews the compliance of the parties with their obligations. Each stage can be further broken down into components, such as into compliance review data, that concern a Party's performance of its implementation obligations, and non-compliance response data, that concern a Party's performance of corrective obligations specifically imposed in response to its previously identified non-compliance.

2.2 Multilateral Non-Compliance Procedures

Most MEAs provide for the development of a formal, multilateral non-compliance procedure ('NCP'). When developed, this usually comes in the form of an elected committee, called an Implementation Committee or Compliance Committee. A Party's alleged non-compliance may be referred to the Committee for consideration and the Committee then makes a recommendation on the matter to the COP. Usually, the final output is a decision by the COP. The purpose of such procedures is to identify compliance difficulties and to facilitate better compliance in a non-adversarial manner and before the convention regime is undermined. In that respect, multilateral NCPs must be distinguished from

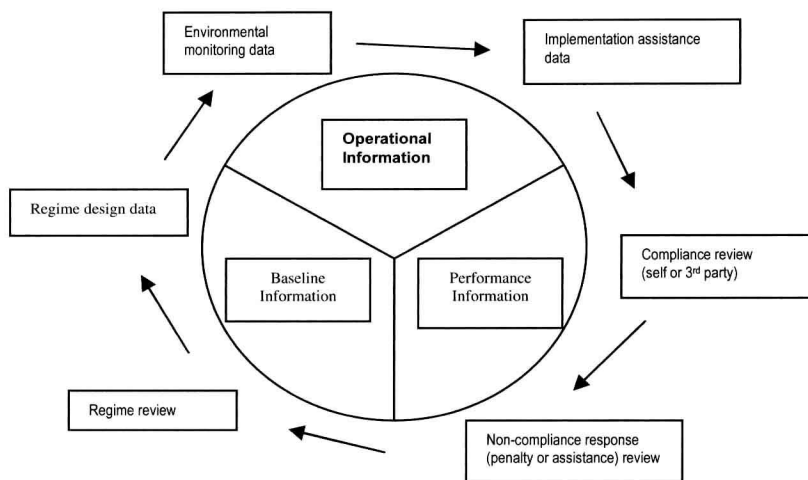


Figure 1.1 MEA Information Cycle

traditional dispute resolution procedures, which are invoked only once sufficient damage has been done to the legal order for a conflict to arise.

Despite the simple dichotomy in the notions of compliance and non-compliance, performance information will usually indicate a degree of compliance rather than perfect compliance or absolute non-compliance. A Party may be compliant to a degree, across a measure of shades of grey. The degree of compliance may in circumstances be so poor that the Party can be determined to be substantially non-compliant. Substantial failures to submit national performance information can conceal national non-performance of primary operational obligations and, therefore, is often treated as a failure to meet a primary operational obligation.

2.3 Non-Compliance Response Measures

When an instance of substantial non-compliance is identified under a non-compliance procedure, a response is necessary at the multilateral level. The response needs to be tailored to the particular circumstances of the case. Non-compliance usually stems from lack of human, material and financial resources and/or lack of political will.¹ The response measures available can be classified into two categories: incentives – technical and financial assistance to support improved implementation; and disincentives – penalties such as stricter requirements for performance review information. These are sometimes referred to as “carrots and sticks”.

Incentives are the usual response and include enhanced international cooperation with the non-compliant Party in support of implementation. Thus, a COP might direct priority financial and technical assistance to a non-compliant Party. This assistance may be subject to conditions such as the adoption of a national programme of implementation actions. This priority or conditional assistance is referred to here as “non-compliance response assistance” and must be distinguished from regular cooperative assistance under the MEA.

Technical assistance includes capacity-building mechanisms in the form of training and workshops, which address issues relating to lack of human resources and know-how; technology transfers and exchange of information mechanisms to address issues relating to the lack of materials; and financial provisions to address resource issues.² (It is noteworthy that information exchange obligations arise also in the context of technical assistance.) Financial assistance often comes in the form of a Trust Fund or a financial mechanism from which the Parties provide funding for relevant projects. One of the most important financial mechanisms is the Global Environment Facility (‘GEF’), which was established in 1991 by the World Bank to provide funding to projects falling within the categories of biological diversity, climate change, international waters and ozone layer depletion.³ When invoked under an NCP, technical and financial assistance might be made conditional on demonstration of the Party’s demonstration of bona fides in redressing the non-compliance failure, such as by adopting domestic legislation or a national action plan.

In some cases, disincentives to continued non-compliance can be imposed. For example, a COP might impose additional, stringent and customised performance review information obligations on a non-compliant Party and direct that the information provided be subject to verification. The additional required information can be termed “non-compliance response information”. These additional reporting requirements must be distinguished from their regular performance review information counterparts.

Other disincentives to non-compliance are warnings and penalties. The latter may include additional obligations or suspension of privileges. For example, a non-compliant Party might be warned that its rights under the MEA regime could be suspended. The suspension of rights may involve the imposition of limited trade sanctions, as can occur under the Montreal Protocol on Substances that Deplete the Ozone Layer and the Kyoto Protocol to the United Nations Framework Climate Change Convention. Penalties imposed through the multilateral process of the NCP can be distinguished from compensation liabilities. The latter can be imposed under the terms of the MEA but often need to be determined between Parties bilaterally through an arbitral process or other form of dispute resolution procedure.

