

9

Implementation: new approaches

9.1 Introduction

In the preceding chapter, we identified four stages in the process of compliance   
with a primary environmental norm. We saw that the traditional approaches   
used in international law to implement international obligations focus on the   
first (information) and the fourth stages (reparation). The techniques dealing   
with information gathering/reporting as well as with the characterisation of a   
breach (through adjudication) and the determination of the ensuing legal   
consequences (responsibility/liability) play a significant role in environmental   
protection, but they also raise significant challenges. We identified in the   
process going from compliance to non-compliance, a grey area characterised   
by uncertainty as to the level of compliance (information without breach   
characterisation). This area, which one might call the ‘soft belly’ of the com-  
pliance process, is important for our discussion because it is the main target of   
the implementation system of many environmental treaties.

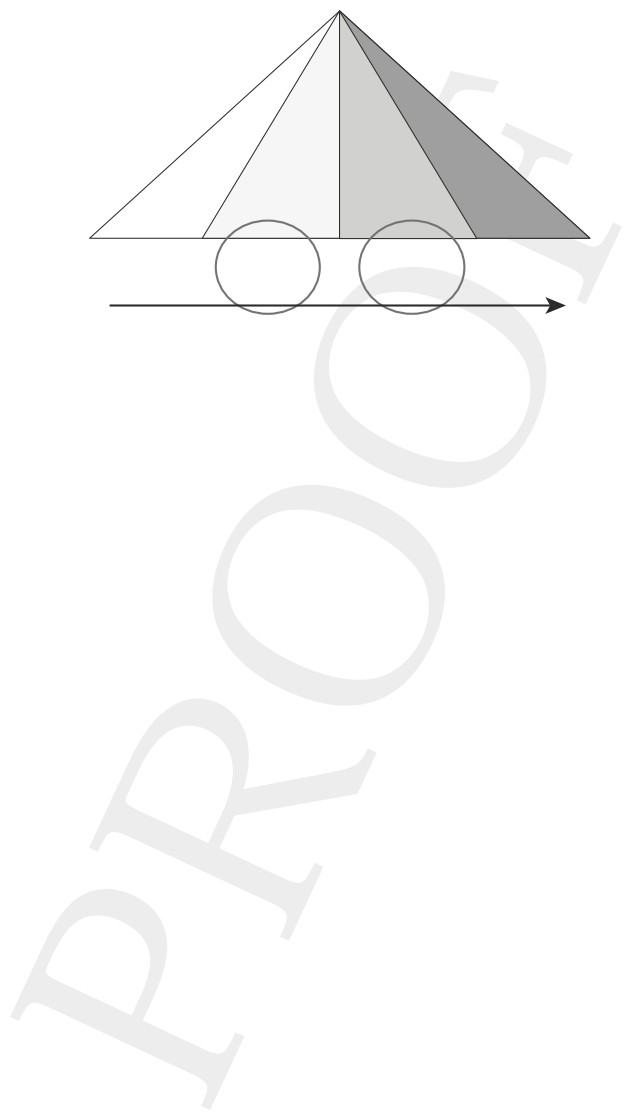
This strategic choice is based on two main considerations. On the one hand, in   
an environmental protection context, prevention is much more important than   
the reparation of environmental damage, which is often very difficult.1 On the   
other hand, the techniques relevant for the first and fourth stages assume that   
non-compliance with an obligation is a matter of willingness rather than one of   
financial and technological capacity.2 This assumption is not necessarily accurate   
for all States. The costs and technical expertise involved in complying with   
environmental treaties sometimes make their implementation difficult for   
States that do not have the necessary resources. Moreover, even when a State   
has the resources, minimising the costs associated with the implementation of   
measures remains important to make compliance more efficient. These two   
factors have led to the development of new approaches to implementation.   
Figure 9.13 identifies the stages where these approaches intervene.

1 See Section 8.3.3.4 of Chapter 8.

2 See A. Chayes and A. Handler Chayes, The New Sovereignty, Compliance with International Regulatory Agreements (Cambridge MA: Harvard University Press, 1998).

3 See P.-M. Dupuy, ‘Où en est le droit international de l’environnement à la fin du siècle?’ (1997)   
Revue generale de droit international public 873, in particular 893-5; J. E. Viñuales, ‘Managing

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 271 [270-294] 24.2.2015 3:45PM



271 Facilitating compliance

Stage 1: Stage 2: Stage 3: Stage 4:

Information Facilitation Management Reparation

**Stages in the norm compliance process**

Figure 9.1: The ‘soft belly’ of the compliance process

The main techniques to facilitate compliance with environmental obliga-  
tions (Stage 2) seek to provide ‘assistance’ and ‘efficiency’ gains (9.2). Technical   
and financial assistance are intended to give developing States the means to   
create the necessary infrastructure for the implementation of their environ-  
mental obligations. Other techniques aim to increase efficiency so as to reduce   
the cost of compliance with environmental obligations. The latter are relevant   
for both developed and developing countries and they are usually structured   
as market mechanisms. Regarding techniques to manage cases of non-  
compliance (Stage 3), their purpose is to maintain the effectiveness of the   
regime within reasonable bounds through a combination of renewed   
assistance, diplomatic pressure and sanctions (9.3).

9.2 Techniques to facilitate compliance

9.2.1 Types of techniques

The analysis of techniques to facilitate compliance with environmental   
standards presents several difficulties. The diversity of these techniques and   
the specificities of each mechanism make them difficult to understand.   
Moreover, their operation is as much about political and economic factors as   
it is about law. It is therefore necessary to clarify the angle from which these   
techniques will be discussed here.

Often, international environmental law textbooks provide a description of   
various mechanisms such as development aid, environmental funds, technol-  
ogy transfer, capacity building and others. In this way, the constitutive rules of   
several instruments are presented succinctly without going into the details of

Abidance by Standards for the Protection of the Environment’, in A. Cassese (ed.), Realizing Utopia (Oxford University Press, 2012), pp. 326-39.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 272 [270-294] 24.2.2015 3:45PM



272 New approaches

their operation. This approach is understandable because, as noted earlier, the   
techniques differ and each mechanism has features that cannot be analysed in   
the limited context of a textbook, even a voluminous one. Our discussion   
adopts a slightly different yet complementary approach. Instead of providing a   
survey with a brief introduction to each mechanism, we focus on three aspects.

First, a key consideration in the context of this book is to clarify the nature of   
the innovative implementation approaches adopted by environmental treaties.   
This is why we emphasise the two goals pursued by the diverse range of   
facilitation techniques, namely the provision of assistance and the generation   
of efficiency gains. Second, given the significant number of potentially relevant   
instruments, it is not possible to cover every eventuality succinctly. To over-  
come this difficulty, we will select major illustrations of each technique, on the   
basis of both their emblematic character and their practical importance. A   
third aspect that we must consider is the particular angle adopted in the   
analysis. After introducing the basic features of each mechanism, we will pay   
particular attention to the legal issues that arise in their operation.

9.2.2 Techniques oriented towards assistance

9.2.2.1 Financial assistance

9.2.2.1.1 Overview

An important technique in the implementation of environmental agreements   
is the provision of financial assistance. The term ‘financial assistance’ includes   
a variety of public, private or even mixed mechanisms. These mechanisms are   
often established to bridge the positions of developed and developing countries   
in treaty negotiations. This was the case, for example, of the Multilateral Fund   
of the 1987 Montreal Protocol.4 Indeed, the Fund was introduced in 1990 by an   
amendment to the Protocol designed to bring certain developing countries, in   
particular China and India, into the system. This mechanism, as several other   
innovations introduced by the Montreal Protocol, profoundly influenced   
the way differences between developed and developing countries came to be   
managed in subsequent environmental negotiations. We will discuss this   
mechanism in more detail later, but first it is useful to place it in the broader   
context of financial assistance techniques. Figure 9.2 gives an overview of these   
techniques.

More generally, in international negotiations the source of funding plays   
an important role. Public finance is often preferred by developing countries   
because it is, in theory, more predictable,5 although the commitments of   
developed countries in this area are not always respected and often have

4 Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS   
3 (‘Montreal Protocol’). See also the Terms of Reference for the Multilateral Fund, 25 November   
1992, UNEP/OzL.Pro.4/15, Annex IX (‘Terms of Reference for the Multilateral Fund’).

5 Report of the United Nations Conference on Environment and Development, A/CONF.151/26/ Rev.l (Vol. l), Resolution 1, Annex 2: Action 21 (‘Action 21’), para. 33.11(b).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 273 [270-294] 24.2.2015 3:45PM



273 Facilitating compliance

**Public**

**General Environmental**

ODA (Official

Development **General Specific**

Assistance)

**Finance**

**Mixed Private**

**Hybrid Leveraged Direct SRI**

**Mechanisms finance Investment**

PCF (Prototype GEF Flexible mechanisms Private funds

Carbon Fund) (CDM and JI)

GEF (Global

World Bank Environmental

Facility) Regional Banks

World Heritage   
Fund

Multilateral Fund   
(ozone)

Green Climate   
Fund

Agreements on   
access to genetic   
resources and   
benefit sharing   
(ABS)

Payments for

ecosystem services   
(PES), including

REDD-plus

General investment

Figure 9.2: Techniques of financial assistance

strings attached. In contrast, developed countries often argue the need for a   
greater role of private finance, including through the liberalisation of capital   
movements and easier access for foreign direct investment. Within public   
finance, two distinct strands can be identified depending on whether finan-  
cial resources are generally allocated to development or more specifically to   
environmental protection. We cannot dwell here on the broader issue of   
official development assistance (‘ODA’).6 Suffice it to note that the emphasis   
on the provision of ‘new and additional’7 resources is intended to ensure that   
financial assistance goes beyond the mere reallocation of ODA to environ-  
mental projects. As for mechanisms focusing on environmental protection,   
a further distinction can be made between general environmental funds (e.g.   
the Global Environmental Facility or ‘GEF’) and treaty-specific ones (e.g. the   
World Heritage Fund, the Multilateral Fund or the Green Climate Fund).   
Regarding private finance, whether it is foreign direct investment, portfolio   
investment,8 or simply commercial lending, its importance has been increas-  
ingly recognised since the 1992 Earth Summit. The legal questions raised by   
this source of finance will be discussed in Chapter 12. Another technique of   
growing importance is mixed financing, often under the aegis of a develop-  
ment bank or the GEF, which has mobilised substantial amounts of private   
capital as part of its leveraged finance activities. Another example is the   
Prototype Carbon Fund (‘PCF’) set up by the World Bank, which provides a   
template for the creation of other hybrid funds at the domestic level.

These general observations about the types of financing set the background   
for a more detailed analysis of three examples, namely treaty-specific

6 See P. Kohona, ‘UNCED - The Transfer of Financial Resources to Developing Countries’ (1992)

1 Review of European Community and International Environmental Law 307.

7 Action 21, supra n. 5, Chapter 33, particularly para. 33.1.

8 See B. J. Richardson, Socially Responsible Investment Law: Regulating the Unseen Polluters (Oxford University Press, 2008).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 274 [270-294] 24.2.2015 3:45PM



274 New approaches

environmental funds, the GEF and the PCF. The analysis of these mechanisms will emphasise their function as well as some selected legal questions.

9.2.2.1.2 Treaty-specific environmental funds

The first treaty-specific environmental fund was created in 1972 under Article

15 of the World Heritage Convention.9 Despite the modest amounts (approxi-  
mately $4 million dollars annually) managed by the World Heritage Fund, this   
mechanism is representative of a type of fund that we also find in other   
environmental treaties, including the Ramsar Convention10 and the Basel   
Convention.11 The World Heritage Fund is based on contributions from   
States, partly compulsory and partly voluntary, as well as donations from   
other entities, such as international organisations or private entities.12 The   
amounts of the Fund are allocated to activities defined by the World Heritage   
Committee established by the Convention and only to the extent of amounts   
actually available.13 These activities primarily involve capacity-building of   
States parties (provision of experts and training) and other forms of technical   
assistance (studies and the supply of equipment). Certain amounts of the Fund   
are allocated to maintain a reserve fund (referred to in Article 21(2) of the   
Convention) whose purpose is to lend prompt assistance in emergencies, such   
as the occurrence of natural disasters. The Committee has organised the target   
activities into three categories according to their priority in fund allocation:14emergency assistance (particularly regarding the sites included on the List of   
World Heritage in Danger15); support in the area of conservation and manage-  
ment; and preparatory assistance. The current strategy of the Fund is consis-  
tent with the broader trend of environmental funds to leverage additional   
capital through co-finance of projects.16 Despite its iconic character, the World   
Heritage Fund is only representative of a first - and rather modest - generation

9 Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151 (‘WHC’).

10 Ramsar Convention on Wetlands of International Importance, especially as Waterfowl Habitat,

2 February 1971, 996 UNTS 245 (‘Ramsar Convention’). The fund was established by the ‘Resolution on a Wetland Conservation Fund’, Resolution 4.3 (1990). In fact, this mechanism is known as the ‘Ramsar Small Grants Fund’.

11 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and   
 Their Disposal, 22 March 1989, 1673 UNTS 57 (‘Basel Convention’), Art. 14. The COP   
 established a ‘General Trust Fund’ and a ‘Trust Fund for Technical Cooperation’. See   
 ‘Financial Rules of the Conference of the Parties, its subsidiary bodies and the Secretariat of   
 the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and   
 their Disposal’, Decision BC-10/28 (2011).

12 Financial Regulations of the World Heritage Fund, available at [www.whc.unesco.org](http://www.whc.unesco.org/) (last   
 visited on 15 March 2013) (‘Financial Regulations’), Art. 3.1.

13 Ibid., Art. 4.

14 Guidelines for the Implementation of the World Heritage Convention, July 2012, WHC 12/01   
 (‘Guidelines’), para. 235.

15 Ibid., para. 236.

16 Ibid., para. 225. See M. Bowman, P. Davies and C. Redgwell, Lyster’s International Wildlife Law   
 (Cambridge University Press, 2nd edn, 2010), pp. 475-7 for concrete examples.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 275 [270-294] 24.2.2015 3:45PM



275 Facilitating compliance

of treaty-specific environmental funds.17 A second generation, capable of mobilising far more resources, was introduced with the establishment of the Multilateral Fund within the Montreal Protocol.

The Multilateral Fund is emblematic in two respects.18 On the one hand,   
it is the first fund of the second generation, i.e. a fund large enough (more than   
US$ 400 million for each period19) to finance ‘agreed incremental costs’ incurred   
by developing countries as a result of the conversion of their infrastructure to   
comply with an environmental treaty. On the other hand, the composition of its   
governing body, the Executive Committee, which consists of seven developing   
countries and seven developed countries (despite the fact that only the developed   
countries contribute funds20), is an expression of the principle of common but   
differentiated responsibilities.21 Created by an amendment to the Montreal   
Protocol in June 1990, the Fund was established in 1991 and made permanent   
in 1992 in order to cover the ‘agreed incremental costs’ (as designated under   
Article 10(1) of the Protocol).22 These include costs arising from the conversion   
or the premature decommissioning of facilities producing controlled substances,   
the establishment of new facilities producing substitutes, the import of such   
substitutes, or the use of relevant patents and designs, to name a few categories.23Decisions about funding are taken by the Committee by consensus or, failing   
that, by two thirds of the members present and voting, provided that a double   
majority of both developing and developed countries is respected.24 In practice,   
the Committee has always acted by consensus. The implementation of this   
system of financial assistance is managed by ‘implementing agencies’, in parti-  
cular the United Nations Environment Programme (‘UNEP’), the United   
Nations Development Programme (‘UNDP’), the World Bank25 and the   
United Nations Industrial Development Organisation (‘UNIDO’). An example   
may be useful to understand how this mechanism operates. In 2011,   
the Executive Committee approved an amount of US$ 265 million to reduce   
the use of hydrochlorofluorocarbons (‘HCFCs’) pursuant to Article 2E of the   
Montreal Protocol.26 These substances are also potent greenhouse gases. The

17 On ‘generations’ of financial mechanisms, see L. Boisson de Chazournes, ‘Technical and   
 Financial Assistance’, in D. Bodansky, J. Brunnée and E. Hey (eds.), The Oxford Handbook of   
 International Environmental Law (Oxford University Press, 2007), pp. 948-72.

18 On this mechanism, see P. Lawrence, ‘Technology Transfer Funds and the Law: Recent   
 Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer’ (1992) 4   
 Journal of Environmental Law 15.

19 The periods were asfollows:1991-3,1994-6, 1997-9,2000-2,2003-5,2006-8,2009-11,2012-14.

20 Montreal Protocol, supra n. 4, Art. 10(5)-(6); Terms of Reference of the Executive Committee   
 as Modified by the Ninth Meeting of the Parties in its Decision IX/16, 25 September 1997,   
 UNEP/OzL.Pro.9/12, Annex V (‘Terms of Reference of the Executive Committee’), para. 2. The   
 Terms of Reference have been revised several times.

21 See Chapter 3. 22 Montreal Protocol, supra n. 4, Art. 10(1).

23 Indicative List of Agreed Incremental Costs, 25 November 1992, UNEP/OzL.Pro.4/15, Annex VIII.

24 Montreal Protocol, supra n. 4, Art. 10(9).

25 Terms of Reference for the Multilateral Fund, supra n. 4, para. 2-7.

26 Montreal Protocol, supra n. 4, Art. 2F and Annex C (Group I).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 276 [270-294] 24.2.2015 3:45PM



276 New approaches

financial assistance is to be used for the conversion of hundreds of assembly lines   
that currently use HCFCs. As part of this project, which should first freeze and   
then reduce the consumption of HCFCs, China will be assisted by UNDP,   
UNEP, UNIDO, the World Bank and the German and Japanese governments.27All in all, the Multilateral Fund can be characterised by reference to three key   
features: coverage of ‘agreed incremental costs’ incurred by developing countries   
to comply with the treaty; decision-making by a Committee with equal   
membership of developed and developing countries; the implementation of   
assistance by ‘implementing agencies’. As discussed next, negotiations on climate   
finance have deviated from this template on some significant points.

The third illustration of a treaty-specific environmental fund is the recent   
creation of the Green Climate Fund (‘GCF’).28 This Fund was established by a   
decision of the Conference of the Parties (‘COP’) of the UN Framework   
Convention on Climate Change (‘UNFCCC’)29 in December 2011, but it is   
the result of a process that had already begun in 2006 and that was strength-  
ened at the Copenhagen Conference in December 2009. The controversial   
‘Copenhagen Accord’ focused on the creation of a fund to mobilise   
considerable resources (US$ 100 billion per year in 2020), an idea that was   
taken up by the ‘Cancun Agreements’ in December 2010 and crystallised at the   
Durban Conference in 2011.30 Despite the fact that at the time of writing, the   
GCF was only starting its financing operations, its institutional architecture   
merits attention because it largely reflects the lessons accumulated over   
decades of experience in the development of environmental funds. From this   
standpoint, five main features must be highlighted.

First, regarding the decision-making power in respect of the allocation of the   
funds, it is in the hands of a ‘Board’ with equal membership (twelve members   
representing developed countries and twelve members representing develop-  
ing countries).31 Decisions are taken by consensus and the Board has to adopt   
regulations governing cases where consensus cannot be reached.32Significantly, the Board felt the need to define the term ‘consensus’,33 perhaps   
because of the controversy over the scope of this principle raised by the   
decision-making procedure of the UNFCCC COP in Cancun and Doha.

27 See ‘China Commits to Landmark Agreement on Dual Ozone and Climate Benefits’, 29 July   
 2011, available at: [www.multilateralfund.org](http://www.multilateralfund.org/) (last visited on 15 March 2013).

28 Implementation of the Green Climate Fund, Decision 3/CP.17, 15 March 2012, FCCC/CP/   
 2011/9/Add.1, Annex: Governing Instrument for the Green Climate Fund (‘GCF Instrument’).   
 On this instrument, see L. Schalatek and S. Nakhooda, ‘The Green Climate Fund’, (November   
 2012) 11 Climate Finance Fundamentals.

29 UN Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (‘UNFCCC’).

30 On climate negotiations, see supra Chapter 5. 31 GCF Instrument, supra n. 28, para. 9.

32 Ibid., para. 14.

33 Revised Draft Additional Rules of Procedure of the Board, 12 March 2013, GCF/B.01-13/02/   
 Rev.01, Annex IX: Additional Rules of Procedure relating to Decision-making and Voting   
 (‘Additional Rules of Procedure’), para. 1 (‘Decisions of the Board will be taken by consensus.   
 Consensus exists when no objection is stated by any Board member or alternate member acting   
 on behalf of a Board’).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 277 [270-294] 24.2.2015 3:45PM



277 Facilitating compliance

The second point concerns the Board’s relations with, on the one hand, the   
COP and, on the other, the fund ‘Trustee’ (provisionally the World Bank).   
The GCF is an independent entity, but it serves as a financial mechanism of the   
UNFCCC under Article 11 of the convention. This places the GCF in a   
subordinate position as regards the COP. The instrument establishing the   
GCF only states that ‘arrangements will be concluded’ to this effect and sets   
some general parameters, including the need to comply with the general   
guidelines of, and submit annual reports to, the COP.34 In practice, this   
formula conceals the divergent views between developing States (funding   
recipients) who want more control of the GCF by the COP, and developed   
countries that favour greater freedom. The divergence of views has also played   
out in the election of the administrator (‘Trustee’) who actually receives and   
holds the funds, even though it is managed in accordance with the decisions of   
the Board. At the request of the COP (on the initiative of donor countries), the   
World Bank acts as an interim Trustee for a period of three years.35

The third element is the source of the funds. The GCF is expected to become   
the most important mechanism in terms of the funds mobilised. The objective   
is to mobilise US$ 100 billion per year by 2020, although this target is probably   
too ambitious. One way to come closer to this target would be to use available   
public funds as the basis to raise much greater private funds. This is expressly   
provided for in the GCF Instrument. In fact, paragraph 30 provides ‘[t]he Fund   
may also receive financial inputs from a variety of other sources, public and   
private, including alternative sources’.

A fourth important aspect of the architecture of the GCF is how it will organise   
the distribution of the funds. This may include providing funds to implementing   
entities or organisations in charge of funding specific projects or, conversely, the   
GCF could directly undertake such funding activities, which would require a   
more sophisticated administrative structure.36 The instrument suggests that the   
first model will be followed, with the GCF channelling its resources through   
international, regional but also national implementing entities accredited by the   
Board.37 The role of domestic authorities is specifically addressed to ensure co-  
ordination among the proposals submitted for funding in a given country and   
consistency with the national mitigation and adaptation plans.

Finally, a fifth element characterising the GCF is that, unlike other funds, it   
can cover not only ‘agreed incremental costs’ incurred by developing   
countries but also ‘agreed full costs’ of projects related to adaptation, mitiga-  
tion, technology transfer and capacity building.38 These are the basic features   
of the GCF’s architecture. They owe much to a financial mechanism that we   
will study next, namely the GEF.

34 GCF Instrument, supra n. 28, para. 6. 35 Ibid., para. 26.

36 Schalatek and Nakhooda, supra n. 28, p. 2. 37 GCF Instrument, supra n. 28, para. 45.

38 Ibid., para. 35.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 278 [270-294] 24.2.2015 3:45PM



278 New approaches

9.2.2.1.3 General environmental funds: the GEF

The Global Environmental Fund (‘GEF’)39 is the main example of a general   
environmental fund that is not treaty-specific. Initially set up as a prototype   
(1991-4), the GEF was established as an independent entity in 1994.40 As for the   
GCF, we will focus on five main architectural features of the GEF, namely (i) the   
decision-making power, (ii) relations with the COP, (iii) the source of funds,

(iv) the implementation of assistance, and (v) the type of costs covered. However,   
the main feature of the GEF, when compared to other financial mechanisms, is   
its general purpose or, in other words, its coverage of several areas, whether   
addressed by specific treaty regimes (biodiversity, climate change, desertifica-  
tion, depletion of the ozone layer and persistent organic pollutants) or not   
(international waters).41 The GEF serves as the financial mechanism of several   
environmental treaties, but it has a broader scope. This has often caused frictions   
with the respective COPs, as discussed in this section.

Regarding, first, the decision-making power, it rests on a ‘Council’ composed   
of thirty-two members (sixteen developing countries, fourteen developed coun-  
tries and two transition States)42 that normally acts by consensus but, when   
consensus is not possible, decisions are taken by a ‘double weighted majority’ (an   
affirmative vote representing both a 60 per cent majority of the total number of   
participants and a 60 per cent majority of the total contributions).43 This system   
is a compromise between the interests of donor States (who favoured the   
weighted system of the World Bank) and developing countries that supported   
an equal-weight approach.

Relations between the GEF and COPs have raised a number of difficulties.   
The origin of these is the tension between developing countries, which seek to   
have greater control over the allocation of funds (via the COP), and developed   
countries, in particular donors, which favour a more autonomous model. The   
GEF has concluded agreements (‘memoranda of understanding’) with the   
secretariats of the respective treaties, subsequently approved by the COPs   
and annexed to a decision. However, as a general matter, relationships are   
organised in a rather broad fashion, with the COPs having the power to   
establish general policies for the allocation of funds and the GEF Council   
keeping responsibility for making decisions on specific projects.44

Regarding the origin of the funds, they take the form of contributions by the   
participant States to the ‘Trustee’, namely the World Bank, during four-year   
periods of ‘replenishment’,45 which start with participants’ pledges to contribute

39 See A. S. Miller, ‘The Global Environmental Facility and the Search for Financial Strategies to   
 Foster Sustainable Development’ (1999-2000) 24 Vermont Law Review 1229.

40 The instrument establishing the GEF was revised several times thereafter. For the current   
 version, see ‘Instrument for the Establishment of the Restructured Global Environment   
 Facility’ (October 2011) (‘GEF Instrument’).

41 Ibid., para. 2. 42 Ibid., para. 16. 43 Ibid., para. 25(b) and (c)(i).

44 Ibid., para. 6(a). See ‘Strengthening Relations with the Conventions in the GEF Network’, 21   
 April 2011, GEF/C.40/15.

45 GEF Instrument, supra n. 40, para. 10.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 279 [270-294] 24.2.2015 3:45PM



279 Facilitating compliance

certain amounts. From this perspective, the GEF is a form of public finance. So   
far, the GEF has undergone five replenishment periods and a sixth one was   
initiated in 2013. Since its inception until 2013, the GEF had invested approxi-  
mately US$ 11.5 billion in about 3,200 projects related to its areas of interven-  
tion. More important are the amounts from other sources, including private   
sources, which have been leveraged through GEF activities (US$ 57 billion).   
These ‘hybrid’ activities are undoubtedly one of the most realistic ways to   
mobilise the amounts required to meet large-scale environmental challenges.   
As already noted, the GEF is not the only mechanism that has leveraged its   
impact through a resort to private funds. The growing role of private finance and   
the market logic that drives its operations have been met with some reluctance   
from developing countries, which see this source of financing as insufficiently   
predictable and more difficult to manage. This is yet another manifestation of a   
common tension between pragmatism and equity, which underpins many areas   
of global environmental governance.

The financial assistance provided by the GEF is channelled through ‘implementing agencies’. These include, mainly, UNDP, UNEP, and the World Bank,46 although the GEF currently operates through ten implementing agencies, including the regional development and co-operation banks (African, Asian, European, and Inter-American).

Finally, as regards the type of expenditure covered by the GEF, in principle it   
only covers ‘agreed incremental costs’ of measures taken within its areas of   
intervention.47 We have characterised this notion in our analysis of the   
Multilateral Fund of the Montreal Protocol, where this concept made its first   
appearance. An exception to this principle concerns the ‘agreed full costs’   
involved in performing the procedural obligations set out in Article 12(1) of   
the UNFCCC, which may also be covered by the GEF.48

As suggested by the foregoing discussion, there are many common fea-  
tures between the GEF and the more recent GCF. The architecture of the   
latter is, indeed, based on the experience of the former. However, the GCF is   
expected to go beyond the GEF in terms of resource mobilisation, interaction   
with the private sector and the nature of covered costs. Conversely, the   
GCF’s mandate is limited to climate change, even though the GCF   
Instrument defines this area broadly encompassing its interactions with   
other areas, such as the protection of biodiversity, particularly in respect of   
projects to reduce deforestation (known as ‘REDD-plus’).49 More funda-  
mentally, the GCF is a brand new instrument, and it has everything to prove,   
whereas the GEF has already more than twenty years of operation and has   
channelled dozens of billions of dollars towards environmental protection   
projects.

46 Ibid., para. 22. 47 Ibid., para. 2. 48 Ibid., para. 6(a) in fine.

49 GCF Instrument, supra n. 28, para. 35.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 280 [270-294] 24.2.2015 3:45PM



280 New approaches

9.2.2.1.4 Hybrid mechanisms: the PCF

A hybrid financial mechanism that merits some attention is the Prototype   
Carbon Fund (‘PCF’) established in 1999 under the aegis of the World Bank.50Despite the relatively modest amounts mobilised by the PCF (less than   
US$ 200 million), this mechanism is interesting as an institutional experiment.   
Its purpose is to facilitate the channelling of both public and private funds   
(offered by companies such as Electrabel or Mitsubishi Corporation) towards   
emissions reduction projects structured according to the rules of the Clean   
Development (‘CDM’) and Joint Implementation (‘JI’) mechanisms set up by   
the Kyoto Protocol.51

This is useful not only as a source of environmental finance but also as a   
testing ground to further develop this type of mechanism. In addition to the   
project management expertise accumulated by the PCF, the investor, whether   
public or private, obtains emission reduction units, which it can use later to   
fulfil its obligations in this area or to sell in the market for emission rights.

Despite the serious difficulties encountered in recent years by carbon   
trading, especially due to the global economic crisis (with the ensuing excess   
in the supply of emission rights) and the uncertain future of the Kyoto Protocol   
(which, despite the adoption of a second commitment period, will probably   
cease to impose quantifiable emissions targets in 2020), the contribution of the   
PCF must not be underestimated. It has, among others, prompted the devel-  
opment of similar mechanisms at the domestic level,52 and it could serve as a   
model for other international initiatives of mixed funding.

9.2.2.2 Technical assistance

Technical assistance is closely related to financial assistance. Often, the latter   
aims to finance former, whether in the form of capacity building (personnel   
training, provision of experts or equipment, development of infrastructure and   
administrative capacities)53 or the transfer of technology to developing coun-  
tries (transfer of intellectual property rights or technical know-how to the   
public or private sectors of the recipient country).54 There is some overlap in   
the definition of these two types of technical assistance. By way of illustration,

50 IBRD, ‘Amended and Restated Instrument Establishing the Prototype Carbon Fund’,

Resolution No. 99-1 (‘PCF Instrument’). See D. Freestone, ‘The World Bank’s Prototype   
Carbon Fund: Mobilising new Resources for Sustainable Development’, in S. Schemmer-  
Schulte and K. Y. Tung (eds.) Liber Amicorum Ibrahim S. I. Shihata (The Hague: Kluwer,   
2001), pp. 265-341.

51 Kyoto Protocol to the UN Framework Convention on Climate Change, 11 December 1997,   
 2302 UNTS 148 (‘Kyoto Protocol’). See Chapter 5.

52 World Bank, Annual Report. Carbon Finance for Sustainable Development (2010), pp. 23-77.

53 See Action 21, supra n. 5, Chapter 37. More generally, see D. Ponce-Nava, ‘Capacity-Building in   
 Environmental Law and Sustainable Development’, in W. Lang (ed.), Sustainable Development   
 and International Law (London: Springer, 1995), pp. 131-6.

54 See Action 21, supra n. 5, Chapter 34. See also L. Gündling, ‘Compliance Assistance in   
 International Environmental Law: Capacity-Building, Transfer of Finance and Technology’   
 (1996)56 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 796.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 281 [270-294] 24.2.2015 3:45PM



281 Facilitating compliance

chapter 37 of Agenda 21 states that ‘(t)echnical cooperation, including that   
related to technology transfer and know-how, encompasses the whole range of   
activities to develop or strengthen individual and group capacities and   
capabilities’.55 Similarly, chapter 34 of Agenda 21, on the transfer of ‘envir-  
onmentally sound technologies’ refers repeatedly to the need to strengthen the   
technical and institutional capacity in developing countries.56

However, in practice, the two forms of technical assistance have their own   
distinctive features, and these specificities are important to understand the   
place of technical assistance in the architecture of environmental treaties.   
Capacity building is the type of technical assistance initially envisaged by   
environmental treaties. The World Heritage Fund provides a good illustration   
of this point.57 We saw that this Fund was established to assist States parties in   
identifying sites of outstanding value, preparing the application to include   
them in the World Heritage List as well as taking measures for their protection,   
especially when they are threatened by circumstances such as natural disasters   
or armed conflicts. This type of technical assistance can be distinguished from   
certain forms of assistance envisaged by the Montreal Protocol and funded by   
its Multilateral Fund. As noted earlier,58 the Montreal Protocol was amended   
in 1990 to attract some developing States. The ‘London Amendment’ created   
the Multilateral Fund, but it also introduced a provision (Article 10A) on the   
‘transfer of technology’. To understand the scope of the Amendment, not only   
as regards the ozone regime but, more generally, in relation to the issue of   
technology transfer in international environmental law, it is useful to recall   
some aspects of the negotiations of the Montreal Protocol.

The London Amendment helped to bring certain countries, such as China   
or India, into the system of the Montreal Protocol. These countries (operating   
under Article 5(1)) have undertaken obligations to eliminate the production   
and consumption of controlled substances, which are broadly similar to the   
obligations of developed countries (the main difference is the time-scale   
applicable to each group). In exchange for this commitment, developed   
countries agreed to cover the ‘agreed incremental costs’ incurred by   
developing countries in complying with their obligations.59 But the deal was   
not a mere question of finance. We have studied in Chapter 5 the context in   
which the Montreal Protocol was negotiated and, in particular, the considera-  
tions of international competitiveness raised by the search for substitutes   
to controlled substances. In such a context, the commitment to no longer   
produce/use certain substances, important from an industrial standpoint,   
was not a realistic option for States that did not have substitutes, unless

(i) sufficient time was granted to gradually convert their industrial infrastruc-  
ture, (ii) financial assistance was given to them, and (iii) intellectual property

55 Action 21, supra n. 5, para. 37.2. 56 Ibid., paras. 34.8, 34.14(d), 34.20, 34.22 and 34.26(b).

57 See supra Section 9.1.2.2. 58 See supra Section 9.1.2.2.

59 Indicative list of agreed incremental costs, supra n. 23.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 282 [270-294] 24.2.2015 3:45PM



282 New approaches

rights (‘IPRs’) and know-how relating to substitutes was transferred under reasonable conditions. These three considerations are important to understand the contents of the technology transfer provision (Article 10A) introduced by the London Amendment:

Each Party shall take every practicable step, consistent with the programmes supported by the financial mechanism to ensure:

(a) That the best available, environmentally safe substitutes and related   
 technologies are expeditiously transferred to Parties operating under   
 paragraph 1 of Article 5; and

(b) That the transfers referred to in subparagraph (a) occur under fair and most   
 favourable conditions.

In other words, unlike capacity building, the transfer of technology poses, in   
practice, important issues of IPRs and know-how protection and, thereby, of   
international competitiveness. These questions concern not only the financing   
of transfers but, more fundamentally, the provision of technologies. The   
holders of IPRs may restrict access to certain technologies (refusing to grant   
a licence) to prevent other companies (actual or potential) from developing   
competing products. This question effectively arose in connection with indus-  
tries in India and Korea, which were denied licences (even against payment) to   
produce substitutes for substances regulated by the Montreal Protocol.60 Such   
refusal meant that substitute products had to be purchased from the holder of   
the patent. The Multilateral Fund can cover the costs of importing substitutes   
but this is not a satisfactory solution to the problem because such assistance   
depends on the availability of sufficient funds. Moreover, there is a question of   
circularity to the extent that financial ‘assistance’ is being used to pay for the   
products of companies based in donor countries. This case illustrates some   
of the specific problems raised by technology transfer.

The interactions between IPRs and international environmental law will be   
discussed in more detail in Chapter 12. For present purposes, suffice to draw   
some general conclusions regarding technical assistance. A distinction can be   
made between capacity building and technology transfer (as characterised   
in this section). The second type of assistance raises specific problems of   
competitiveness and IPRs protection. We illustrated this difference in the   
context of the Montreal Protocol, but similar problems arise in other   
contexts, such as the fight against climate change61 and the control of persis-  
tent organic pollutants.62 The reference to India and China also highlighted the

60 See UNDP, Rapport sur le développement humain 2001 (Brussels: DeBoeck Université, 2001), p.   
 109.

61 See K. E. Maskus, ‘Differentiated Intellectual Property Regimes for Environmental and Climate   
 Technologies’, (2010) No. 17 OECD Environment Working Papers.

62 See ‘Endosulfan ban call inspired by European interests’, 29 April 2011, available at [www.news.](http://www.news./)   
 agropages.com (last visited on 10 April 2013).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 283 [270-294] 24.2.2015 3:45PM



283 Facilitating compliance

tension between developed countries (which, as a rule, support the IPRs   
holders) and developing countries (technology recipients). This tension   
is reflected in legal terms by the ‘form’ in which technology transfer is   
envisaged.63 While developed countries tend to favour lower tariffs applicable   
to such environmental products64 (i.e. the export of substitution products),   
developing countries emphasise the need for genuine technology transfer,   
including the associated know-how, in favourable terms. Between these two   
extremes, the lawyer must find intermediate solutions to preserve the essential   
requirements of both sides. This research, which is strictly legal, is of consider-  
able importance for the effectiveness of international environmental law.

One might ask, in this context, what are the instruments that can be used to   
address this trade-off? There are several possibilities, ranging from the issuing   
of compulsory licences to use IPRs65 to the implementation of specific   
mechanisms for the development66 or sharing of technologies,67 in particular   
through the creation of ‘markets’ of IPRs.68 A recent attempt to establish an   
innovative instrument was made at the 2010 COP of the UNFCCC held in   
Cancun. On this occasion, a ‘Technology Mechanism’ was created based on   
two institutional pillars, namely a ‘Technology Executive Committee’ and a   
‘Climate Technology Centre and Network’.69 The Committee’s function is   
essentially to provide guidance for technology transfer policies, while the   
Centre focuses on implementation. The Centre is currently managed by   
a consortium of intergovernmental (including UNEP and UNIDO),   
non-governmental and private organisations. The Centre is primarily   
intended to share information and expertise but, for the time being, specific   
references to the management of IPRs have been avoided. Of note is the   
emphasis on encouraging entrepreneurship, partnerships between organisa-  
tions of the ‘North’ and ‘South’ and foreign direct investment. This form of

63 The three ‘forms’ traditionally identified in economics, namely trade, licensing and foreign   
 direct investment, have very different political and legal implications. On the economic   
 approach, see W. Keller, ‘International Technology Diffusion’ (2004) 42 Journal of Economic   
 Literature 752.

64 See OECD, Policy Brief: Opening Markets for Environmental Goods and Services (Paris: OECD,   
 2005); R. Steenblink and J. A. Kim, ‘Facilitating Trade in Selected Climate Change Mitigation   
 Technologies in the Energy Supply, Buildings, and Industry Sectors’, OECD Trade and   
 Environment Working Paper, No. 2009-02 (4 May 2009).

65 See C. Correa, ‘Innovation and Technology Transfer of Environmentally Sound Technologies:   
 The Need to Engage in a Substantive Debate’ (2013) 22 Review of European, Comparative and   
 International Environmental Law 54, at 60.

66 See L. Diaz Anadon, ‘Missions-oriented RD&D Institutions in Energy Between 2000 and 2010:   
 A Comparative Analysis of China, the United Kingdom, and the United States’ (2012) 41   
 Research Policy 1742.

67 See Correa, supra n. 65.

68 A. H. B. Monk, ‘The Emerging Market for Intellectual Property: Drivers, Restrainers, and   
 Implications’ (2009) 9 Journal of Economic Geography 469.

69 ‘The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term   
 Cooperative Action under the Convention’, Decision 1/CP.16, 15 March 2011, Doc. FCCC/CP/   
 2010/7/Add.1, paras. 117-27.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 284 [270-294] 24.2.2015 3:45PM



284 New approaches

investment could be a good compromise between the protection of IPRs (which remain in the hands of the investor) and the development of national infrastructure sought by developing countries, but it does have a number of problems, which are discussed in Chapter 12.

9.2.3 Techniques oriented towards efficiency (renvoi)

Techniques seeking efficiency gains, such as the market mechanisms introduced by the Kyoto Protocol, have been studied in Chapter 5. Here, it will suffice to recall why they reduce the costs of compliance with international environmental obligations.

We saw in Chapter 5 that the Kyoto Protocol established a number of   
‘flexible mechanisms’ in the form of emissions trading (Article 17) and   
project-based mechanisms (the JI (Article 6) and the CDM (Article 12)).   
These mechanisms have several advantages. From the perspective of   
assistance, they help channel funds to environmental projects and, as the   
case may be, also to transfer certain technologies that help reduce emissions   
as compared to a ‘business as usual’ (‘BAU’) scenario. Importantly, they can   
also generate efficiency gains in developed countries. The costs of achieving   
additional emissions reduction in countries like Switzerland or Germany,   
whose production processes already employ modern technology, may be   
much higher than achieving such reductions in countries where ‘dirtier’   
technologies are still widespread. Thus, from a cost/benefit perspective, seek-  
ing to reduce emissions in countries such as Switzerland or Germany is likely   
to be less efficient than doing so in countries, such as China or Mexico, where   
the margin of improvement is wider. This is important because the emissions   
of carbon dioxide have the same impact on the global climate system   
regardless of whether they stem from Switzerland or China. In this context,   
mechanisms that allow countries like Switzerland to comply with their   
obligations by achieving (directly or indirectly) emissions reductions in   
countries (e.g. China) where this is cheaper clearly generate efficiency gains.   
This is the reasoning underpinning the search for efficiency through market   
mechanisms.70

Such an approach, however, also has its disadvantages. The main problem   
relates to the wrong message that it may send to economic operators based in   
developed countries, namely that there is no need to generate additional   
emissions reductions in their own production processes because they can   
offset any emissions at a lower cost in developing countries. It is for this reason   
that the use of such ‘international measures’ was limited under the Kyoto   
Protocol to a certain percentage of the reductions required by the quantified

70 For a more general discussion of the use of market mechanisms in environmental law, see

J. Freeman and C. Kolstad (eds.), Moving to Markets in Environmental Regulation. Lessons from Thirty Years of Experience (Oxford University Press, 2006).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 285 [270-294] 24.2.2015 3:45PM



285 Managing non-compliance

commitments. A similar, albeit much more generous, approach has been followed at the EU and domestic levels (e.g. in a non-member country such as Switzerland). Thus, efficiency techniques must be used within reasonable bounds so as to avoid undermining the core message of most environmental protection instruments: reduce the level of pollution.

9.3 Techniques to manage non-compliance

9.3.1 Non-compliance procedures

Non-compliance procedures (‘NCPs’) play a very important role in the implementation of environmental treaties.71 Their main objective is to ensure a satisfactory level of compliance with treaty obligations through the provision of financial or technical assistance or the adoption of a series of sanctions. The main components of NCPs will be analysed in the following sections. Here, we provide some background with respect to their historical origin, their approach to compliance and their main legal features.

Regarding the first element, like many other legal innovations, the origin of   
NCPs can be found in the Montreal Protocol and, more specifically in its   
Article 8, according to which: ‘[t]he Parties, at their first meeting, shall   
consider and approve procedures and institutional mechanisms for determin-  
ing non-compliance with the provisions of this Protocol and for treatment of   
Parties found to be in non-compliance’. This provision was the basis for the   
establishment of the first modern NCP, and the model greatly influenced the   
treaties adopted after the Montreal Protocol as well as some older instruments   
that subsequently established NCPs.

It is this model that has defined the general approach of compliance under-  
lying NCPs. We have already referred to this approach in Chapter 2. Its two   
main features are the non-confrontational character of the procedure and the   
emphasis on the prevention of environmental damage. These two features are   
closely related. Failure by a State to comply with an international obligation   
may not be due to a lack of willingness to comply, but rather down to certain   
technical or financial difficulties. In this context, NCPs are intended to help   
the State concerned to return to a situation of compliance or, at least, to keep   
non-compliance within reasonable bounds. In doing so, NCPs seek to prevent   
or mitigate environmental damage resulting from non-compliance without   
stigmatising the State concerned.72 In those cases where the breach results

71 On these procedures, see T. Treves et al. (eds.), Non-Compliance Procedures and Mechanisms   
 and the Effectiveness of International Environmental Agreements (The Hague: TMC Asser Press,   
 2009); S. Urbinati, Les mécanismes de contrôle et de suivi des conventions internationales de   
 protection de l’environnement (Milan: Giuffrè, 2009).

72 See M. Koskenniemi, ‘Breach of Treaty or Non-Compliance? Reflections on the Enforcement of   
 the Montreal Protocol’ (1992) 3 Yearbook of International Environmental Law 123.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 286 [270-294] 24.2.2015 3:45PM



286 New approaches

**Principal components**

**Legal basis**

**Explicit in Implicit Treaty**

**the treaty (COP dec.) Organ**

e.g. e.g. e.g.

Montreal Ramsar Montreal

Kyoto CITES Basel

Cartag. Basle CITES

Aarhus Aarhus

**Trigger**

**States parties**

**State Others   
concerned**

e.g. All

Montreal e.g.

**Composition Outcomes**

**Private State reps. Indep. Assistance Requests for Warnings and**

**experts information sanctions**

e.g. e.g. e.g.

Aarhus Montreal e.g. Montreal e.g. e.g.

Alpine (Basel) Kyoto CITES Montreal Montreal

Aarhus Basel CITES CITES

Kyoto Kyoto Kyoto

Aarhus Aarhus Aarhus

Basel Montreal

Ramsar Kyoto

CITES Aarhus

Kyoto

Cartag. Injured

Aarhus e.g.

Basel   
Cartag.

Figure 9.3: Overview of some NCPs

from State unwillingness to comply, some NCPs can be transmuted into   
something close to a judicial proceeding leading to a finding of non-  
compliance and even the adoption of sanctions. But, overall, the approach to   
compliance underpinning NCPs is clearly focused on prevention and   
assistance.

As for the main legal features of NCPs, they can be organised under four   
headings, namely (i) their legal basis, (ii) the parties authorised to trigger them,   
(iii) the composition of the compliance committees and (iv) the measures that   
they can adopt.73

Figure 9.3 provides an overview of these features referring to some examples   
drawn from specific NCPs (Montreal,74 Kyoto,75 Cartagena,76 Aarhus,77Ramsar,78 Basel,79 CITES,80 Alpine81). In what follows, we analyse each one   
of these features in turn.

73 See Viñuales, supra n. 3, pp. 335-8.

74 ‘Non-compliance Procedure’, Decision IV/5, 25 November 1992, UNEP/OzL.Pro4/15, Annex   
 IV (Report of the Parties) as subsequently amended (‘Montreal NCP’).

75 ‘Procedure and Mechanisms relating to Compliance under the Kyoto Protocol’, Decision 27/   
 CMP.I, 30 March 2006, FCCC/KP/CMP/2005/8/Add.3, Annex (‘Kyoto NCP’).

76 ‘Establishment of Procedures and Mechanisms on Compliance under the Cartagena Protocol   
 on Biosafety’, Decision BS-I/7, 27 February 2004, UNEP/CBD/BS/COP-MOP/1/15, Annex I   
 (‘Cartagena NCP’).

77 ‘Review of Compliance’, Decision I/7, 2 April 2004, ECE/MP.PP/2/Add.8, Annex, (‘Aarhus   
 NCP’).

78 ‘Mechanisms for Improved Application of the Ramsar Convention’, Recommendation   
 REC.C.4.7 (Rev) Annex I.

79 ‘Establishment of a Mechanism for Promoting Implementation and Compliance’, Decision VI/   
 12, 10 February 2003, UNEP/CHW.6/40 (2003), Annex, as amended by COP.10 (‘Basel NCP’).

80 ‘CITES Compliance Procedures’, Resolution Conf. 14.3, June 2007, Annex (‘CITES NCP’).

81 ‘Mechanism for the Verification of the Compliance with the Alpine Convention and its   
 Implementation Protocols (Compliance Procedure)’, Decision XII/I, 7 September 2012,   
 ACXII/A1/1, Annex (‘Alpine NCP’).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 287 [270-294] 24.2.2015 3:45PM



287 Managing non-compliance

9.3.2 The legal basis of NCPs and its implications

As a general matter, NCPs are based on a specific treaty provision. This is true   
of many treaties concluded after the adoption of the Montreal Protocol. In   
addition to Article 8 of this Protocol, examples include Article 18 of the Kyoto   
Protocol, Article 34 of the Biosafety Protocol82 or Article 15 of the Aarhus   
Convention,83 to name but a few. These provisions are then specified by a   
stream of decisions adopted by treaty bodies (most often the COPs or, for   
Protocols, the Meetings of the Parties or ‘CMPs’). Some other treaties have   
established NCPs without an explicit legal basis. Examples include the   
procedures established under the Ramsar Convention, the CITES84 and the   
Basel Convention. This difference is mostly explained by the time at which   
each treaty was adopted. Treaties adopted after the Montreal Protocol   
generally (albeit not always, e.g. the Basel Convention) include a specific   
provision regarding the establishment of an NCP, whereas previous   
instruments have been updated through COP decisions.

This difference is not without legal significance since the existence of a legal   
basis in the treaty may be important in determining the nature of the proceed-  
ings and, in particular, whether the decision resulting from the NCP is binding   
or not. It is a complex question that has not yet been settled, despite its practical   
significance. To address this question it is necessary to distinguish three levels.

First, the binding character must be analysed in light of the specific context   
of the treaty. It is at this level that the existence of a provision in the treaty is of   
particular importance. For example, Article 18 of the Kyoto Protocol recog-  
nises that decisions regarding compliance may be binding, but only if the NCP   
was established by amendment (i.e. it has been ratified by the States con-  
cerned). A contrario in the absence of such an amendment, the decisions are   
technically not binding. Conversely, the underlying treaty may also expressly   
provide for the optional and consultative nature of the NCP and thereby of the   
decisions adopted by the NCP. Such is the case of Article 15 of the Aarhus   
Convention. In other cases still, such as Article 8 of the Montreal Protocol or   
Article 34 of the Biosafety Protocol, the treaty is silent as to the binding   
character of decisions on compliance, which leads to the second level.

In such cases, the legal nature of these decisions must be analysed in the light   
of the general powers of the treaty bodies and, in particular, the COP (or the   
CMP). Some treaties authorise the CMP to adopt binding decisions. This is the   
case of Article 2(9) of the Montreal Protocol or Article 7(4) of the Biosafety

82 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000,   
 2226 UNTS 208 (‘Biosafety Protocol’).

83 Convention on Access to Information, Public Participation in Decision-making and Access to   
 Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447 (‘Aarhus Convention’).

84 Washington Convention on International Trade in Endangered Species of Wild Fauna and   
 Flora, 3 March 1973, United Nations, 993 UNTS 243 (‘CITES’).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 288 [270-294] 24.2.2015 3:45PM



288 New approaches

Protocol.85 The existence of such provisions suggests that the CMP, in fact, has   
the power to issue binding decisions in some cases (and therefore that it may   
delegate this power). But these provisions are normally formulated so as to   
restrict this power to specific types of decisions that do not necessarily   
encompass decisions on non-compliance. In any event, where the treaty does   
not give the possibility for the COP or CMP to adopt binding decisions, it   
seems clear a fortiori that the NCP will not be entitled to do so. This conclusion   
does not imply, however, that such decisions do not, in practice, have norma-  
tive effects.

At the third level, it is important to determine whether the decisions arising   
from the NCP are respected or not, or at least whether they carry some   
authority.86 The question arose with respect to certain countries, notably   
Greece, under the Kyoto Protocol.87 The Compliance Committee considered   
that Greece had not complied with its obligations under Article 5(1) and 7 of   
the Kyoto Protocol and found ‘Greece (to be) in non-compliance’. On this   
basis, it directed Greece to ‘develop a plan referred to in paragraph 1 of section   
XV and submit it within three months’ and, significantly, decided that in the   
meantime Greece was ‘not eligible to participate in the mechanisms under   
Articles 6, 12 and 17 of the Protocol pending the resolution of the question of   
implementation’.88 This suspension of Greece was later lifted without any   
explicit determination as to the binding nature of the Committee’s decision.89This case is often cited to emphasise the authority of NCP decisions in practice.   
Among the numerous examples that could be mentioned to illustrate this   
point,90 the decisions adopted by the Compliance Committee of the Aarhus   
Convention are particularly apposite. Although Article 15 of the Convention   
makes clear that decisions on compliance are not binding, the normative   
power they display in practice can hardly be questioned. The recommenda-  
tions made by the COP to States parties on the basis of the Committee’s   
decisions have indeed been largely followed in practice.91

85 J. Brunnée, ‘COPing with Consent: Law-making under Multilateral Environmental

Agreements’ (2002) 15 Leiden Journal of International Law 1, 21-3.

86 Ibid., 23ff.

87 Compliance Committee, Final Decision: Greece, 17 April 2008, CC-2007-1-8/Greece/EB   
 (‘Decision - Greece’). See also Compliance Committee, Final Decision: Croatia, 19 February   
 2010, CC-2009-1-8/Croatia/EB.

