6

State-to-State Procedures before Environmental Compliance Committees: Still Alive?

JUSTINE BENDEL AND YUSRA SUEDI

6.1 Introduction

Many multilateral environmental agreements (MEAs) have established committees that monitor compliance and/or facilitate State parties' implementation.[1] They offer an alternative to traditional judicial dispute settlement and are designed with a slightly different purpose in mind. One of the ways they are different from international courts is the way in which a procedure can be triggered.[2] Indeed, there are many ways such committees may be triggered to take action: the committee could act *proprio motu* (committee trigger), or any State party could trigger the committee with respect to its own compliance or implementation (self-trigger) or sometimes an NGO or member of the public can trigger the committee (third-party trigger). However, most compliance committees also have a more 'traditional' way to initiate a procedure before them, reminiscent of a judicial procedure: a State party may seize the committee concerning the compliance or implementation of another State party.[3] This type of trigger has only been used a handful of times across the existing

[1] The difference between implementation and compliance is defined clearly by C Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement' (2016) 25(2) *Review of European Community and International Environmental Law* 161–73, 166.

[2] While 'trigger' is the most common term used in literature, States have also used 'referral' and 'initiation' in negotiations. See S Oberthür and E Northrop, 'Towards an Effective Mechanism to Facilitate Implementation and Promote Compliance under the Paris Agreement' (2018) 8(1–2) *Climate Law* 39–69, 53, fn 44; Ad-hoc Working Group on the Paris Agreement, Third Part of the First Session, Bonn, 8–18 May 2017, Agenda Item 7: Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15.2 of the Paris Agreement, Informal Note by the Co-Facilitators, Final Version, available at https://unfccc.int/files/meetings/bonn_may_2017/application/pdf/apa_item7_informalnote_provisional_17may2017@1100_final.pdf.

[3] For an overview of existing triggers, see J Bendel, *Litigating the Environment: Process, and Procedure before International Courts and Tribunals* (Edward Elgar 2023) 218–22.

https://doi.org/10.1017/9781009373913.010 Published online by Cambridge University Press

environmental committees that provide for it, most famously in the context of the Aarhus Convention. However, this trigger has deliberately not been included in the list of the various options triggering the Paris Agreement Implementation and Compliance Committee (PAICC). It is also interesting to see that, in the human rights context, the UN Convention on Racial Discrimination's Committee has been triggered only twice.

One may ask: What is to be achieved through State-to-State triggers that is not achieved through other triggers? Why should they exist? Arguments for their existence and added value are twofold. The main objective of State-to-State triggers is to give responsibility to States themselves to make sure that every party implements the treaty, and to reinforce norms as community interests. Many rules contained in MEAs are arguably obligations *erga omnes partes*, which can and should be implemented and complied with by all parties to the treaty. While compliance committees are tasked with monitoring States' compliance with such obligations, State-to-State triggers reflect States' primary role in their implementation and compliance. The existence of State-to-State triggers is also justified as it creates another means, alongside other types of triggers, to implement and ensure compliance with a multilateral treaty. Having multiple ways to access the compliance mechanism of a treaty is beneficial, as more actors can be involved in the compliance process.

As a result, this chapter explores the following question: What are the challenges and obstacles of State-to-State triggers that can explain their sparse use? Focussing on compliance committees for MEAs, we identify two types of challenges faced by State-to-State triggers: challenges related to the perception and behaviour of States *vis-à-vis* State-to-State triggers (Section 6.3) and challenges related to the institutional design and procedural mechanisms of State-to-State procedures (Section 6.4). While the methodology is doctrinal in essence, we also conducted interviews with three negotiators of the Paris Agreement, in order to better understand the process that led to the creation of the PAICC. We also refer to examples in the human rights context where relevant. Before delving into the challenges identified, we first explain how State-to-State triggers were established (Section 6.2.1) and describe the instances in which they have been used (Section 6.2.2).

6.2 Overview of State-to-State Compliance Procedures

In order to understand the challenges faced by State-to-State triggers, we first explain the negotiation process leading up to their creation and present the instances in which they have been employed.

https://doi.org/10.1017/9781009373913.010 Published online by Cambridge University Press

6.2.1 Establishment

The inclusion of State-to-State triggers as a means to encourage compliance with MEAs has historically been a contentious matter. Indeed, there has long been an ideological conflict within the international community about the best approach to guarantee States' compliance with their international environmental obligations. The adversarial approach, on one hand, is typically where one State will 'sue' another for non-compliance in a confrontational manner. The State-to-State trigger is representative of this approach. The facilitative approach, on the other hand, involves 'non-confrontational means to persuade State parties into compliance, through technical and financial assistance, aid with reporting requirements, advice, technology transfers and capacity building'.[4]

Such tension is reflected in the negotiation processes to establish a number of MEAs. During negotiations on the compliance committee for the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), for instance, Australia argued that 'a right to raise the performance of other parties would not be consistent with the consultative, non-confrontational nature of the mechanism',[5] and that 'compliance should not be secured through threats or by creating a mechanism equipped with strong enforcement procedures'.[6] The draft decision from the *ad hoc* Legal Working Group that established the compliance mechanism was a matter of lengthy and heated debate,[7] resulting in a consensus that was not satisfactory to all States.[8] Similarly, provisions on the State-to-State trigger in MEAs such as the 1998 Rotterdam Convention on the Prior

[4] N Goeteyn and F Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?' (2011) 10 *Chinese Journal of International Law* 36.

[5] Monitoring the Implementation of and Compliance with the Obligations set out by the Basel Convention, comment submitted by Australia, UNEP/CHW/LWG/2/3/Add.1, 2000.

[6] A Shibata, 'The Basel Compliance Mechanism' (2003) 12(2) *Review of European, Comparative & International Environmental Law* 183–98, 184, citing Draft Decision for the Sixth Meeting of the Conference of the Parties Establishing a Mechanism for the Basel Convention, Rome, 15–17 October 2001, available at www.basel.int/meetings/LWG/index.html.

[7] UNEP, Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Geneva, 9–12 December 2002, Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, UNEP/CHW.6/40, para 57, available at www.basel.int/TheConvention/ConferenceoftheParties/Meetings/COP6/tabid/6149/Default.aspx.

[8] Ibid., para 65.

Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) and the 2001 International Treaty on Plant and Genetic Resources were enclosed in square brackets during the drafting process 'as no agreement [had] been reached on this issue between the Parties'.[9]

The tension was particularly high in the context of the Paris Agreement. This was considered to be more 'more sensitive'[10] than other MEA negotiations due to the high political implications, the focus on the complex matter of climate change and a wide range of issues covered in the Agreement (such as mitigation, adaptation, finance, transparency and technical support). The mere inclusion of a compliance mechanism was difficult to negotiate in the first place, but certain States managed to convince the majority that the inclusion of a compliance committee would add value and guarantee accountability to the world.[11] However, reluctance remained regarding the acceptable ways to trigger such a committee. While many were initially willing to retain only a self-trigger,[12] a committee trigger was eventually added.[13] Unfortunately, State-to-State triggers were 'shut down immediately by some parties'.[14] Deemed 'impossible to include' and 'something parties would never agree

[9] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, signed 10 September 1998, entered into force 24 February 2004, 2244 UNTS 337, para 12(b). S Bugnatelli, 'The 1998 Rotterdam Convention on the Prior Informed Consent Procedure' in T Treves, L Pineschi, A Tanzi et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009) 93; L Crema, 'The 2001 International Treaty on Plant and Genetic Resources' in Treves et al. (eds.), *Non-Compliance Procedures* (n 9) 147.

[10] Participant 2, question 1.

[11] Participant 1, question 2: 'We insisted that this shouldn't be an ATM machine, where you say "I have problems, give me money" – it should add value in the context of the whole Paris Agreement'; 'Listen, when you go back home, you will have journalists, academia and students asking you this one question: "What happens if a state doesn't comply?" If we don't have this body, your answer will be extremely complicated! But with Article 15 of the Paris Agreement establishing a compliance committee, you will have a straightforward answer.'

[12] The committee trigger was successfully included after difficult negotiations in Katowice. Participant 1, question 1: 'The options were secretariat: that didn't work either; the Committee itself, which is what it is there in the text. And other triggers were not even considered, like NGOs. That was completely unacceptable for many.' Informal note, May 2017, 4: 'Other referrals would risk the Committee becoming politicized, adversarial, intrusive and redundant.'

[13] Participant 3 questions 3 and 4.

[14] Participant 3, question 1; participant 2, questions 2 and 3.

to', this proposal was abandoned by its negotiators in favour of other ideas that could be more readily accepted.[15]

Today, most MEAs contain many features that lean towards a facilitative rather than an adversarial approach. This facilitative approach is the essence of environmental compliance procedures, within which more adversarial State-to-State triggers can exist. While some may believe that an adversarial approach to non-compliance is more efficient, most opine that the facilitative approach characterising compliance procedures is 'better suited to promoting compliance' in this context, particularly as it is 'easier to sell to states'.[16] It can therefore be said that the facilitative approach is at the core of the existence of compliance procedures.[17] However, compromises have been reached in some MEAs to allow a State party preferring a more adversarial approach to seize the compliance committee against another State party if so desired. When featured, the State-to-State trigger has therefore found itself incorporated as a concession; a square peg in a round hole.

6.2.2 *Practice*

This context indicates why the facilitative approach has become the preference in the majority of MEAs. To date, only three compliance committees have been triggered for review by a State against another State: the Aarhus Compliance Committee (twice), the Espoo Implementation Committee (nine times) and the Kyoto Protocol Facilitative Branch (once).

The Aarhus Convention Compliance Committee saw its first State-to-State procedure in 2004 when Romania triggered a non-compliance procedure against Ukraine, in relation to the Bystre Canal project in

[15] Participant 2, question 2.

[16] D Bodansky, J Brunnée and L Rajamani, *International Climate Change Law* (Oxford University Press 2017) 68 ' . . . One might add that this "softer touch" on compliance has also been easier to sell to states than a harder-edged approach would have been.'; M Doelle, 'In Defence of the Paris Agreement's Compliance System: The Case for Facilitative Compliance' in B Mayer and A Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021) 86–98; J von Stein, 'The International Law and Politics of Climate Change: Ratification of the United Nations Framework Convention and the Kyoto Protocol' (2008) 52(2) *Journal of Conflict Resolution* 243–44.

[17] J Klabbers, 'Compliance Procedures' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 1004; A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995).

the Danube Delta.[18] It alleged that the Ukrainian authorities had not complied with the obligations of public participation and had not let various local and international NGOs participate throughout the planning of the project. The second procedure triggered before the Aarhus Convention Compliance Committee was submitted by Lithuania against Belarus in 2015 with regard to the construction of a nuclear power plant in Belarus. Lithuania claimed that Belarus had denied the right to access detailed information of citizens to Lithuania during the preparatory and project implementation phases of the construction of the nuclear power plant.[19]

The Espoo Implementation Committee has seen nine procedures initiated by a State party against another, making it the most successful to date. They are all related to large projects with transnational effects, such as nuclear power plants, oil and gas projects, mining, hydropower plants or modifications to river waterways.[20] In these cases, the triggering parties argued that the transboundary environmental impact assessments were not carried out in accordance with the Espoo Convention.

Another interesting procedure was triggered before the Kyoto Protocol Facilitative Branch in 2006 by South Africa. In this case, South Africa made a submission, in its capacity as Chairman of the Group of 77 and China and on their behalf, about State parties' non-compliance with Article 3.1 of the Kyoto Protocol.[21] The alleged non-compliance concerned the submission of national progress reports, as several countries had not submitted theirs six months after the set deadline.

There is further evidence of a sparing use of State-to-State procedures even beyond MEAs. For instance, before the UN human rights treaty bodies, the first inter-State communications ever to be submitted both occurred in 2018 before the Committee on the Elimination of Racial

[18] Aarhus Convention's Compliance Committee, 'Findings and Recommendations with Regard to Compliance by Ukraine with the Obligations under the Aarhus Convention in the Case of Bystre Deep-water Navigation Canal Construction', Doc ECE/MP.PP/C.1/2005/2/Add.3, 18 February 2005 (14 March 2005), available at https://unece.org/DAM/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.3.e.pdf.