Thus, responses to non-compliance vary, from requiring additional reports (non-compliance response information as distinguished from regular performance review information), to recommending conditional assistance measures (non-

compliance response assistance, as distinguished from regular implementation support assistance), to imposition of liabilities and the suspension of a Party's rights under the convention.

2.4 Dispute Resolution

MEA mechanisms to settle disputes can be grouped in three clusters of procedures: Negotiation, Conciliation and Arbitration.

2.4.1 Negotiation

In the event of a dispute, Parties must submit to negotiation. Thus, there is no obligation to pursue binding arbitration.

2.4.2 Conciliation

Generally, these provisions provide that Parties must submit to negotiation or other peaceful means as the first port of call. If the dispute is not resolved within a specified period of time (usually 12 months), Parties must then submit to conciliation in accordance with a procedure that is either annexed to the Convention or to a COP resolution. The conciliation procedure is not automatically triggered. Thus, once the requisite period has lapsed, one of the Parties must request it. However, Parties can bypass the conciliation procedure in favour of arbitration before the International Court of Justice or in accordance with an arbitration procedure, which, again, is either annexed to the Convention or to a COP resolution. The arbitration process is not compulsory and can only be invoked where both Parties have notified the Secretariat that they accept this means of dispute resolution.

2.4.3 Arbitration

Unlike conciliation, arbitration is binding. In marked contrast to the weak dispute resolution procedures described above, which avoid imposing compulsory, binding arbitration on Parties, the UNCLOS sits in a category of its own. It has compulsory, binding arbitration for specific disputes. Generally, however, the arbitration procedure is invoked if the dispute has not been resolved through negotiation. Conciliation is an option where negotiations fail, but is invoked only if one Party requests it and the other accepts the invitation. Otherwise, Parties have the right to invoke compulsory arbitration procedures and the forum in which the proceedings are to take place.

Table 1.1 provides a broad overview of the framework for compliance in each MEA by identifying the particular compliance components that each incorporates. It is evident that dispute resolution is the most frequently used compliance mechanism. However, as will be demonstrated below, these are usually voluntary and are not binding. National performance reporting is the next most frequently used compliance mechanism but the quality of the individual

performance reporting mechanisms varies. Multilateral non-compliance procedures, although less common, are becoming more so, as the several pending mechanisms indicate. They are followed by corresponding non-compliance response measures in all cases but one.

Table 1.1 Overview of MEA Compliance Frameworks

Convention	National Performance Information	Multilateral Non-Compliance Procedures	Non-Compliance Response Measures	Dispute Resolution Procedures
Ramsar	√	√	√	
World Heritage	√	√	√	√
CITES	√	√	√	√
CMS	√			√
CBD	√			√
UNCCD	√	Pending		√
ITPGRFA		Pending		√
Basel	√	√	√	√
PIC		Pending		√
Biosafety	√	√	√	√
POPs	√	Pending		√
Vienna Ozone	√			√
Montreal Protocol	√	√	√	√
UNFCCC	√	√	√	√
Kyoto Protocol	√	√	√	√
Whaling	√	√		
London	√			
UNCLOS				√
Fish Stocks				√

3. INTERNATIONAL INSTITUTIONAL EFFORTS TOWARDS INTERLINKAGES IN COMPLIANCE

International institutional efforts to interlink MEA compliance systems form a subset of their efforts to produce synergies in national implementation of MEAs, i.e. they generally seek to do both in combination. For example, performance information is a subset of the wider body of information related to implementation. Nevertheless, the conceptual distinction between interlinkage of MEA compliance systems, as compared to interlinkage of MEA broader implementation efforts more generally, is maintained in the analysis in this chapter. Current international institutional efforts in interlinking MEAs to achieve interlinkages and synergies between approaches to compliance tend to fall into two categories: those conducted by broad-mandate, multi-sectoral UN organisations, and those conducted by the individual MEA Secretariats.

There is little active support outside of the UN system and MEA Secretariats for the construction of international interlinkages between MEA compliance mechanisms. The exceptions are found in regional organisations in Europe and North America. In North America, the Commission for Environmental Cooperation ('CEC') created by the USA, Canada and Mexico under the North American Agreement on Environmental Cooperation⁴ has a Law and Policy programme to address compliance with and enforcement of environmental laws within the region.⁵ It includes an Enforcement and Compliance Cooperation Program that aims to provide support to the North American Working Group on Enforcement and Compliance Cooperation.⁶ However, it does not focus on interlinkages across MEAs.⁷ The European Network for the Implementation and Enforcement of Environmental Law ('IMPEL') is a network of regulators that focuses on training inspectors, exchanging information and experience between Member States and reviewing European Union environmental legislation.⁸ IMPEL's role is recognised in the 6th Environment Action Programme, which was passed by the European Parliament on 22 July 2002. Article 9.1 outlines priority international environmental areas and Article 9.2(j) states that these international objectives shall be achieved by means of promoting policy coherence. This involves linking the work done within the framework of different MEAs, including assessing interlinkages between the biodiversity and climate change conventions.

3.1 United Nations Organisations

United Nations ('UN') members are called upon to undertake activities to promote the full and prompt implementation of international agreements. It is suggested that States could: