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Lessons from the Paris Agreement for International Pandemic Law and Beyond

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2.1 Introduction

Populations around the world today are physically and economically interdependent. They share a global economy, they share supply chains, they share the global environment, they share the earth's resources, they share the air that we breathe, they share contagious diseases and they share a reliance on nature's well-being. In this world of shared interests, conceiving of implementation and compliance primarily through a dispute settlement lens has become more outdated than ever before. Dispute settlement machinery deals with often bilateral individual disputes, and it deals with them once they have crystallised, and often retrospectively. Even in multilateral settings, it is likely to be focussed on a relatively narrow range of issues identified by the litigants in light of their immediate and longer-term strategic interests. In contrast, today's international problems increasingly require addressing *ex ante*, at times before major concerns become apparent. They call for dynamic processes that will review and re-review compliance. They correspond to a broad agenda calling for contemporaneous action by multiple Parties across multiple interrelated policy spheres. They require significant information flow, including scientific, technical and economic and social information.

Facilitative implementation and compliance processes like those found mainly in multilateral environmental agreements (MEAs) have the potential to help address this set of needs if we bring them into wider use across international law, and this chapter advocates their more widespread adoption in treaty regimes across diverse fields of international law. Provision for these processes should specifically be included in the expected treaty on pandemic preparedness and response, to which this chapter devotes its main attention, and the intended international legally binding instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine

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Biological Diversity of Areas Beyond National Jurisdiction (BBNJ),[1] as well as the plastics pollution treaty presently under negotiation.[2]

Frequently contrasted with formal international dispute settlement, such non-compliance mechanisms (NCMs) are generally characterised as providing a softer option. Indeed, a 'new generation'[3] of MEAs, including the Paris Agreement,[4] the Rotterdam Convention on the Prior Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade as it now operates[5] and the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes[6] now leave aside the enforcement elements seen in the non-compliance arrangements under earlier regimes like the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol),[7] the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[8] the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)[9] and

[1] International legally binding instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, UNGA Res 72/249, 24 December 2017, UN Doc A/RES/72/249.

[2] UNEP/EA.5/L.23/Rev.1 United Nations Environment Assembly of the United Nations Environment Programme, 2 March 2022; CA Cruz Carrillo, 'The Advisory Procedure in Non-Compliance Procedures: Lessons from the UNECE Water Convention' in C Voigt and C Foster (eds), *International Courts versus Non-Compliance Mechanisms: Comparative Advantages and Shortcomings* (Cambridge University Press 2024).

[3] M Fitzmaurice, 'The New Generation of Environmental Non-Compliance Procedures and the Question of Legitimacy' in C Voigt and C Foster (eds), *International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation* (Cambridge University Press 2024).

[4] Paris Agreement signed 12 December 2015, entered into force 4 November 2016, 1673 UNTS 125.

[5] 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.

[6] UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, signed 17 March 1992, entered into force 6 October 1996, 1936 UNTS 269.

[7] Montreal Protocol on Substances that Deplete the Ozone Layer, signed 25 November 1992, entered into force 14 June 1994, 1785 UNTS 517.

[8] Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed 3 March 1973, entered into force 1 July 1975, 1453 UNTS 243.

[9] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed 25 June 1998, entered into force 29 October 2001, 2161 UNTS 447; also with punitive elements see the Regional

the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[10] These 'new generation' regimes emphasise the practical facilitation of compliance, increasingly omitting sanctions for non-compliance and taking an explicitly non-confrontational approach.[11] The focus and the terminology being employed have both shifted towards implementation as well as compliance. We can arguably now talk of 'implementation and compliance mechanisms' rather than non-compliance mechanisms, but for simplicity the more general term 'non-compliance mechanisms' will continue to be used in this chapter.

Pursuing the argument that including facilitative NCMs in international pandemic law and beyond could help meet the needs of an increasingly interdependent world, this chapter is divided into four parts. The first part introduces the chapter. The second part considers the value that an NCM could add to the international law on pandemic preparedness and response. As negotiations for a new pandemic treaty progress, there are important opportunities to adopt machinery that will help ensure its better implementation. The third part investigates whether aspects of the facilitative compliance and accountability machinery in the Paris Agreement – as perhaps the most recent, sophisticated and universal of the NCMs in the various MEAs – could potentially be transferable to international pandemic law. While we have still to see the Paris Agreement's compliance and accountability machinery in operation over time in order to evaluate its strengths and weaknesses, the Paris model provides much food for thought. It is not too early to suggest that reflections on the Paris model can helpfully inform negotiations on compliance in new instruments across other fields of international law.

The fourth part underpins these practical discussions with an investigation of developments in the theoretical basis for NCMs, explaining

Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, known as the Escazú Agreement; MA Tigre, 'The Right to a Healthy Environment in Latin America and the Caribbean: Compliance through the Inter-American System and the Escazú Agreement' in C Voigt and C Foster (eds), *International Courts versus Non-Compliance Mechanisms: Comparative Advantages and Shortcomings* (Cambridge University Press 2024).

[10] Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed 11 December 1997, entered into force 16 February 2005, 2303 UNTS 162. J Brunnée, 'Promoting Compliance with MEAs' in J Brunnée, M Doelle and L Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press 2011) 38.

[11] G Handl, 'Compliance Control Mechanisms and International Environmental Obligations' (1997) 5 *Tulane Journal of International and Comparative Law* 29, 34.

that, in today's interdependent world, managerial and rationalist theories of compliance converge to support the adoption of facilitative implementation and compliance machinery. At the same time, facilitative implementation and compliance mechanisms will work in complement with the occasional exercise of international courts' and tribunals' jurisdiction and formal dispute settlement processes more generally. The chapter concludes with comments on associated questions of State responsibility as well as an update on relevant negotiations.

2.2 An NCM for International Pandemic Law?

International law on pandemic preparedness and response has not had a strong focus on the development of non-compliance machinery. Yet compliance with the central legal instrument, the International Health Regulations (IHR), is critical. The IHR concern matters including sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease. They were adopted by the World Health Assembly in 1969 under Article 21 of the WHO's Constitution.[12] They are binding on WHO member States by virtue of Article 22 of the Constitution and were reviewed in 1983 following the eradication of smallpox and in 2005 after the defeat of the novel coronavirus SARS-CoV (Severe Acute Respiratory Syndrome).

The IHR 2005 revolve around a set of concrete requirements relating respectively to capacity[13] and to notification and information sharing.[14] As to capacity, the key provisions in Article 5 and Article 13 require States to develop, strengthen and maintain respectively the surveillance capacity to detect, assess, notify and report events; and the public health response capacity to respond promptly and effectively to public health risks and public health emergencies of international concern. The WHO is to assist on request.[15] Eight inferred core capacities are in the areas of

[12] The IHR 2005 were adopted by the Fifty-eighth World Health Assembly on 23 May 2005. They entered into force on 15 June 2007.

[13] IHR 2005, Articles 5, 13 (n 12).

[14] IHR 2005, Articles 6–10 (n 12).

[15] In response to the call for a globally agreed minimum standard, the Parties added an Annex to the IHR in 2005 that sets out States' required capacities. See, G Bartolini, 'The Failure of "Core Capacities" under the WHO International Health Regulations' (2021) 70 *International and Comparative Law Quarterly* 233, 234. See respectively Annex 1(A) and (B): 'Core Capacity Requirements for Surveillance and Response'; and 'Core Capacity Requirements for Designated Airports, Ports and Ground Crossings'.

national legislation, policy and financing; coordination and national focal point communications; surveillance; response; preparedness; risk communication; human resources and laboratory services.[16] As to notification, the IHR call for notification by a WHO member State to the WHO within twenty-four hours of assessment of public health information of any event which may constitute a public health emergency in its territory, as well as the response and support received.[17] Further provisions of the Regulations deal with matters including the declaration of public health emergencies of international concern, the WHO adoption of temporary and standing recommendations, measures to be taken at points of entry, travel and transport-related public health measures, travel documentation, charges, additional health measures, collaboration and assistance, and further matters relating to administration and review of the regulations.

Public debate on the IHR's effectiveness has tended to focus on the emergency provisions, neglecting the underpinning significance of the capacity provisions and mechanisms to help ensure implementation.[18] The Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response observed that the IHR 2005 'do not contain a clear mechanism to monitor compliance with the many obligations of WHO and States Parties' other than a 'static self-assessment report on core capacities' and a WHO secretariat annual implementation report to the World Health Assembly.[19] Under Article 54(c) of the IHR 2005, States Party and the Director-General are to report to the Health Assembly on the implementation of these

[16] These eight core capacities are inferred in the WHO Secretariat's 'Checklist and Indicators for Monitoring Progress on the Development of IHR Core Capacities in States Parties', previously used for States' annual reports to the WHO on their implementation of the regulations. Bartolini (n 15) 238, citing WHO/HSE/IHR/2010.1.Rev.1 (2010) and following revision in 2013 WHO/HSE/GGR/2013.2 (2013).

[17] IHR 2005, Article 6 (n 12). See also Annex 2: 'Decision Instrument for the Assessment and Notification of Events That May Constitute a Public Health Emergency of International Concern'.

[18] GL Burci and M Eccleston-Turner, 'Preparing for the Next Pandemic: The International Health Regulations and World Health Organization during COVID-19' (2021) 2 *Yearbook of International Disaster Law* 259, 270.

[19] 'WHO's Work in Health Emergencies, Strengthening Preparedness for Health Emergencies: Implementation of the International Health Regulations (2005)', Report of the Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response, 30 April 2021, A74/9 (Review Committee on the COVID-19 Response), para 121.

Regulations as decided by the Health Assembly.[20] Historically, Article 54 reports were required to align with the indicators, scoring system and topics found in the WHO's 2010 IHR Core Capacity Monitoring Framework. However, since 2018 a self-scoring quantitative questionnaire has been used, known as the State Parties Self-Assessment Annual Reporting (SPAR) tool.[21] The number of States submitting annual reports has increased.[22] However, it has been argued that under the new model, the required content does not contribute effectively to identification of what is expected of States in terms of core capacities.[23] Furthermore, although the scores submitted by States in their reports may be made public, there is no subsequent critical review process.[24] Neither is there a clear adverse consequence in case of non-submission, late submission or incomplete reporting.[25] The processes used are evidently insufficiently focussed: '[t]hese reports, and the tools used to produce them, do not assess how well individual countries have performed on specific IHR functions and obligations.'[26]

The annual reporting process is the main feature of the WHO's 2016 IHR Monitoring and Evaluation Framework, also embracing three processes introduced in response to a call to move away from the self-evaluations on which Article 54 reports rely. These three processes are: voluntary joint external evaluations (JEEs); after-action reviews; and simulation exercises,[27] all of which remain voluntary. Figures published

[20] This takes place annually in accordance with World Health Assembly Resolution WHA61.2 (2008).

[21] A Berman, 'Closing the Compliance Gap: From Soft to Hard Monitoring Mechanisms under the International Health Regulations' (2021) 20 *Washington University Global Studies Law Review* 593, 598–99; Bartolini (n 15) 233, 239.

[22] Bartolini (n 15) 240, reports a rise from 127 reports in 2016 to 189 in 2018 and 173 in 2019, observing that greater detail is required on IHR 2005 core capacities under the 2019 WHO Benchmarks for International Health Regulations (IHR) Capacities, which the Secretariat drafted to help States in developing a Voluntary National Action Plan for Health Security. Citing WHO, 'NAPHS for ALL: A Country Implementation Guide for NAPHS' (2019) WHO/WHE/CPI/19.5.

[23] Bartolini (n 15) 240, observing that greater detail is required on IHR 2005 core capacities under the 2019 WHO Benchmarks for International Health Regulations (IHR) Capacities, which the Secretariat drafted to help States in developing a Voluntary National Action Plan for Health Security. Citing WHO, 'NAPHS for ALL: A Country Implementation Guide for NAPHS' (2019) WHO/WHE/CPI/19.5.

[24] Bartolini (n 15) 240.

[25] Ibid.

[26] Review Committee on the COVID-19 Response (n 19), para 121.

[27] Ibid., para 21.

in 2021 suggest that 112 on-site JEE missions had taken place, 64 reviews following public health action under the IHR, and 128 simulation exercises.[28] Refined in 2018,[29] the JEE process involves a State's preliminary self-assessment with subsequent on-site visits and reviews by a combined group of external and local experts.[30] Reliance within the JEE process on States' self-assessment is considered a weakness of the JEE process.[31] States' self-assessments are said to be an estimated 20 per cent higher than estimates of their capacity in JEE reports.[32] States' agreement is required for the experts' selection and methodology, and any publication of a JEE report.[33]

COVID-19 revealed critical gaps in pandemic preparedness, including gaps in governance, subnational gaps and capacity, essential public health functions, such as diagnosis/testing, contact tracing and treatment capacities.[34] According to the data reported to the WHO by State Parties, as at 2021 the vast majority of countries still had low or moderate levels of national preparedness.[35] The Review Committee also found that weak capacities were reported for emergency preparedness and response at points of entry.[36] Confounding matters, IHR core capacities alone did not prove to be a good predictor of pandemic response in respect of COVID-19.[37] COVID-19's magnitude and challenges overwhelmed many countries, including countries with high assessment scores.[38] There was 'a significant disconnect between the actual and perceived levels of preparedness'.[39] Compliance problems had, though, previously been fully apparent. Too many countries had missed the five-year deadline for development of the requisite capacities, even with second

[28] Bartolini (n 15) 243–44.
[29] WHO, 'Joint External Evaluation Tool: Second Edition' (2018).
[30] Berman (n 21) 599. JEEs focus on 19 technical areas using 49 indicators and approximately 200 technical or contextual questions. Bartolini (n 15) 244, though noting there has been criticism of quality and accuracy of some indicators.
[31] Bartolini (n 15) 244.
[32] Berman (n 21) citing the work of the 2015 Review Committee on Second Extensions for Establishing National Public Health Capacities in IHR Implementation.
[33] Bartolini (n 15) 244.
[34] Review Committee on the COVID-19 Response (n 19), para 25.
[35] Ibid., para 23.
[36] Ibid.
[37] Ibid.
[38] Ibid., para 27.
[39] Member States Working Group on Strengthening WHO Preparedness for and Response to Health Emergencies (WGPR), 'Preliminary Findings From COVID-19-Related Recommendation Mapping', A/WGPR/2/3, 26 August 2021, para 11.

extensions.[40] Reviews of the functioning of the IHR following past disease outbreaks including H1N1 and Ebola had provided relevant readings on the state of under-preparedness and the under-implementation of the IHR.[41] And, to be fair, two thirds of States' own annual reports to the WHO indicated only a poor or modest preparedness, at a level of 1 to 3 out of 5.[42] Even with progress in the evaluation of core capacities from 2016 to 2018,[43] the compliance problem had attracted serious concern to the point where the WHO had identified protection from health emergencies as one of three strategic priority areas for the World Health Organization in the 2019–2023 period.[44]

Strengthening the effectiveness and implementation of, and compliance with, the IHR 2005 is now a clear area of priority for all member States.[45] Improved compliance with the international law on pandemic preparedness and response is central to preventing fresh iterations of the experience with COVID-19, or worse, in the case of future emerging pandemics, and clearly requires greater attention. Initially a 2021 World Health Assembly mandate tasked the WHO Member States Working Group on Strengthening WHO Preparedness and Response to Health

[40] IHR 2005 Articles 5(2) and 12(2) and Annex 1(A) para 2 provided for two-year extensions subject to States' development and implementation of action plans.

[41] e.g., Report of the Review Committee on the Functioning of the International Health Regulations (2005) in relation to Pandemic (H1N1) 2009, WHO (2011), available at https://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_10-en.pdf. Summary at https://theindependentpanel.org/wp-content/uploads/2020/10/IndependentPanel_Mapping-Exercise.pdf, para 26.

[42] Bartolini (n 15) 241, citing WHO, 'Thematic Paper on the Status of Country Preparedness Capacities', 25 September 2019.

[43] O Jonas, R Katz, S Yansen, K Geddes and A Jha, 'Call for Independent Monitoring of Diseases Outbreak Preparedness' (2018) 361 *British Medical Journal* 361, mapping completion of States' joint external evaluations in partnership with the WHO.

[44] WHO, 'Thirteenth General Programme of Work 2019–2023' WHO/PRP/18.1, approved by the Seventy-first World Health Assembly in Resolution WHA71.1 on 25 May 2018, 7. See also 'Five-Year Global Strategic Plan to Improve Public Health Preparedness and Response 2018–2023' adopted by the World Health Assembly in 2018, WHA 71(15), 26 May 2018.