[19] Ministry of Environment of Lithuania, 'Submission to the Compliance Committee by the Republic of Lithuania Requesting to Investigate the Compliance of the Republic of Belarus', 25 March 2015, available at https://unece.org/DAM/env/pp/compliance/S2015-02_Belarus/Submission/Submission_by_Lithuania_concerning_Belarus_27.03.2015.pdf.

[20] All submissions can be found at https://unece.org/submissions-overview.

[21] Submission by South Africa, CC-2006-1-1/FB, available at https://unfccc.int/files/kyoto_mechanisms/compliance/application/pdf/cc-2006-1-1-fb.pdf.

Discrimination (CERD).[22] The CERD dealt with an inter-State communication submitted by Qatar on 8 March 2018 against Saudi Arabia and the United Arab Emirates (UAE), and an inter-State communication submitted on 23 April 2018 by the State of Palestine against Israel.

There are several reasons that could explain the very sparing use of State-to-State triggers, despite their appearance in the guidelines or rules of procedure of all compliance committees. We identify two types of challenges: challenges related to the perception and behaviour of States vis-à-vis State-to-State triggers and challenges related to the institutional design and procedural mechanisms of State-to-State procedures.

6.3 Reluctance of States to Use Compliance Procedures

Although it is not within the scope of this chapter to empirically assess why States are reluctant to use State-to-State triggers, we identify two circumstances that may make State-to-State compliance procedures seem undesirable to States. First, State-to-State compliance procedures can be perceived as hostile mechanisms by States (Section 6.3.1). Second, States may lack the motivation to defend communal interests through State-to-State triggers (Section 6.3.2).

6.3.1 Hostile Perception of State-to-State Compliance Procedures

The principal reason States may be discouraged from using State-to-State procedures is the adversarial and hostile perception of those State-to-State triggers, as mentioned in Section 6.2.1. This hostile perception means that States may think that triggering a compliance procedure against another State may be perceived as an escalation of tensions in their diplomatic relations. This is because the process of one State complaining about another State before a third party (judicial, quasi-judicial or non-judicial) is perceived negatively in international relations. Indeed, while the judicial avenue is theoretically an equal alternative to other forms of peaceful dispute settlement provided in the UN Charter,[23] it tends to be a last resort in practice. Certain MEAs or international human rights conventions even provide that a court (most commonly, the International Court of Justice (ICJ)) may only be seized once negotiations

[22] OHCHR, 'Inter-State Communications: Committee on the Elimination of Racial Discrimination', available at www.ohchr.org/en/treaty-bodies/cerd/inter-state-communications.
[23] See Article 33(1) UN Charter.

https://doi.org/10.1017/9781009373913.010 Published online by Cambridge University Press

have been exhausted.[24] This indicates that States may turn to a third party when they are unable to communicate successfully between themselves, or, worse, when they have reached a political 'boiling point' or deadlock.[25] In the context of human rights compliance committees, notable examples include the Israeli–Palestinian dispute before the CERD as part of a decades-long historical conflict with deadlocked negotiations.[26] The other dispute before the same committee between Qatar and the UAE is also in the context of an important political conflict between these two countries which also made its way onto the ICJ's docket.[27]

Tensions that lead to the triggering of a State-to-State procedure escalate more easily between neighbouring countries. In addition to the two disputes between neighbouring countries before the CERD, all procedures before the Espoo Implementation Committee have involved neighbouring States, where projects have had clear transboundary effects. Obligations around transboundary environmental impact assessments lend themselves naturally towards a bilateral and adversarial conflict, as they are easily 'bilateralisable'. For instance, in 2019, Montenegro started a procedure against Albania regarding the ongoing build of a small hydropower plant on the Cijevna River, which is shared with Montenegro. It alleged that Albania had not considered the potential adverse impacts of the project on Montenegrin territory and people.[28] This is a clear case of a 'bilateralisable' and adversarial problem arising

[24] See, for example, Article 20 of the Basel Convention. In another instance, the ICJ declared the *Georgia v Russia* dispute inadmissible as Georgia had made no attempt at negotiations prior to *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgment, 1 April 2011, para 182.

[25] For example, in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, Judgment, ICJ Reports 2018, 507.

[26] On 30 April 2021, the CERD declared Palestine's submission admissible. See 'Inter-State Communication Submitted by the State of Palestine against Israel: Decision on Admissibility', CERD/C/103/4, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/150/90/PDF/G2115090.pdf?OpenElement.

[27] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*, Preliminary Objections, ICJ Reports 2021.

[28] 'Submission by Montenegro having concerns about the Compliance of the Republic of Albania with Its Obligations under the Convention on Environmental Impact Assessment in a Transboundary Context: Espoo and the Protocol on Strategic Environmental Assessment (SEA) in Respect of the Activity of the Construction of the Small Hydropower Plants on the Cijevna River', 11 September 2019 (submission was received by the secretariat on 25 September 2019), available at https://unece.org/DAM/env/documents/2019/ece/IC/Submission/Albania/Submission_to_the_Implementation_Committee__Espoo_11._IX_2019.pdf.

within a multilateral treaty, where Montenegro is using similar rhetoric and seeking a similar outcome to what it would use, and seek, in a judicial procedure.

Any compliance arrangements in general may already be viewed as hostile, discouraging States from setting ambitious environmental targets or even joining the MEA altogether.[29] However, State-to-State triggers would naturally be seen as particularly undesirable. One participant recalled that 'parties are very reluctant to be pointed the finger at. They want to avoid that'.[30] This could, at least partly, be due to the disclosure of sensitive information or the attraction of potentially negative public opinion during proceedings.[31] It could also be due to costs associated with such proceedings where relevant. Another reason could be the risk of a 'boomerang effect', whereby the initiating State may be under closer scrutiny from the alleged non-complying State, who is looking for retaliation. The latter may become vindictive and look into whether the triggering State is also complying. Such a 'boomerang effect' could also take place with respect to another MEA, as there are chances that both States are parties to multiple treaties. States could even bring other issues beyond the scope of the MEA in question to the forefront. The committee would be 'open to misuse',[32] creating a space for political issues other than the compliance with the treaty in question. However, such risks can and will be mitigated by the committee itself, which will decide on its jurisdiction and the scope of its work. Unfortunately, this was not a sufficient guarantee in the negotiations of the PAICC, possibly because of the high political stakes under the Paris Agreement.

The hostile perception of State-to-State triggers could also explain why the dispute settlement mechanisms featured in MEAs are rarely used.[33] Indeed, a few MEAs feature a clause giving State parties the option to

[29] Voigt (n 1) 162.

[30] Participant 1, question 1.

[31] State-to-State triggers are by default closed to the public: see Section 6.4.3. See also F Romanin Jacur, 'Triggering Non-Compliance Procedures' in Treves et al. (eds), *Non-Compliance Procedures* (n 9) 374.

[32] Participant 3, question 1; Participant 1, question 3; Participant 2, question 3; Informal note May 2017 (n 2) 4; Draft Elements for APA Agenda Item 7: Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15.2 of the Paris Agreement, Informal note by the Co-facilitators, Final Version, 13 November 2017, 7.

[33] Notable exceptions include cases brought before the ICJ regarding the Genocide Convention, the CERD and the Whaling Convention.

resort to the ICJ or possibly arbitration if a dispute arises about the interpretation, application of or compliance with the relevant convention.[34] Therefore, in theory, a State could resort directly to judicial bodies as opposed to non-compliance procedures on a matter of another State's non-compliance with their shared convention. These procedures are separate.[35] However, 'there appears to be widespread avoidance of resort to third-party dispute resolution'.[36] This may in part be due to the fact that most non-compliance is due to capacity issues as opposed to the legal interpretation of a provision in an MEA.[37] It is however mainly due to the confrontational nature of dispute settlement, requiring the existence of a dispute where States 'hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations',[38] with one party's claim being 'positively opposed' by the other.[39] It is also likely due to the binding nature of dispute resolution procedures, disliked by States who prefer more flexibility with regard to their environmental commitments.[40]

[34] See, for example, Basel Convention Article 20; Rotterdam Convention Article 20; Stockholm Convention on Persistent Organic Pollutants, signed 22 May 2001, entered into force 17 May 2004, 2256 UNTS 119, Article 18.

[35] See, for example, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, signed 29 January 2000, entered into force 11 September 2003, 2226 UNTS 208, Article 34.

[36] U Beyerlin, P-T Stoll and R Wolfrum, 'Conclusions Drawn from the Conference on Ensuring Compliance with MEAs' in U Beyerlin, P-T Stoll and R Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Brill 2006) 369.

[37] Goeteyn and Maes (n 4) 37–38, para 43.

[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Provisional Measures, Order of 23 January 2020, ICJ Reports 2020, 10, para 20; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)*, Provisional Measures, Order of 19 April 2017, ICJ Reports 2017, 115, para 22; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, 74.

[39] *Application (The Gambia v Myanmar)* (n 37); *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, 328.

[40] United Nations Environmental Programme (UNEP), *Compliance Mechanism under Selected Multilateral Environmental Agreements*, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7507/-Compliance%20Mechanisms%20under%20selected%20Multilateral%20Environmental%20Agreements-2007761.pdf?sequence=3&amp%3BisAllowed=, 119.

6.3.2 *Lack of Motive to Defend Communal Interests*

Many of the obligations contained in MEAs are arguably obligations *erga omnes partes*. This means that a State party owes such obligations towards all the other States parties to the same treaty, due to the treaty's protection of collective interests. Therefore, all State parties have their own interests on the one hand and communal interests on the other hand.[41] By ratifying those treaties, they have agreed that the protection of environmental rights is worth joint efforts. The pursuit of this 'common good', however, does not seem to have inspired many States to date. They may lack motivation to pursue such proceedings due to both the absence of perceived personal gain and the novelty of the practice itself. Indeed, from a jurisdictional perspective, States have a legal interest in safeguarding community interests before a judicial body or a compliance committee, if such obligations are *erga omnes partes*. However, international jurisprudence has recently distinguished between specially affected States – directly and tangibly impacted by the breach of an obligation – and non-specially affected States that may be concerned about ensuring respect for the *erga omnes partes* obligation but are not directly and tangibly impacted by its breach.[42] While States occasionally demonstrate altruism in international relations,[43] they may generally hesitate to start a procedure against another State if they are not specially affected by the breach in question. This may particularly be the case as the practice is quite novel.

As much as this can explain some of the reasons States are reluctant to use State-to-State compliance procedures, it does not make such procedures redundant. Contrary to the common perception that State-to-State proceedings are hostile, it can be argued that they were designed to allow for collegial co-operation and solidarity between States. Indeed, a State-to-State compliance procedure is communal in nature.[44] Even if the

[41] A Fodella, 'Structural and Institutional Aspects of Non-Compliance Mechanisms' in Treves et al. (eds), *Non-Compliance Procedures* (n 9) 366; Romanin Jacur (n 31) 376; L Pineschi, 'Non-Compliance Procedures and the Law of State Responsibility', in Treves et al. (eds), *Non-Compliance Procedures* (n 9) 494; T Treves, 'The Settlement of Disputes and Non-Compliance Procedures', in Treves et al. (eds), *Non-Compliance Procedures* (n 9) 513–14.

[42] *Application (The Gambia v Myanmar)* (n 38) paras 41–42.

[43] J Rudall, *Altruism in International Law* (Cambridge University Press 2021).

[44] U Fastenrath, D-E Khan, R Geiger, A Paulus and S von Schorlemer (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011).

procedure itself opposes two parties, the purpose of the procedure has a larger communal objective. In this sense, it is possible to view such procedures not as hostile, but as co-operative, aspiring towards a 'common good'.

On one hand, there are many instances where the initiating State is specially affected by another State's non-compliance, and therefore communal obligations can be 'bilateralisable' such as the case of the Espoo Convention on Transboundary Environmental Impact Assessments. On the other hand, there are instances where a State can be non-specially affected by another State's non-compliance with communal obligations, such as in the case of the Kyoto Protocol. In both types of cases, a shift in States' understanding of State-to-State procedures may be used as is necessary: individual adversarial procedures can be conducted for the defence of community interests. Although the more bilateral nature of a State-to-State procedure may be at odds, from the perspective of State parties, with the communal spirit of the treaties under review, they are not incompatible.

6.4 Procedural and Institutional Challenges

Since State-to-State compliance procedures are adversarial in nature, opposing two States, the type of procedural rules applicable become central to the conduct of such procedures. Certain well-established procedural principles developed in the judicial context become essential to the State-to-State compliance procedure, such as questions of jurisdiction (Section 6.4.1), evidence (Section 6.4.2), expertise (Section 6.4.3), independence and impartiality (Section 6.4.4), participation and transparency (Section 6.4.5) and outcomes (Section 6.4.6). This section will argue that the design and practice surrounding these identified procedural and institutional features of State-to-State triggers can contribute to their scarce use by States.

6.4.1 Jurisdiction

Questions such as when a compliance committee should pursue a State-to-State procedure are worth exploring, as they show that it is not only States that can be the reason why State-to-State procedures do not proliferate, but it is also committees themselves that can prevent procedures from being heard. This means that even when State-to-State triggers are initiated, the process can be impeded by a hesitant committee.

https://doi.org/10.1017/9781009373913.010 Published online by Cambridge University Press

The case submitted by South Africa to the Kyoto Protocol Facilitative Branch – one of the two branches of the Protocol's compliance committee – shows that the committees themselves may not be as familiar as expected in dealing with State-to-State compliance procedures. Potential reasons for this may be that they have so little prior experience. In this case, as soon as the submission was not exactly in line with the set procedures, the committee decided to end the procedure altogether.

As mentioned, the submission by South Africa was made, on behalf of the Group of 77 and China, against various parties for failure to communicate national reports. The Facilitative Branch dismissed the submission on procedural grounds. Indeed, two questions needed to be answered: Can a party submit on behalf of a group, and can a party submit against multiple other parties? These questions were not answered clearly in the Branch's rules of procedures. Therefore, the committee decided the procedure could not continue. In only two instances, concerning Slovenia and Latvia, the Branch closed the procedure, as these two countries had in the meantime complied with their obligations, making the compliance procedure redundant.[45]

The fact that the Branch did not engage with the merits of the claim brought by South Africa shows a strict application of the rules of procedures, despite there being easily justifiable grounds to continue the procedure. Indeed, the committee decided that South Africa did not name the States against which it was making its submission, but South Africa stated clearly that those States who were six months late in submitting their reports were the object of the submission, and sent the submission to the relevant fifteen States. Therefore, despite the fact that it did not clearly name the parties against which it was initiating the procedure, it was in fact clear who it was aimed at. This level of respect for the procedural rules may be seen as contrary to the Kyoto Protocol's objective to, *inter alia*, '[c]ooperate with other . . . Parties to enhance the individual and combined effectiveness of their policies and measures'.[46] The decision shows great commitment to the wording of the rule, which could be explained by a lack of confidence on the part of the committee in its own 'jurisdiction' to rule on such matters. It also shows an

[45] Goeteyn and Maes (n 4) 33.

[46] Article 2(1)(b) Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed 11 December 1997, entered into force 16 February 2005, 2303 UNTS 162. See also Article 18.

unwillingness on the part of the committee to take matters into its own hands. An explanation for this behaviour may be that the committee does not have a traditionally 'judicial' mandate as do international courts and tribunals, and may have hesitated to take action without such traditionally understood 'judicial' legitimacy. This may contribute to an unclear institutional framework for the use of State-to-State procedures.

6.4.2 *Evidence*

Another procedural hurdle contributing to the scarce use of State-to-State triggers is the requirements for and handling of evidence during a State-to-State procedure. State-to-State triggers in MEAs allow for a State party to seize another State party before the compliance committee on the grounds of concern alone. In the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter the party must have an interest where it is affected or likely to be affected.[47] In the 2000 Cartagena Protocol on Biosafety and in the Rotterdam Convention it must be '*directly* affected or likely to be *directly* affected'.[48] The Basel Convention Compliance Mechanism is the most demanding in this respect, requiring a specific, bilateral relationship between the two parties involved in order to be triggered.[49] In all other MEAs, however, State parties may trigger this procedure without having to prove involvement or interest.[50] The benefit of this is that it facilitates the ability for States to easily trigger the procedure.

However, non-specially affected States may have more difficulty obtaining evidence that a certain State has violated an obligation in their shared convention. Indeed, States are still required to provide evidence of their claim in the form of an informational report. However, there are two obstacles to fulfilling this requirement.

[47] LC 39/16/Add.1 Annex 5, para. 4.1.3, available at https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/Revised%202017%20CPM.pdf.

[48] Cartagena Protocol, available at https://bch.cbd.int/protocol/cpb_art34_cc.shtml; Rotterdam Convention, Article 12(b) (emphasis added).

[49] A Fodella, 'Mechanism for Promoting Implementation and Compliance with the 1989 Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal' in Treves et al. (eds), *Non-Compliance Procedures* (n 9) 40; A Shibata, 'Ensuring Compliance with the Basel Convention: Its Unique Features' in Beyerlin et al. (eds), *Conclusions* (n 36) 81.

[50] VI.1(b) Kyoto Protocol; Montreal Protocol; LRTAP; Kyoto Protocol; Aarhus Convention; Espoo Convention; Water Protocol para 12(b); Rotterdam Convention.

First, it is perhaps difficult to imagine how a State would substantiate its claims in such a report if it were not directly affected. It is easier to substantiate claims and provide information for a matter that is of direct relevance to a State, as more information about the effects of the non-compliance is in the country itself. This closely mirrors traditional judicial inter-State disputes before international courts and tribunals.

Second, it is generally difficult for State parties to be aware of the level of compliance of other States. This would not be as much of a problem before international courts and tribunals because, at the ICJ for instance, proceedings involving *erga omnes partes* obligations have tended to be high-profile cases where evidence has already been collected by UN fact-finding missions or media outlets.[51] Therefore, even if the effects of the violation could not be measured on the State's territory, it could still obtain enough evidence to support its claim.[52] States' compliance with MEAs, however, does not garner the same level of publicity.

It is therefore more difficult for States who are not directly affected to corroborate their claims before compliance committees. This could explain why, in practice, only specially affected States have resorted to State-to-State triggers to date.[53] Regarding the attempt made by South Africa before the Kyoto Protocol Facilitative Branch, its submission was also rejected because it 'was not supported by corroborating information and did not substantiate how the question related to any of the specific commitments of the relevant parties under the Protocol'.[54]

6.4.3 *Expertise of Members of Compliance Committees*

State-to-State procedures would also benefit from clearer rules surrounding the appointment and expertise of compliance committee members, if

[51] For example, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro).*

[52] *Application (The Gambia v Myanmar)* (n 38) paras 71–72.

[53] For example, Aarhus Convention Decision *Romania v Ukraine*, available at https://unece.org/DAM/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.3.e.pdf; Aarhus Convention Decision *Lithuania v Belarus*, available at https://unece.org/env/pp/cc/accc.s.2015.2_belarus.

[54] S Oberthür and R Lefeber, 'Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after Four Years of Experience' (2010) 1 *Climate Law* 138–39; *Report of the Compliance Committee on the Deliberations in the Facilitative Branch Relating to the Submission*, FCCC/KP/CMP/2006/6, 22 September 2006, available at http://unfccc.int/kyotoprotocol/compliance/plenary/items/3788.php.

their use is to be enhanced. The range of expertise needed in order to be able to sit on a compliance committee is a point of contention, as the technical nature of a compliance committee may require non-legal skills, yet legal knowledge is essential to make adequate decisions. In order to make a decision on compliance, compliance committees need to rely on both legal and scientific or technical knowledge. This is often reflected in the rules, which might say for example that members 'shall have expertise relating to the subject matter of the Convention in areas including scientific, technical, socio-economic and/or legal fields', in the case of the Basel Convention Implementation and Compliance Committee.[55] Similar language is used for the PAICC.[56] This is an advantage that compliance committees may have over international courts, as the latter are often criticised for their lack of ability to handle scientific evidence.[57] One of the challenges of international adjudication, especially in an environmental context, is how judges handle complex facts, especially when they involve complex science, and how that affects their decision-making.[58]

However, it is not always clear whether the requirements concerning the legal and/or scientific skills of the committee members are fulfilled in practice. Before the Montreal Protocol Implementation Committee, member States of the Montreal Protocol appoint their representatives. This means there is no requirement to co-ordinate between member States, and therefore no guarantee that the committee itself will be composed of individuals with balanced and complementary expertise.[59] Even in the human rights context, the CERD stated explicitly in the *Qatar v Saudi Arabia* case that it initially could not take any decisions

[55] Sixth Meeting of the Conference of Parties to the Basel Convention, Decision VI/12, Terms of Reference, UNEP/CHW.6/40, para 5. Available at www.basel.int/Portals/4/Basel%20Convention/docs/meetings/cop/cop6/english/Report40e.pdf#page=45.

[56] ' . . . members with recognized competence in relevant scientific, technical, socioeconomic or legal fields'. Decision 20/CMA.1, FCCC/PA/CMA/2018/3/Add.2, para 5. Available at https://unfccc.int/sites/default/files/resource/cma2018_3_add2_new_advance.pdf.

[57] MM Mbengue, 'International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 53.

[58] K Sulyok, *Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication* (Cambridge University Press 2021); C Foster, *Science and the Precautionary Principle in International Courts and Tribunals* (Cambridge University Press 2011).

[59] F Romanin Jacur, 'The Non-Compliance Procedure of the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances That Deplete the Ozone Layer' in Treves et al. (eds), *Non-Compliance Procedures* (n 9) 17.

due to 'the legal complexity of the issues broached and a lack of resources'.[60]

6.4.4 *Impartiality and Independence of Members of the Compliance Committees*

Another difficulty in relation to the members of the compliance committees contributing to the limited use of State-to-State triggers relates to their impartiality and independence. An important procedural safeguard that ensures a fair procedure is to separate the relationship between the individual members and the State(s) of which they are citizens. Guaranteeing that the members are not influenced or manipulated by outside forces, especially by potential parties to a compliance procedure, is a key element to achieving a fair outcome. It is a well-established rule in the judicial context and has also been integrated into the provisions and rules governing most compliance committees.[61] The reason why the two notions of impartiality and independence are especially important in State-to-State compliance procedures is that the role of the compliance committee is more akin to that of an arbiter between two parties in such a procedure. This role requires the committees to show fairness and equality in the process, and this is ensured, *inter alia*, by having impartial and independent members.

In order to ensure independence, a lot of compliance committees require that their members act in their personal capacities, and not as representatives of their member States.[62] Indeed, once they have been elected, often according to rules of geographical and/or gender representation, they need to be able to decide in their own name, separately from the States that nominated them. An example of how to operationalise the concept of impartiality can be seen in the context of the PAICC, where '[m]embers and alternate members shall perform any duties and exercise any authority in an honourable, independent, impartial and

[60] OHCHR (n 22); OHCHR, 'Committee on the Elimination of Racial Discrimination Concludes its Ninety-Eighth Session' (10 May 2019), available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24601&LangID=E.

[61] R Mackenzie and P Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 *Harvard International Law Journal* 271; D Shelton, 'Form, Function, and the Powers of International Courts' (2009) 9 *Chinese Journal of International Law* 537, 545.

[62] A few examples can be found in the Cartagena Protocol (2000), the Aarhus Convention (1998), the Paris Agreement (2015) and the Rotterdam Convention (1998).

conscientious manner',[63] and they have to confirm in writing that they will do so at the beginning of their mandate.[64] They also have to 'disclose immediately any interest in any matter under discussion before the Committee that may constitute a real or apparent, personal or financial conflict of interest or that might be incompatible with the objectivity, independence and impartiality expected of a member', which then prevents them from being involved in matters related to the issues they disclosed.[65]

However, not all compliance committees are structured in the same way, and some important committees still have their members sit as representatives of parties, such as the Montreal Protocol and CITES.[66] When rules on impartiality and independence are not as clear, it can negatively affect the functioning of the committee. For instance, issues may arise when a member of the committee has a duty, as a civil servant, to relay information to its State.[67] This can impact the procedures and decision-making processes of the committee, as States before the committee may not feel free to share all necessary information for the committee to decide in the best possible way.

These guarantees of impartiality and independence may not be as essential in other roles performed by the compliance committees, especially as facilitators in compliance processes. However, when they act as arbiters in adversarial procedures, these guarantees are necessary and when they are lacking, this seriously undermines the State-to-State compliance procedures.

6.4.5 *Participation and Transparency*

Another procedural challenge in State-to-State procedures is the transparency of proceedings from the moment a State triggers the procedure against another State. While the State whose compliance is being called into question fully partakes in the proceedings and has the right to be

[63] Decision 24/CMA.3, Annex, 'Rules of Procedure of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, paragraph 2, of the Paris Agreement', FCCC/PA/CMA/2021/10/Add.3, Rule 3.3, para 1.

[64] Ibid., para 3.

[65] Ibid.

[66] Montreal Protocol MOP Decision X/10, Annex II: 'Non-Compliance Procedure (1998): Tenth Meeting of the Parties'; CITES Resolution Conf 18.2 Establishment of Committees, available at https://cites.org/sites/default/files/document/E-Res-18-02.pdf.

[67] Participant 2, question 4.

heard, the same cannot systematically be said for the State who initiated the procedure. Typically, the latter State will be excluded from the procedure going forward and will have no opportunity to take stock of matters with which it was initially concerned. In fact, meetings between the compliance committee and the party whose compliance is in question are closed to the public.[68] This is possibly favourable towards the party in question who can avoid public scrutiny, potential embarrassment and the divulging of sensitive information. However, it does an injustice to the State triggering the procedure who has expressed concern.

This is particularly so in instances whereby the State triggering the procedure is required to be affected or have an interest of some sort. For instance, regarding the 2001 Stockholm Convention on Persistent Organic Pollutants, one author has observed a contradiction between the fact that a party must be particularly affected in order to trigger the procedure – reflective of a more 'traditional, bilateral, state-to-state dispute approach' – but cannot participate in the consequent proceedings.[69] Similarly, transparency before the Basel Convention has been described as 'remarkably poor as far as ... the Party triggering the mechanism [is] concerned'.[70]

Before international courts and tribunals, State litigants are given equal rights of participation. Third States making requests for intervention are likewise fully integrated in written and oral proceedings if their request is granted.[71] Transparency is also an important feature of proceedings before international courts and tribunals. Before the ICJ, for example, written parties' submissions may be made public on or after oral proceedings with the parties' consent,[72] while oral hearings are made open to the public[73] and streamed live online.[74] At the International Tribunal for the Law of the Sea (ITLOS), written pleadings of the parties are publicly accessible even before oral pleadings commence.[75] The World Trade Organization (WTO) Dispute Settlement Mechanism's contrasting practices (confidential submissions by parties and closed oral hearings) have

[68] See for example, the Stockholm Convention, Terms of Reference para 16.
[69] Fodella (n 49) 40.
[70] Ibid., 40.
[71] Articles 62 and 63 ICJ Statute.
[72] Rules of the Court, 14 April 1978, entered into force 1 July 1978, Article 53(2).
[73] Unless the Court or both parties decide otherwise. See Article 46, ICJ Statute; Article 59, Rules of the Court.
[74] They are streamed on UN Web TV, available at http://webtv.un.org/.
[75] Rule 67(2) ITLOS Rules of Procedure.

been widely criticised, demonstrating the increasing importance that transparency yields in international law.[76] Generally, participation and transparency have become increasingly significant in international judicial processes.

Greater transparency and participation are certainly imaginable before non-compliance procedures,[77] without jeopardising their facilitative spirit. In the case of the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer, for example, '[a]lthough [it] is based on facilitative and amicable principles, it also envisages principles of due process, such as notification, right to a fair hearing and impartiality, which are usually found in traditional dispute settlement mechanisms'.[78]

6.4.6 *Outcomes of State-to-State Compliance Procedures*

The lack of clarity in the outcome that States can get from triggering such procedures may further discourage their use. Indeed, the political cost of triggering a compliance procedure may not justify such an uncertain outcome. The question States may ask is: What can they get out of a State-to-State compliance procedure? The answer to this question is twofold and can partly explain why State-to-State compliance procedures have not been popular so far.

First, the fact that the decisions are not final and binding renders the overall effect of the decisions weaker. Indeed, the decisions taken by compliance committees 'generally do not possess any legally binding force. Even if a non-compliance procedure results in giving an appropriate response to non-compliance, such a response would still be of only a preliminary nature, because it is up to the Conference of the Parties to take a final decision'.[79] The decisions taken by compliance committees

[76] S Charnovitz, 'Transparency and Participation in the World Trade Organization' (2004) 56 *Rutgers Law Review* 927; G Villalta Puig and B Al-Haddab, 'The Transparency Deficit of Dispute Settlement in the World Trade Organization' (2011) 8 *Manchester Journal International Economic Law* 2; G Marceau and M Hurley, 'Transparency and Public Participation: A Report Card on WTO Transparency Mechanisms' (2012) IV(1) *Trade, Law and Development*; L Wallach, 'Transparency in WTO Dispute Resolution' (1999-2000) 31 *Law & Policy International Business* 773; see also A Bianchi and A Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 4.

[77] G Handl, 'Compliance Control Mechanisms and International Environmental Obligations' (1997) 5 *Tulane Journal of International and Comparative Law* 29–49, 42–43.

[78] Romanin Jacur (n 59) 21.

[79] Beyerlin, Stoll and Wolfrum (n 36) 369.

are mostly endorsed by the Conference of the Parties – the governing body of the treaty – but theoretically the latter could depart from the initial decisions, or only adopt a part of them. In many instances, the compliance committee can take some decisions that are facilitative in nature, but when more punitive measures have to be taken, or those with financial consequences, the Conference of the Parties is the body that will take this type of decision.[80] This is contrary to judicial decisions rendered by international courts and tribunals, which are binding and final.