[45] Bureau's Summary Report of the Second Meeting of the Working Group on Strengthening WHO Preparedness and Response to Health Emergencies, 1–3 September 2021, A/WGPR/2/4, 1 October 2021, para 2(a). See also Zero Draft, 'Report of the Member States Working Group on Strengthening WHO Preparedness for and Response to Health Emergencies to the special session of the World Health Assembly', Report of the Fourth Meeting of the Working Group on Strengthening WHO Preparedness and Response to Health Emergencies, A/WGPR/4/3, 28 October 2021, (Zero Draft) para 3.

Emergencies (WGPR) to assess the benefits of developing such a convention, agreement or instrument on pandemic preparedness and response.[46] On 1 December 2021 the WHA established a new Intergovernmental Negotiating Body to work on the intended instrument, with the WHO secretariat tasked in March 2022 to prepare a draft text, in an open and inclusive manner. In parallel the WGPR continued to consider improvements to the IHR 2005. In July 2022 governments decided that the new instrument would be legally binding and would be adopted under Article 19 of the WHO Constitution. It has remained unclear whether improved compliance and implementation procedures will be elaborated in the context of the expected new instrument.[47] However, during the period this book was being produced, governments began to turn their attention more closely to this question.

The reports and reviews on which the intergovernmental negotiations and WGPR are drawing have addressed implementation and compliance in broad terms only. These reports and reviews have included reports of the Independent Global Preparedness Monitoring Board,[48] the WHO's Review Committee on the functioning of the IHR 2005 during the COVID-19 Response,[49] the Independent Panel for Pandemic Preparedness and Response (IPPR)[50] and the WHO's Independent Oversight Advisory Committee.[51]

2.2.1 Proposals for Compliance Mechanisms

2.2.1.1 Global Preparedness Monitoring Board

The Global Preparedness Monitoring Board, an entity comprising political leaders, agency principals and experts co-convened by the Director-General of the World Health Organization and the President of the

[46] 'Special Session of the World Health Assembly to Consider Developing a WHO Convention, Agreement or Other International Instrument on Pandemic Preparedness and Response', Resolution WHA74 (16), 1 May 2021.

[47] See, in 2021, Bureau's Summary Report of the Second Meeting (n 45), para 2(a). See also Zero Draft (n 45), para 3, paras 22(d) and 26.

[48] In particular, 'From Worlds Apart to a World Prepared', Global Preparedness Monitoring Board Annual Report 2021 (GPMB 2021).

[49] Review Committee on the COVID-19 Response (n 19).

[50] Report of the Panel for Pandemic Preparedness and Response (IPPR), 'Make it the Last Pandemic', May 2021, 52, available at https://theindependentpanel.org/.

[51] 'From Worlds Apart' (n 48); Report of the Independent Oversight and Advisory Committee for the WHO Health Emergencies Programme, A74/16, 5 May 2021 (IOAC 2021).

World Bank, emphasised the critical importance of strengthened independent monitoring to incentivise action and engender greater mutual accountability.[52] Independence is key; a monitoring body must be 'autonomous, unconstrained by political, organizational, operational or financial considerations'.[53] Objectivity is essential, assessments must be evidence-based, transparent and independently verifiable.[54] For monitoring to generate accountability, assessments and recommendations must then be expected to lead to action.[55]

2.2.1.2 Review Committee on the Functioning of the International Health Regulations (2005)

The Review Committee on the Functioning of the International Health Regulations (2005) convened by the WHO Director-General under the IHR to review the Regulations' functioning during the COVID-19 Response recommended that the WHO 'should continue to review and strengthen tools and processes for assessing, monitoring and reporting on core capacities, taking into consideration lessons learned from the current pandemic, including functional assessments, to allow for accurate analysis and dynamic adaptation of capacities at the national and subnational levels'.[56] Practical exercises may be necessary to gauge as well as to improve capacity and functioning. The Review Committee suggested that '[a] combination of static measurements of capacities scores, and dynamic assessments through external evaluations, simulation exercises and after-action reviews, were found to provide a more complete overview of both the existence and functionality of capacities'.[57] The Committee also recommended that 'WHO should work with States Parties and relevant stakeholders to develop and implement a universal periodic review mechanism to assess, report on and improve compliance

[52] 'From Worlds Apart' (n 48), 5, 9, 12, 38, referring also to collective financing, echoing the Paris Agreement where accountability and compliance mechanisms embrace obligations to report on finance flows. See also GL Burci, S Moon, ACR Crosato Neumann and A Bezruki, 'Envisioning an International Normative Framework for Pandemic Preparedness and Response: Issues, Instruments and Options', Institutional Repository, Graduate Institute Of International And Development Studies, University of Geneva, 2021, available at https://repository.graduateinstitute.ch/record/299175?ln=en, 18.

[53] 'From Worlds Apart' (n 48) 38.

[54] Ibid. The GPMB has said it is developing a Monitoring Framework as a robust platform for monitoring the world's pandemic preparedness.

[55] Ibid.

[56] Review Committee on the COVID-19 Response (n 19) 25.

[57] Ibid., para 26.

with IHR requirements, and ensure accountability for the IHR obligations, through a multisectoral and whole-of-government approach'.[58] The Committee noted that as it operated in the human rights arena, universal periodic review had helped foster intersectoral coordination, whole-of-government approaches and civil society engagement, as well as encouraging participation and good practices, with implementation of its recommendations linked to the Sustainable Development Goals and other government agendas.

2.2.1.3 Independent Oversight and Advisory Committee for the WHO Health Emergencies Programme

The Independent Oversight and Advisory Committee for the WHO Health Emergencies Programme was established in 2016 with an advisory and oversight function in respect of the WHO's work in disease outbreaks and emergencies and necessarily has a collaborative relationship with the WHO secretariat. The Committee's 2021 report iterated that the COVID-19 pandemic has exposed failings in pandemic preparedness and response across the world, with national and international systems struggling and health systems overwhelmed, highlighting shortcomings in the IHR 2005 and their application by member States and the WHO secretariat.[59] Stricter compliance with the IHR 2005, together with stronger international solidarity, was of the utmost importance in facing future pandemic threats.[60] The Committee aligned itself with the Review Committee's recommendation to introduce a mechanism to foster whole-of-government accountability,[61] and sought a review by the secretariat of the existing tools and framework for national and international preparedness, including JEEs and national action plans. The Committee intends to keep this area of work under close review.[62]

2.2.1.4 Independent Panel for Pandemic Preparedness and Response

The IPPR, co-chaired by Helen Clark and Ellen Johnson Sirleaf, was convened by the World Health Organization (WHO) Director-General in response to 2020 World Health Assembly (WHA) Resolution

[58] Ibid., 54.
[59] Report of the Independent Oversight and Advisory Committee (n 51), para 7.
[60] Ibid., para 22.
[61] Ibid., para 19.
[62] Ibid., para 21.

WHA73.1 to evaluate the world's response to the COVID-19 pandemic. The IPPR's Report (i) called for immediate action to alleviate the devastating reality of the COVID-19 pandemic, and (ii) set out a roadmap for fundamental transformation in the international system for pandemic preparedness and response.

Centrally for present purposes, the report recommended investment in preparedness now, and not when the next crisis hits, with critical accountability mechanisms to spur action. The report also recommended stronger leadership and better coordination at national, regional and international level, including a more focussed and independent WHO, a pandemic treaty and a senior Global Health Threats Council; an improved system for surveillance and alert at a speed that can combat viruses like SARS-CoV-2, and new authority for the WHO to publish information and dispatch expert missions immediately; a pre-negotiated platform for production and equitable distribution of vaccines, diagnostics, therapeutics and supplies; and access to financial resources as a vital investment in preparedness and for immediate availability at the onset of a potential pandemic.[63] Highlighting the failure to take pandemics seriously, the report emphasised that the world had attended insufficiently to accumulated warnings following the 2003 SARS epidemic, the 2009 H1N1 influenza pandemic, the 2014–2016 Ebola outbreak in West Africa, Zika and other disease outbreaks, including Middle East respiratory syndrome (MERS).[64] In the Report's own words, the majority of pandemic preparedness and response recommendations had not been implemented.[65] National pandemic preparedness was vastly underfunded,[66] and too many national governments lacked solid preparedness plans and core public health capacities.[67]

The Panel incorporated a central focus on the question of accountability, capacity building and access to finance in its section on leadership. In recommending that States establish a Global Health Threats Council, the Panel intended to secure high-level political leadership for pandemic preparedness and response, and ensure the subject would gain

[63] Report of the Panel for Pandemic Preparedness and Response (n 50), 45. For summary and analysis, C Foster, 'Report of the Panel for Pandemic Preparedness and Response (IPPR), "Make it the Last Pandemic"' (Oxford International Organizations 2022).
[64] Ibid., 15.
[65] Ibid., 16.
[66] Ibid., 17.
[67] Ibid., 18.

sustained attention.[68] This body would monitor progress towards the goals and targets to be set by the WHO, as well as against new scientific evidence and international legal frameworks, and report on a regular basis to the United Nations General Assembly and the WHA. Actors would be held accountable including through peer recognition and/or scrutiny and the publishing of analytical progress status reports.[69] This would operate in a context of coordinated leadership from the WHO, the International Monetary Fund (IMF), the World Bank and the United Nations Secretary-General, as well as regionally.[70]

The Panel proposed incorporation of relevant pandemic considerations into existing instruments used by the IMF and World Bank, as well as the amalgamation of disaster risk reduction capacity building which has largely been separated from health sector pandemic preparedness efforts.[71] The Panel recommended further that the WHO set new and measurable targets and benchmarks for pandemic preparedness and response capacities against which all national governments should update their national preparedness plans within six months.[72] The Panel recommended formalising universal periodic peer reviews of national pandemic preparedness and response capacities against the WHO's targets as a means of both accountability and learning between countries. The Panel suggested also that, as part of its regular consultation with member countries under Article IV of the IMF's Articles of Agreement, the IMF should routinely include a pandemic preparedness assessment, including an evaluation of economic policy response plans. Five-yearly Pandemic Preparedness Assessment Programs should also be instituted in each member country, in the same spirit as the Financial Sector Assessment Programs, jointly conducted by the IMF and the World Bank.[73] Incentivising speedy action on outbreaks to reward early and precautionary response action will be key.[74]

[68] Ibid., 46.
[69] Ibid., 47.
[70] Ibid., 46.
[71] Ibid., 50.
[72] Ibid., 51.
[73] Ibid.
[74] Ibid., 52. See, proposing the establishment of a specific instances enquiry mechanism to provide accountability for trade restrictions, C Foster, 'Disease Outbreak Disclosure and Trade in Goods: A Specific Instances Inquiry Mechanism?' (2020) 18 *New Zealand Yearbook of International Law* 3.

2.2.2 *Evaluating the Proposals*

An appropriate NCM supported by the secretariat of the WHO has the potential to add value to all the options contemplated above, helping bridge the gaps in the presently contemplated IHR 2005 compliance and implementation processes, and assisting the international community in meeting on an enduring basis the imperative need for robust pandemic preparedness and response. This would involve a shift away from viewing compliance as a matter of setting up a layer of '[i]ndependent monitoring, evaluation and oversight',[75] to the expectation of a more engaged form of ongoing member State accountability. Although peer recognition, public scrutiny and transparency will be significant motivators for compliance, many of the proposed mechanisms are not closely enough focussed on an on-the-ground engagement with realities of public health and communications systems in each WHO member State. Prior experience suggests that such proposals are likely to remain insufficient, given the ongoing difficulties and wide gap between capacity required under the IHR 2005 and WHO member States' actual capacity to deal with contagious disease outbreaks. The inter-linkage of implementation and compliance with questions of equity, finance and capacity building also calls for hands-on practical and informed country- and case-specific attention.

The proposed Global Health Threats Council also differs from an NCM in that it would be high level only, and the idea does not initially appear to have met with strong support from member States.[76] World Health Organization targets for achievement of core capacities would help reinforce resolve and political will. However, target-setting arguably needs to be accompanied by means of differentiating the challenges faced by different populations, communities and bureaucracies with a view to close-range analysis and assistance. The IPPR's suggested IMF and World Bank procedures may serve as pragmatic planks for the development of pandemic preparedness and response capacity. Yet these are financial institutions. Although pandemic preparedness and response is a whole-of-government endeavour and economic concerns are central,

The idea of recognising a disclosing country's 'right' to assistance has also been considered. '2022 Beeby Exchange, "Prospects for a Global Pandemic Treaty"', Wellington, 3 March 2022.

[75] Member States Working Group on Strengthening WHO Preparedness for and Response to Health Emergencies (n 39) Annex.

[76] See, e.g., Zero Draft (n 45) para 22(h).

there is a strong case that compliance machinery for aspects of pandemic preparedness and review relating directly to health systems should be housed in an institution experienced in health policy.

The idea of a universal periodic review (UPR) would go some way towards reinforcing compliance needs and identifying implementation gaps, but does not appear to offer the schematic complexity or focussed expert attention, support and communication that an NCM could bring to bear. The UPR model seen in the human rights field is set up to provide a review of all States' fulfillment of human rights commitments once every four and a half years, through a series of three two-week periods annually where a State's representatives are interviewed by other States' representatives. This is combined with a country visit by experts from the roster of the Office of the High Commissioner for Human Rights. A working group proposes a set of recommendations and the State concerned then decides which recommendations merely to note and which to accept and implement.[77]

Conceptually, the UPR seems in certain respects an unusual fit for pandemic preparedness law. The UPR concept brings with it overtones of the special sensitivity of States to potential criticism of their human rights records. Reflecting this orientation, the description of the UPR process on the website of the Office for the High Commissioner of Human Rights refers to it as 'a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries'.[78] Yet, because pandemics affect all countries, and in such serious ways, it seems inappropriate to carry such a sensitivity over to the field of pandemic law. There is also the risk that the idea of a UPR, drawing inspiration from the human rights domain,[79] will reinforce the idea that the implementation of the IHR 2005 is essentially for the well-being of a State's own citizens, even though in the context of contagious diseases, reviews of any one State are critical for all States. There are elements in common with Trade Policy Reviews in the World Trade Organization (WTO).

The adjusted denominator 'Universal Health Preparedness Review' (UHPR) has been employed to describe a pilot process in the WHO, for which WHO member States from all regions have expressed

[77] Review Committee on the COVID-19 Response, (n 19) 53.
[78] www.ohchr.org/en/hr-bodies/upr/upr-main.
[79] Review Committee on the COVID-19 Response, (n 19) para 123.

appreciation.[80] It will be interesting to see the results of the WHO UHPR which is described as involving a 'Member State-driven intergovernmental consultative mechanism' involving 'volunteer and peer-to-peer' (i.e., State-to-State) reviews of States' preparedness capacities.[81] Even if States decide that a UHPR is the best way forward for helping ensure compliance with international pandemic law, it would be valuable to see the UHPR process evolve in ways that incorporate various of the independent, expert, tailored and facilitative elements of the type we see in the non-compliance machinery of the Paris Agreement and elsewhere.

The next section of this chapter examines the Paris Agreement model more closely, including features to consider for transfer to international pandemic law and beyond.

2.3 The Paris Agreement's Compliance and Accountability Machinery as a Model for International Pandemic Law

The Paris Agreement is of a particular character in that participating States' emissions reductions targets or Nationally Determined Contributions (NDCs) are self-specified. There is no obligation in the Paris Agreement compelling their realisation (although NDCs are subject to the Agreement's requirements that each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition).[82] Accordingly the Paris Agreement's accountability and compliance arrangements focus on a range of other administrative and procedural obligations and processes intended to help bring about the Agreement's effective implementation.

Compliance with the Paris Agreement is encouraged through several overlapping mechanisms including: accountability in relation to NDCs, an enhanced transparency framework and the work of the Implementation and Compliance Committee. In addition, there is the

[80] Zero Draft (n 45) para 20(b).

[81] https://apps.who.int/gb/COVID-19/pdf_files/2021/25_11/Item2.pdf.

[82] Paris Agreement, Article 4(3). See L Rajamani, 'The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations' (2016) 28(2) *Journal of Environmental Law* 337; and earlier C Voigt and F Ferreira, '"Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5 *Transnational Environmental Law* 2, 285–303.

Global Stocktake, and additionally the possibility of dispute settlement.[83] Communication, reporting and accounting requirements for NDCs are central.[84]

The Enhanced Transparency Framework (ETF) is established under Article 13. The ETF involves compulsory submission of national greenhouse gas inventory reports (NIRs) and information necessary to track progress in implementing and achieving a Party's NDC.[85] The transparency framework is to be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, avoiding placing an undue burden on the Parties.[86] Biennial transparency reports (BTRs) are expected, and NIRs may also be provided as stand-alone documents for developed countries reporting annually. For developed country Parties, the BTR must also contain information on finance provided and mobilised, as well as on technology transfer and capacity building for developing country Parties. Each report goes through an independent Technical Expert Review (TER). The Technical Expert teams review the consistency of the information submitted with requirements in the ETF's Modalities, Procedures and Guidelines (Article 13 MPG).[87] The review also requires consideration of the Party's implementation and achievement of its NDC, consideration of the Party's support provided, identifying areas of improvement for the Party relating to the implementation of Article 13, and, for those developing country Parties that need it in the light of their capacities, assistance in identifying capacity-building needs.[88] A report is prepared containing recommendations with respect to these mandatory reporting requirements. The TER

[83] C Voigt and G Xiang, 'Accountability in the Paris Agreement: The Interplay between Transparency and Compliance' (2020) 1 *Nordic Environmental Law Journal* 31–57; see also C Voigt, 'Accountability in the Paris Agreement (Transparency and Compliance)', 9 April 2021, The Road to COP 26/CMA 3 Preparatory Lecture Series.

[84] See Paris Agreement, Article 4.8, 4.9, 4.13.

[85] Article 13(7), see also Article 13(8) on adaptation and Article 13(9) on finance flows.

[86] Article 13(3); Decision 18/CMA.1, Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement, FCCC/PA/CMA/2018/3/Add.2 (19 March 2019) (Article 13 MPG), Annex, para 148.

[87] Article 13 MPG (n 86), and Decision 5/CMA.3, Guidance for Operationalizing the Modalities, Procedures and Guidelines for the Enhanced Transparency Framework Referred to in Article 13 of the Paris Agreement.

[88] Article 13 MPG (n 86), para 146; H van Asselt and K Kulovesi, 'Article 13: Enhanced Transparency Framework for Action and Support' in G van Calster and L Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar 2021) 302, 319–22.

is followed by a Facilitated Multilateral Consideration of Progress (FMCP).[89] This is a plenary dialogue which involves a biennial question-and-answer session and then a working group session.[90]

The Paris Agreement's Implementation and Compliance Committee was established under Article 15(1) as part of a 'mechanism to facilitate implementation of and promote compliance with the agreement' and the Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC) serving as the Meeting of the Parties to the Paris Agreement (CMA) adopted the Committee's rules of procedure in 2021[91] and 2022.[92] Article 15(2) specifies that the mechanism 'shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive' and that the Committee is to pay particular attention to the Parties' respective national capabilities and circumstances. The Committee is a standing body with geographically and politically representative composition. Its mandate is discrete from that of the other bodies and elements of the Paris Agreement's overall accountability and compliance scheme previously discussed.[93] The Committee is to address individual Party's performance within the parameters of the modalities and procedures (MP) adopted by the CMA in 2018 to guide the Committee's work.[94]

[89] van Asselt and Kulovesi (n 88), 322–23; G Zihua, C Voigt and J Werksman, 'Facilitating Implementation and Promoting Compliance with the Paris Agreement: Conceptual Challenges and Pragmatic Choices' (2019) 9 *Climate Law* 65, 90, citing Article 13 MPG (n 86) Annex, ch. VIII.

[90] Zihua, Voigt and Werksman (n 89), 79, citing Article 13 MPG (n 86) Annex, paras 191–99.

[91] Decision 24/CMA.3, Rules of Procedure of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, paragraph 2, of the Paris Agreement.

[92] Report of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, paragraph 2, of the Paris Agreement, Decision -/CMA.4, Rules of Procedure of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, paragraph 2, of the Paris Agreement, 14 November 2022, available at https://unfccc.int/sites/default/files/resource/cma4_auv_16_PAICC.pdf

[93] Zihua, Voigt and Werksman (n 89).

[94] Decision 20/CMA.1, Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, paragraph 2, of the Paris Agreement, FCCC/PA/CMA/2018/3/Add.2, Annex (19 March 2019) (MP).

Consideration of a Party's situation by the Committee may be initiated in three different ways depending on the issues of concern.[95] Firstly, as seen in many MEAs including the Montreal Protocol, a State may refer issues related to its own implementation or compliance to the Committee of its own motion.[96] Secondly, consideration of a Party's situation by the Committee may be initiated automatically as a matter of course in certain types of situation where non-compliance is apparent on the face of the public record, as provided for under the Agreement in relation to a Party's non-fulfillment of its obligation to communicate or maintain an NDC, its reporting obligations[97] or non-participation in the FMCP.[98] Thirdly, with a Party's consent, the Committee may deal with cases involving significant and persistent inconsistencies between the information a State has submitted within the ETF and Article 13 MPG.[99] Additionally, the Committee has a role, as seen in MEAs, including the Minamata Convention on Mercury[100] and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[101] in identifying and making recommendations to the CMA on issues of a systemic nature, at its own initiative or on the request of the CMA.[102]

The Committee is to constructively engage a Party at all stages, remaining in regular contact or making all efforts to do so.[103] The MP recognise several types of action that the Committee may take in order to help bring about a Party's compliance with the Paris Agreement.[104] Firstly, the Committee may engage in a dialogue with the Party, to identify the challenges the Party is facing in implementing the Paris Agreement and make recommendations as well as share information

[95] L Benjamin, R Haynes and B Rudyk, 'Article 15: Compliance Mechanism' in G van Calster and L Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar 2021) 347, 356.
[96] Para 20. Zihua, Voigt and Werksman (n 89), 83–85.
[97] MP (n 94), para 22(a).
[98] Ibid.
[99] Ibid., para 22(b). See also MPGs (n 86).
[100] Minamata Convention on Mercury, signed 10 October 2013, entered into force 16 August 2017.
[101] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, signed 22 March 1989, entered into force 5 May 1992, 1673 UNTS 57.
[102] Zihua, Voigt and Werksman (n 89) 94–96.
[103] Benjamin, Haynes and Rudyk (n 95) 355.
[104] Zihua, Voigt and Werksman (n 89) 80–83.

on how to access support, thus acting as a 'source of advice and assistance'.[105] Secondly, the Committee may assist the Party in its engagement with institutions that may be able to help meet its needs in relation to finance, technology and capacity building to help it better implement its obligations.[106] The Committee may make recommendations in this regard to the Party concerned, and communicate those recommendations to the relevant institutions. Thirdly, as in the case of compliance committees operating under other MEAs, the Committee may recommend a Party's development of an action plan, providing assistance on request, and encourage a Party that has developed a plan to inform the Committee of its implementation progress.[107] Fourthly, in readily identifiable circumstances, the Committee may issue findings of fact regarding a Party's non-participation in the FMCP,[108] or a Party's non-submission of particular communications and reports.[109] These communications and reports comprise the communication (and maintenance) of an NDC,[110] NIRs,[111] information necessary for tracking progress in implementing and achieving NDCs[112] and, in the case of developed country Parties, information on support provided or mobilised to developing country Parties, as well as communication of finance to be provided (*ex ante*) to developing countries.[113]

The Implementation and Compliance Committee's work has to be considered in the context of the Paris Agreement's accountability and compliance scheme as a whole. The Committee's work complements the TER. The Committee provides a backstop in cases of repeated inaction, while the TER also performs aspects of a facilitative role. The FMCP that follows the TER process provides a plenary inter-State process enabling all States to take partial ownership of the drive for compliance. The Paris Agreement's Global Stocktake, also mentioned, enables the efforts of all to be evaluated against appropriate benchmarks. Global Stocktakes will take place every five years, beginning in 2023, as a way to consider the combined, collective performance of all Parties. The Global Stocktake

[105] MP (n 94) para 30(a).
[106] Ibid., para 30(b) and (c).
[107] Ibid., para 31.
[108] Ibid., para 22(a)(iii).
[109] Ibid., para 30(e).
[110] Ibid., para 22(a)(i); see Article 4(2) Paris Agreement.
[111] Ibid., para 22(a)(ii); see Article 13(7) Paris Agreement.
[112] Ibid., para 22(a)(ii); see Article 13(7)(b) Paris Agreement.
[113] Ibid., para 22(a)(ii); see Article 13(9), 9(5), 9(7) Paris Agreement.

process collects and assesses technical information, leading to a discussion of the findings that will inform all Parties' actions under the Agreement on an ongoing basis.[114]

The value added to the Paris Agreement by its combined accountability and compliance arrangements is clear. They can be expected to make a significant difference to the Agreement's implementation. Their standout features include the way they embrace global and technical processes, including with plenary participation, as well as Party-specific compliance committee processes involving a higher level of facilitative engagement. Parties to the Paris Agreement will be able to turn to the Implementation and Compliance Committee to gain access to increased assistance with implementation, and for support in the adoption and rollout of action plans where needed. The Committee's power to make findings of fact will also be significant for formal transparency as well as constituting a partial sanction for certain of States' implementation failures.