Second, the range of options available to compliance committees is also uncertain, rendering the outcome less predictable. Some measures that can be decided upon by compliance committees may also not necessarily suit a State-to-State compliance procedure. Facilitative measures include providing advice and information about how to facilitate compliance and requesting special reporting or action plans from the non-complying party. These may not be the desired outcome of a State-to-State compliance procedure.

Some potential outcomes could be more suitable from the perspective of a State triggering a non-compliance procedure, such as a declaration of non-compliance or a suspension of specific rights under the treaty. For instance, in the case between Lithuania and Belarus concerning Belarus' non-compliance with the Aarhus Convention, the Committee was able to conclude that Belarus had 'failed to comply' with a number of provisions of the Convention[81] and therefore recommended that 'the Party concerned takes the necessary legislative, regulatory and administrative measures and establishes practical arrangements'.[82] This type of decision raises a number of questions pertaining to the law of State responsibility and the law of treaties, which have been the object of debate.[83] The lack

[80] This separation exists for instance in the Basel Convention (1989), the Cartagena Protocol (2000), CITES (1973) and the Nagoya Protocol (2010). For a detailed list, see the overview provided by the Compliance Committee under the Cartagena Protocol on Biosafety, UNEP/CBD/BS/CC/13/INF/2, Annex I, 22 January 2016, 29–35.

[81] 'Findings and Recommendations with Regard to Submission ACCC/S/2015/2 Concerning Compliance by Belarus', para 161. Available at https://unece.org/sites/default/files/2021-07/S2_Belarus_findings_advance_unedited.pdf.

[82] Ibid., para 162.

[83] See for instance, M Fitzmaurice and C Redgwell, 'Environmental Non-Compliance Procedures and International Law' (2000) 31 *Netherlands Yearbook of International Law* 52–62; M Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3(1) *Yearbook of International Environmental Law* 123–62.

of clarity on these points may contribute to a misunderstanding of the role of State-to-State compliance procedures.

In sum, it is not the case that compliance committees do not have the means to address State-to-State requests, as shown in the Aarhus Committee decision regarding Belarus' compliance, but their role encompassing a broad range of actions may deter States from triggering them. Moreover, the frameworks within which compliance committees operate may prevent the latter from being more assertive in their decision-making, since they can only make recommendations that have to be adopted by the Conference of the Parties, which is constituted of States parties to the treaty in question. In other words, compliance committees may not have the tools necessary to make bolder decisions, as their overarching aim is still only facilitative – even in a more adversarial procedure – and their decisions are not final.

6.5 Conclusion

This chapter has sought to shed light on the reasons why State-to-State triggers are seldom used by State parties to MEAs. The reluctance of States is due firstly to the hostile perception of State-to-State compliance procedures and States' lack of motivation to defend communal interests in the environmental context. A number of procedural and institutional challenges were additionally identified, such as issues with jurisdiction, evidence, participation, impartiality and independence, the expertise of such compliance committees, and the outcomes of proceedings.

The chapter observed that, regarding procedural and institutional challenges, international courts and tribunals have more rigorous and effective practices than compliance committees. Not only do international courts and tribunals perform better in many of these respects, but their decisions generate a higher level of authority in the international legal system.[84] Therefore, a combination of the efficient procedural practices of international courts and tribunals and their authority make them a more suitable venue for States to take environmental disputes. This can partly explain why there is an undeniable increase in

[84] F Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9(2) *Journal of International Dispute Settlement* 291–314; AV Huneeus, 'Compliance with International Court Judgments and Decisions' in KJ Alter, C Romano and Y Shany (eds), *Oxford Handbook of International Adjudication* (2013) 437–63.

inter-State environmental disputes before international courts and tribunals.[85]

In an international legal system abundant with choices to keep States accountable to their obligations, compliance committees complement international courts and tribunals: compliance procedures provide a soft way to advise, encourage and influence States to comply with their obligations through assistance, aid and capacity building.[86] They are also helpful where State responsibility is difficult to establish in the environmental context. As Klabbers stated, 'there is . . . often no real wrongfulness at issue – causality between behaviour and environmental degradation is frequently difficult to establish with the degree of precision that the law would insist on'.[87] Judicial procedures, on the other hand, through binding judgments, force States into compliance where State responsibility for environmental degradation can be established. Non-compliance procedures may also be viewed as instruments of 'political rationality' or a 'symbolic exercise' attempting to demonstrate effort to address an issue, while judicial enforcement embodies an 'instrumental rationality' attempting to achieve a desired result.[88] Both may be used concurrently[89] and both, in different yet complementary ways, push States to respect their international environmental obligations.

Where, in the midst of this, does this leave State-to-State triggers? They have certain judicial or quasi-judicial features, but the procedures they trigger under MEAs will take place before compliance committees rather than in international courts or tribunals. They are also part of a menu of other triggers designed to be facilitative and to provide support

[85] For example, Obligations of States in respect of climate change (Request for an Advisory Opinion), ICJ, Order of 20 April 2023; Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), ITLOS, 12 December 2022; *Certain Activities varied out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Compensation, Judgment, ICJ Reports 2018, 15; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, 146 (on the marine environment).

[86] Goeteyn and Maes (n 4) 36.

[87] Klabbers (n 16) 1001. See more generally, M Bowman and A Boyle (eds), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford University Press 2002).

[88] Klabbers (n 17) 1005.

[89] P Sands, 'Non-Compliance and Dispute Settlement' in U Beyerlin, P-T Stoll and R Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Brill 2006) 353–58.

for capacity issues impeding States' compliance with MEAs – but are perceived to be more confrontational as opposed to facilitative in their nature. State-to-State triggers therefore sit in between judicial and non-judicial procedures, and between facilitation on one hand and enforcement on the other.

There is, however, room for State-to-State triggers to evolve out of this supposed identity crisis. This could involve mirroring judicial procedures to align more with the practices of international courts and tribunals. This may not be appealing to States but would give more teeth to environmental obligations. Especially in light of current global environmental crises, we believe that this direction is the most desirable for the future of our planet.