Like the Paris Agreement, the IHR 2005 represent a body of international law where interdependence is strong and coordinated regulation is essential. The regulatory and administrative actions taken by States to give effect to their commitments will be crucial. Yet in the WGPR there appears to be as yet an insufficient focus on how new compliance arrangements could assist with helping ensure the implementation of international law on pandemic preparedness and response 'on the ground'.

In summary, what does the Paris Agreement model offer in relation to the development of compliance machinery for the IHR and potentially more widely? Of all the features of the Paris regime, aspects of the Implementation and Compliance Committee's role may be the most valuable to consider for transfer, combined with an appropriate form of prior technical review like the FMCP, which has some similarities with the idea of universal periodic reviews already under discussion and trial in the WHO. The Implementation and Compliance Committee is an independent standing body mandated to take an objective perspective.[115]

[114] Zihua, Voigt and Werksman (n 89) 79.

[115] Even though she considers standing review bodies to fall at the high end on a spectrum of possible mechanisms arranged according to intrusiveness, Berman recommends for the IHR 2005 both stronger, mandatory reporting and an independent standing review body, together with external inspections subject to oversight and incorporating an element of potential support. Bartolini also recommends mandatory independent evaluations. Cf Lin, who also envisages a 'compliance and accountability' committee but envisages a quasi-adjudicatory body whose focus is on a pandemic response rather than

Concepts of dialogue, support and potentially ongoing processes underpin how the Committee will function. The CMA's modalities and procedures specifically envisage this idea of dialogue,[116] in which there is an exchange of communications elucidating a Party's situation and the challenges it faces. The Committee's independent status and express mandate to make recommendations and to share information on how to access support is important, together with the capacity to recommend a Party develop an action plan and to assist with this on request, also looking at a Party's progress under the plan where a Party accepts the Committee's encouragement to keep the Committee informed.[117]

The Committee's power to make findings of fact is also potentially transferable, as is its systemic role, which could be valuable in the IHR 2005 and similar contexts to help identify needs for targeted multi-jurisdictional implementation assistance programmes. There is merit, too, in potentially transferring the global stocktaking notion to the IHR 2005, even taking into account that managing a diminishing planetary carbon budget is naturally different to preparations for preventing the international spread of diseases. Processes that will catalyse political motivation at the highest level have an important role to play.[118] Global stocktaking in the pandemic context could embrace both States' individual domestic pandemic readiness and the extent to which countries have jointly engaged in the necessary level of planning for international co-operation on all aspects of disease outbreak and pandemic management.

An overarching difference remains between the Paris Agreement and many international agreements, including the IHR 2005: States' substantive emissions reductions targets in the Paris Agreement are not binding and indeed are individually determined by States themselves. The Paris Agreement's compliance and accountability machinery is oriented around ensuring implementation of the Parties' reporting obligations, although there is also potential for a Party to seek the Implementation and Compliance Committee's engagement when struggling to meet its NDC target. In contrast, the IHR 2005 set down the substantive capacity

preparedness. C Lin, 'Covid-19 and the Institutional Resilience of the IHR (2005): Time for Dispute Settlement Redesign?' (2020) 13 *Contemporary Asia Arbitration Journal* 269.

[116] MP (n 94) para 30(a).

[117] Bartolini recommends that compliance machinery for the IHR 2005 should likewise help in the provision of financial or technical assistance, and also recommends greater use of action plans under the IHR 2005.

[118] Bartolini (n 15) 249.

outcomes that Parties are to achieve. This is a case of a fixed floor. Retaining such binding substantive legal commitments in the IHR 2005 and elsewhere makes sense, on balance. However as indicated in the next section of this chapter, for facilitative implementation and compliance machinery to work effectively in such contexts it may need to be taken as written that States' underperformance will be indulged while they continue to make appropriate progress towards better implementation, keeping the spectre of State responsibility at a distance.

2.4 Convergence in the Application of Managerial and Enforcement Theory

In addition to the practical considerations addressed in the previous part of this chapter, the extent to which States' populations are now physically, economically and legally dependent on one another also strengthens the theoretical basis for more widespread facilitative implementation and compliance procedures.[119] In situations of intensified interdependence, the previously opposing managerial and rationalist theories of compliance converge to support reliance on facilitative compliance mechanisms. Rather than having to be forced to do so, it becomes increasingly rational for each State to change its conduct and comply as fully as possible with its international commitments. When a treaty addresses internationally shared regulatory and policy problems, it will be in a State's own interests to comply thoroughly. Compliance by a State will directly reduce the threat posed to it, by reducing the scale of the problem. Compliance by a State will also indirectly reduce the threat posed to it because it will help induce compliance by others and encourage their full participation to protect internationally shared interests.

In sum, the world's situation as contemplated by Abram Chayes and Antonia Handler Chayes' seminal 1995 work on the managerial approach, *The New Sovereignty*,[120] has since moved on, into an era of intensified interdependence. Today, the reasons that States may do their best to comply with relevant obligations may include not only normative considerations such as their desire for good standing internationally as emphasised by the Chayes, but increasingly also a rational appreciation

[119] C Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence* (Oxford University Press 2021).

[120] A Chayes and A Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 22.

of their physical needs in an interdependent world. International compliance machinery employing a facilitative approach can assist States in meeting these combined goals.

2.4.1 *Managerial Theory*

The Chayes' work in the 1990s captured vital insights into how compliance with international regulatory systems is effective when a 'managerial' model is adopted rather than an enforcement model. Consistent with the Chayes' insights into the nature of implementation challenges in international regulatory systems, deficits in the implementation of the IHR 2005 are not, in general, caused by willful political decisions to go against States' commitments but rather by insufficient capacity and prioritisation.[121] As the Chayes saw it, in these circumstances, the complaint that international legal regimes 'have no teeth'[122] is likely to be misplaced; and an approach that seeks primarily to facilitate compliance rather than enforce it may be most productive.[123] Capacity is indeed the overarching problem in compliance with pandemic preparedness law, twinned with prioritisation issues.

Accompanying this insight is the understanding that levels of compliance and implementation will vary. In complex international regulatory systems, compliance is not an 'on-off' phenomenon; States' conduct within a certain penumbra or zone will often be accepted as adequately conforming with their obligations.[124] Compliance and implementation become an activity to manage, or, from today's perspective, to facilitate. What will keep treaty implementation and compliance at acceptable levels will be

> For the most part, compliance strategies seek[ing] to remove obstacles, clarify issues, and convince parties to change their behaviour. The dominant approach is cooperative rather than adversarial. Instances of apparent non-compliance are treated as problems to be solved, rather than

[121] Bartolini (n 15) 241. In the context of the Paris Agreement see similarly Benjamin, Haynes and Rudyk (n 95) 350, 363.

[122] e.g., in the WHO, Committee members' repeated observations that the IHR 2005 lacks enforcement mechanisms and 'has no teeth'. Review Committee on the COVID-19 Response (n 19) para 121.

[123] Chayes and Chayes (n 120) 2.

[124] Ibid., 17. See also at 20.

> wrongs to be punished. In general, the method is verbal, interactive, and consensual.[125]

Bringing about improved implementation and compliance will involve a series of measures and activities, usually starting with the data and its verification and then moving into more active management, identifying behaviour that raises significant compliance questions.[126] The process is initially exploratory, seeking to clarify the nature of the behaviour and surrounding facts and circumstances.[127] The next step in cases of persistent concern may be a diagnosis of the causes for non-implementation and non-compliance, and the aim here is to identify an obstacle that could be removed or solve problems standing in the way of implementation and compliance, such as capacity issues and the need for technical assistance or access to resources.[128] The process will be interactive.[129] This compliance and implementation model ties into the importance of justification and discourse as crucial elements in how international norms operate to control conduct, with questionable action to be explained and justified.[130] While the foundation of compliance remains the normative framework in the relevant treaty,[131] transparency is core.[132]

All these elements of the Chayes' theory have provided valuable insights for the design of NCMs. However, at the same time, the globe is in a fundamentally different position to that of twenty-five years ago. Populations' increasingly shared physical dependence on the health of Earth's planetary systems has become starkly apparent, and now successive novel diseases frequently crossing species from animals to humans, reveal our vulnerability also in terms of collective health. The application of managerial theory increasingly overlaps with the application of rationalist theory.

[125] Ibid., 109, albeit adding that 'In some cases ... the regime may have benefits it can withhold'.
[126] Ibid., 110.
[127] Ibid., 110.
[128] Ibid., 110, 25, 197.
[129] Ibid., 110.
[130] Ibid., 118.
[131] Ibid., 110.
[132] Ibid., 22, 162. Consistent with this, see, on the purposes of the Paris Agreement's ETF, van Asselt and Kulovesi (n 88) 304.

2.4.2 *Rationalist Theory*

Political economists, led by George Downs and others, have traditionally insisted on the importance of enforcement, emphasising a rationalist approach.[133] Enforcement rather than management is the key to compliance, they say, in situations where there are strong incentives to depart from compliance, where treaties require States to pursue conduct themselves differently from that they would have pursued in the absence of the treaty, and where deep co-operation is lacking. This may initially appear to be the case in respect of pandemic preparedness and response, climate change and also problems such as the management of biodiversity on the high seas. But additional, competing, rationalist considerations increasingly logically feed into States' assessment of the degree to which they will comply with such bodies of law. In circumstances of vital physical interdependence like those in which the world now clearly finds itself, sanctions for non-compliance are to a degree inbuilt insofar as a Party's non-compliance will leave that Party more exposed to the global threats now faced. Experiences with the COVID-19 pandemic and severe weather events are illustrative. Depending on the Party's profile relative to the threat, the increased exposure may be greater or lesser. And each Party needs also to reckon with the question of whether its non-compliance will encourage others' non-compliance, ratcheting up the threat. Contrastingly, a State that adopts a policy of close compliance with relevant international legal obligations will rationally derive a range of direct and indirect benefits. By modelling good conduct for others, it will help bring about better compliance and better results globally, as well as enhancing the State's reputation and political influence in ongoing negotiations to address critical problems.[134]

[133] GW Downs, DM Rocke and PN Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50 *International Organization* 379. For discussion, J Brunnée and SJ Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) 13 *Finnish Yearbook of International Law* 273, 282; M Doelle, 'Non-Compliance Procedures' in L Rajamani and J Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd ed, Oxford University Press 2021) 972.

[134] C Foster, 'Dynamics in the Relationship between International and Domestic Climate Change Law and Policy in Aotearoa New Zealand' in A Hertogen and A Hood (eds), *International Law in Aotearoa New Zealand* (Thomson Reuters 2021) 433.

2.4.3 Convergence of the Theories

The realities on which the theory in *The New Sovereignty* was built have evolved to embrace circumstances of deepened global interdependence. At this point in history, it is becoming increasingly rational for States to comply as a matter of self-interest with treaties designed to address pressing problems of global interdependence like the problems we see in the areas of climate change, pandemic prevention and high seas biodiversity. This means that facilitative, non-punitive compliance machinery, or 'new' generation compliance machinery, has a stronger theoretical basis now than before. Non-compliance mechanisms increasingly take the form of 'facilitated implementation and compliance' as with the Paris Agreement.[135] Getting to this point has not been straightforward. The adoption of the reporting and review processes for all Parties to the Paris Agreement represented a significant shift, given the previous ongoing resistance of developing countries including China and India.[136] However, all this strengthens the case for States to consider transferring appropriately adapted elements of the Paris Agreement's facilitative compliance scheme both to international pandemic law and beyond.

2.4.4 International Courts and Tribunals and Questions of State Responsibility

At the same time, international courts' and tribunals' (ICTs) role as avenues for possible formal dispute settlement also continues to be valuable.[137] Adjudication remains available, where there is jurisdiction, in respect of States' general obligations under customary international law regarding the prevention of harm as well as in accordance with the dispute settlement provisions of applicable treaties. And adjudication

[135] 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 2020). Cf the Kyoto Protocol's double-branched 'facilitative' and 'enforcement' machinery, differentiating between developed and developing countries.

[136] Van Asselt and Kulovesi (n 88) 319.

[137] For the IHR 2005 dispute settlement provisions, see Article 56. Lin (n 115) at 278, observes that Article 56 has never been invoked. Article 24 of the Paris Agreement applies *mutatis mutandis* the dispute settlement provisions in Article 14 of the United Nations Framework Convention on Climate Change.

may lead to sanctions including modes of collective enforcement.[138] Adjudication is clearly still on the 'menu',[139] though as a side rather than a main course. It is understood that the operation of facilitative compliance systems and multilateral review processes is unlikely to be enough all the time on its own to persuade powerful countries to comply with all of their commitments. Access to dispute settlement will remain important as a broader aspect of compliance schemes.[140]

Further, ICTs' contribution to the authoritative clarification of international law is helpful. This may take place in contentious or advisory proceedings. The expected International Court of Justice[141] and International Tribunal for the Law of the Sea[142] advisory opinions on climate change are examples. The development of new advisory

[138] Brunnée and Toope (n 133), 294.

[139] Z Savaşan, *Paris Climate Agreement: A Deal for Better Compliance?* (Springer Nature 2019) 253; as Brunnée and Toope put it: '[i]ncentives and disincentives, formal dispute settlement provisions processes, and enforcement through sanctions all have a role to play in shaping the behaviour of international actors.' J Brunnée and SJ Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) 13 *Finnish Yearbook of International Law* 273, 294.

[140] Chayes and Chayes (n 120) 24, 197.

[141] The draft resolution circulated to UN Members by Vanuatu on 29 November 2022 requested the Court to give its opinion on the questions:

> (1) What are the obligations of States under the above-mentioned body of international law to ensure the protection of the climate system and other parts of the environment for present and future generations;
> (2) What are the legal consequences under these obligations for States which, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (a) Small island developing States and other States which, due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
> (b) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

Available at www.vanuatuicj.com/resolution, accessed 13 December 2022.

[142] The Commission of Small Island States' Request for an Advisory Opinion of 12 December 2022 asks: What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the 'UNCLOS'), including under Part XII:

> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

procedures within certain multilateral institutional frameworks, examples of which are discussed in later chapters of this book, are also a promising mechanism.[143] Such procedures may help bring about greater compliance by clarifying States' or others' obligations. In the meantime, traditional non-compliance procedures help to prevent breaches and harm in advance and 'can be considered to work alongside and complement traditional dispute settlement processes rather than replace them'.[144] Today's international legal regulatory problems should also be viewed in the broader context of reliance on 'mosaic' enforcement including through domestic administrative and judicial processes.[145] Flanking tools and principles may helpfully be brought to bear in all these contexts, including impact assessment, the precautionary principle and a dedication to greater equity within and across generations.

However, it is clear that NCMs have the potential to perform a special function in international law as it reconfigures itself in the course of the twenty-first century. They provide a shortcut to enhanced compliance in relation to the advancement or protection of shared international interests in an interdependent world. They are both less confrontational than inter-State procedures, and less beset by hurdles relating to standing. Where NCMs are relied on, the rules relating to the invocation of State responsibility move back-of-picture and the specific rules on initiation of non-compliance proceedings in the regime in question come to bear. There is no need to determine whether an individual State is an injured State or otherwise entitled to invoke the rules with which compliance is to be assessed and whether these rules are for instance obligations *erga omnes partes*. In this respect the advent of an era of greater reliance on

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

Available at: www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.

[143] See in particular Cruz Carillo (n 2).

[144] J Mossop, 'Dispute Settlement in Areas beyond National Jurisdiction' in V De Lucia, L Ngoc Nguyen and A Oude Elferink (eds), *International Law and Marine Areas beyond National Jurisdiction: Reflections on Justice, Space, Knowledge and Power* (Brill 2021), available at https://ssrn.com/abstract=3885272. Cf L Lijnzaad, 'Dispute Settlement for Marine Biodiversity beyond National Jurisdiction: Not an Afterthought' in H Ruiz Fabri, E Franckx, M Benatar and T Meshel (eds), *A Bridge over Troubled Waters* (Brill 2020) 147.

[145] C Redgwell, 'Facilitation of Compliance' in J Brunnée, M Doelle and L Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press 2012).

NCMs would be an appropriate response to international law's entwinement with increasing global interdependence.

What is the relationship, though, between the use of non-compliance procedures on the one hand and on the other hand dispute settlement in ICTs and State responsibility?[146] Generally it appears that the law on State responsibility will continue to apply where a State is not complying with its international obligations. Certain legal consequences attach including in respect of reparation to other affected States. And generally, it appears that it will remain open to States to go to international dispute settlement even while compliance procedures may be underway if there is an international court or tribunal with jurisdiction. States are slow to invoke the responsibility of other States and are even slower to seek formal international dispute settlement. But there is a palpable tension here. Non-compliance procedures in effect ask of States that they acknowledge their implementation of treaty commitments which leaves something to be desired, in order that this non-compliance machinery can be used to get help to these States so that they can achieve better implementation. So are States admitting to treaty breaches when they seek or receive help in the context of working with a compliance committee?

Martii Koskenniemi, who was with the Foreign Ministry of Finland at the time the Montreal Protocol negotiations took place, wrote then that non-compliance procedures could constitute specialised systems of State responsibility which would replace the general international law on State responsibility, in effect taking the question off the table for practical purposes.[147] But this feels unintuitive, because with the fuller range of NCMs now operating in international environmental law, we can see that

[146] Scholars have addressed various versions of this question since the Montréal protocol negotiations. 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; 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); K Scott, 'Non-Compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements' in D French, M Saul and N White *International Law and Dispute Settlement: New Problems and Techniques* (Hart 2010); P Sands, 'Compliance with International Environmental Obligations: Existing International Legal Arrangements' in J Cameron, J Werksman and P Roderick (eds), *Improving Compliance with International Environmental Law* (Earthscan 1996).

[147] Koskenniemi (n 146).

it is possible there may be inbuilt limits on their reach and effect within each regime.[148] Scholars since have, in any event, tended not to endorse Koskenniemi's view.[149]

In closing, a few thoughts on the question of State responsibility are as follows. First, we should welcome the sense of flexibility-in-the-system that accompanies more widespread reliance on non-compliance machinery, and the indulgence of concerted efforts to improve implementation for the benefit of all in an interdependent world in which timely, preventive action to help protect shared interests is more valuable than remonstration *post hoc*. Second, given that non-compliance procedures will generally help address shared public interests, could we view the current situation as the blending of aspects of a more public or administrative law dimension into the international legal order, layering onto the more traditional, bilateral conceptions of international law as analogised with the private law of contract and tort?[150] Third, it may be possible to create semi-formalised safe zones around non-compliance processes, for instance agreeing clearly that the findings of compliance committees will not constitute the equivalent of *res judicata* or will be without prejudice to the findings made in any subsequent international dispute settlement proceedings. Fourth, we may find that States will be careful to try and ringfence the scope of the issues that they ask NCMs to address, although where issues are interlinked, there is likely always to be scope for a certain overlap with matters of State responsibility. States may be more comfortable if such committees are referred to as 'implementation and compliance' committees rather than NCMs. This allows scope for views that the improved conduct requested of States through such machinery may or may not relate to failed compliance attracting State responsibility. Depending on the circumstances it may be a matter only of improving States' implementation of their obligations.

2.5 Conclusion

A world in which international law continues to grapple with the prevention of some of the greatest threats humanity has known to date is a

[148] Their remits will probably not cover all legal issues potentially arising under a given treaty.

[149] e.g., Scott (n 146).

[150] B Simma, 'From Bilateralism to Community Interest in International Law' (Receuil des Cours de L'Academie de Droit International, 1994) 250.

world in which facilitative compliance linked with targeted support and capacity building must surely play a central role. Compliance machinery needs to be built on a supportive but serious ethos, enabling a well-informed and realistic approach, and taking into account the limitations of actors in situations where compliance is a challenge and equity an important consideration. Negotiating governments should consider the Paris Agreement's compliance machinery (and the accumulated practice of reliance on NCMs under MEAs), when they consider the types of mechanism that could be put in place to help improve compliance with various relevant bodies of international law.

In international pandemic law and in other international legal contexts, States could do well to consider the way in which Paris Agreement-style accountability and compliance arrangements need to go beyond declaratory processes presenting States' progress and involve independent, expert engagement with individual States' implementation needs, including taking concrete steps to assist with requests for resources, capacity and remedial planning. These are crucial factors that will need to be seriously considered for introduction into implementation and compliance procedures if international law on pandemic prevention preparedness and response is to be sufficiently effective.

At the time this chapter was initially drafted, in January 2022, and informally circulated, negotiations on both the intended treaty on pandemic preparedness and response and on the BBNJ instrument were mid-stream. As part of its participation in the pandemic treaty negotiations, New Zealand put forward the suggestion in April 2022 that the Paris Agreement could be used as a model for non-compliance procedures under the new treaty.[151] At the same time, the text of the expected BBNJ instrument was also evolving. Initially it was envisaged simply that the BBNJ agreement's Conference of the Parties might in due course adopt co-operative procedures and institutional mechanisms to promote

[151] New Zealand submitted: 'There are different ways to achieve this objective. One option would be a Universal Periodic Health Review process, similar to that operating under international human rights Instruments (building on the WHO Universal Heath Preparedness Review currently being trialed). Option two would be a facilitative compliance committee, similar to that operating under the Paris Agreement on Climate Change.' Aotearoa New Zealand Submission to the Intergovernmental Negotiating Body, April 2022, available at www.health.govt.nz/system/files/documents/pages/new-zealand-submission-to-the-inb-april-2022.pdf.

compliance and address cases of non-compliance.[152] This text was itself in square brackets and at least one delegation (the United States) requested its deletion.[153] Nevertheless, the President of the negotiations, Ambassador Rena Lee of Singapore, retained the provision in the draft text, produced in July 2022, adding as an alternative a more extended five-paragraph compliance provision which would establish a compliance committee based closely in part on the Paris Agreement.[154] At the negotiations in August 2022 in New York, where New Zealand chaired the talks on the compliance issue, States refined this provision.[155]

The non-compliance provision in the BBNJ text is likely to be of particular value within the BBNJ regime because the instrument's practical effect will depend closely on compliance with procedural obligations, including commitments on information flow. Equity and environmental protection can best be assured with the necessary transparency and accountability, whether this be in the accessing of marine genetic resources or the conduct of appropriate environmental impact assessment in zones abutting the Area. An appropriate NCM will complement existing law of the sea dispute settlement machinery, facilitating provision of assistance to States who may be facing technical and political implementation challenges and enabling the international community to

[152] UN, *Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* (Draft text 2020), UN Doc A/CONF.232/2020/3, Article 53(3). Available at https://undocs.org/en/a/conf.232/2020/3. For discussion, see Mossop (n 144).

[153] Article-by-article compilation of textual proposals for consideration at the fourth session dated 15 April 2020.

[154] *Further Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction: Note by the President* (now available in all official languages), 20 July 2022.

[155] Article 53 ter, *Further Refreshed Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, UN Doc A/CONF.232/2022/CRP.13, 26 August 2022. The author attended and participated actively in a series of workshops and informal consultations with the New Zealand Ministry for Foreign Affairs and Trade in the lead up to and during the negotiations led by the New Zealand Government's chief international legal advisor, Victoria Hallum. At the August 2022 negotiations, Hallum took on the role of chairing/facilitating the negotiations on the instrument's non-compliance provisions. See also High Seas Alliance, *Cross-Cutting Briefing #2 Effective Implementation and Compliance under the BBNJ Agreement through an Implementation and Compliance Committee*, available at www.highseasalliance.org/resources-category/policy-recommendations-and-briefs/.

better protect populations' mutually important interests for the long term. Inclusion of an appropriate NCM in the new pandemic treaty instrument, and in the negotiations for the new international legally binding instrument on plastic pollution, would be a similarly valuable step. Governments must be prompted more actively to ensure they adopt appropriate NCMs, sooner rather than later, in all relevant spheres.