88 Ibid., Annex, para. 18.

89 Compliance Committee, Final Decision: Greece, 13 November 2008, CC-2007-1-13/Greece/   
 EB.

90 See M. Fitzmaurice, ‘Non-Compliance Procedures and the Law of Treaties’, in Treves et al,   
 supra n. 71, pp. 453-81.

91 See A. Andrusevich, T. Alge and C. Konrad (eds.), Case Law of the Aarhus Convention   
 Compliance Committee (2004-2011) (Lviv: RACSE, 2nd edn, 2011), in particular Part III   
 synthesising the ‘outcomes’ of the actions taken by States to respond to the recommendations   
 of the COP (made on the basis of those of the Committee).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 289 [270-294] 24.2.2015 3:45PM



289 Managing non-compliance

9.3.3 Triggering NCPs

A feature of NCPs that emphasises their fundamentally non-confrontational   
nature concerns the ways they may be triggered. Unlike judicial proceedings,   
NCPs can be triggered by the State that is in non-compliance.92 As discussed   
later, self-triggering is linked to the possibility of applying for financial and/or   
technical assistance. In addition to the State in non-compliance, NCPs may   
also be triggered, depending on the cases, by (i) other States parties, (ii) some   
treaty bodies or (iii) the public.

Some NCPs can be triggered by other States parties without the need for   
them to prove that they have been particularly affected.93 Here we approach   
the concept of actio popularis inter omnes partes (as opposed to the actio   
popularis, which does not exist - yet - in general international law94). This   
possibility is based on the nature of the object protected by the treaty (e.g. the   
ozone layer, climate system, endangered species, a certain level of transparency   
in environmental matters). Non-compliance by a State party is likely to affect   
the common good protected by the treaty and, thereby, the interests of all other   
States parties. When the treaty does not aim to protect a common resource   
(e.g. environmental protection in a transboundary context), NCPs normally   
give the right to initiate the procedure only to States specifically affected.95

As for the possibility given to some treaty bodies, e.g. the Secretariat, to   
initiate the procedure, it may either apply to non-compliance with specific   
obligations (e.g. procedural obligations96) or more generally to all treaty   
obligations without distinction.97 This form of triggering has several advan-  
tages. First, the treaty bodies centralise information on the implementation   
of the treaty and are therefore in an ideal position to detect cases of non-  
compliance. In addition, triggering by treaty bodies avoids confrontation   
between States parties while producing similar results in the management of   
non-compliance. Finally, treaty bodies may informally relay the concerns of   
groups of civil society that are not usually allowed to initiate NCPs.

The latter point leads us to the third form of triggering, namely referral by   
the public. This possibility has only been provided for in environmental   
treaties of regional scope, such as the Alpine Convention98 or the Aarhus   
Convention.99 It is thanks to this type of triggering that the Compliance   
Committee of the Aarhus Convention has been able to develop an important

92 See, e.g., Montreal NCP, supra n. 74, para. 44; Basel NCP, supra n. 79, para. 9(a); Ramsar NCP,   
 supra n. 78, para. 1; CITES NCP, supra n. 80, para. 19; Kyoto NCP, supra n. 75, para. VI.1(a);   
 Cartagena NCP, supra n. 76, para. IV.1(a); Aarhus NCP, supra n. 77, para. 16.

93 See, e.g., Montreal NCP, supra n. 74, para. 1; NCP Kyoto, supra n. 75, para. VI.1(b); CITES   
 NCP, supra n. 80, para. 18; Aarhus NCP, supra n. 77, para. 15.

94 See F. Voeffray, L’actio popularis ou la défense de l’intérêt collectif devant les juridictions   
 internationales (Paris: Presse Universitaires de France, 2004).

95 See, e.g., Basel NCP, supra n. 79, para. 9(b); Cartagena NCP, supra n. 76, para. IV.1(b).

96 See, e.g., Basel NCP, supra n. 79, para. 9(c). 97 See, e.g., Montreal NCP, supra n. 74, para. 3.

98 Alpine NCP, supra n. 81, para. 2. 99 Aarhus NCP, supra n. 77, para. 18.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 290 [270-294] 24.2.2015 3:45PM



290 New approaches

body of ‘jurisprudence’ on ‘environmental democracy’. Indeed, the vast major-  
ity of communications brought before the Committee come from civil society   
groups. Note that it is not necessary to show a specific interest to use this   
avenue. The rules on locus standi and admissibility make way for communica-  
tions by non-governmental organisations with an interest of a general nature,   
which allows them to contribute to compliance with the standards of   
environmental transparency introduced by the Convention.100

9.3.4 Composition of NCP organs

The composition of NCP organs has some practical importance. The question   
can be considered from several standpoints, depending on whether one is   
interested in the geographical distribution of the members (as in the case of   
environmental funds), the processes of nomination, or the capacity in which   
members act. Generally, we distinguish between organs composed of   
representatives of States and organs consisting of independent experts. The   
nomination procedure can, however, blur these two categories to some extent   
as ‘independent’ experts can be selected by States. In addition, representatives   
of States can sometimes show some independence. But the distinction remains   
useful to understand how NCPs function.

The NCP of the Montreal Protocol is governed by a body (the ‘Compliance   
Committee’) consisting of ten State representatives elected by the COP for   
a period of two years in accordance with an equitable geographical   
distribution.101 The same applies to other compliance committees, such as   
those established under the LRTAP Convention102 and the Espoo   
Convention.103 At the other extreme, the NCP of the Kyoto Protocol is   
governed by a complex organ (also a ‘Compliance Committee’) consisting of   
twenty experts elected by the COP and acting in their independent capacity.104The Committee holds plenary sessions (twenty members), but also has two   
branches (each with ten members) known as a ‘facilitative branch’ (whose   
purpose is to provide assistance) and an ‘enforcement branch’ (which may   
characterise situations of non-compliance and impose sanctions). The selec-  
tion of members must also take into account geographic representation as well   
as technical expertise.105 The Aarhus Compliance Committee is composed of   
independent experts. It has eight members serving in a personal capacity (and   
pro bono) who are recognised experts, including in the legal matters.106Between these two extremes, one finds other bodies, such as the committee

100 See Andrusevich et al., supra n. 91, pp. 102ff. 101 Montreal NCP, supra n. 74, para. 5.

102 Convention on Long-range Transboundary Air Pollution, 13 November 1979, 1302 UNTS 217   
 (‘LRTAP Convention’).

103 Convention on Environmental Impact Assessment in a Transboundary Context, 25 February   
 1991, 1989 UNTS 309 (‘Espoo Convention’).

104 Kyoto NCP, supra n. 75, para. II(3) and (6). 105 Ibid., para. II(6), IV(1) and V(1). 106 Aarhus NCP, supra n. 77, para. I(1)-(2).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 291 [270-294] 24.2.2015 3:45PM



291 Managing non-compliance

established under the Basel Convention, whose members are in fact representatives of States, although this may not be made explicit in the instrument establishing the NCP.107

The composition of the organs in charge of administering the NCPs can   
explain how these procedures function. Aside from questions of indepen-  
dence, which may be driven by personal considerations as much as by the   
institutional structure of an organ, the composition helps to understand the   
different approaches (whether technical or more political) favoured by each   
organ. Commentators have observed that adopting a more political approach   
runs the risk of making compliance ‘negotiable’.108 Yet, the political dimension   
of NCPs may also be seen as a necessary feature of their operation to the   
extent that they are mostly intended to manage non-compliance and not to   
characterise a breach and determine the ensuing legal consequences.

9.3.5 Measures adopted by NCPs

We saw in Section 9.2.2 that the legal nature of the decisions adopted by NCPs   
remains unsettled. However, we also noted that they have a significant normative   
influence in practice. We must now complete the analysis through a survey of   
different types of measures that can be adopted by compliance committees.

The primary objective of NCPs is to determine the reasons for non-  
compliance and to provide financial and technical assistance. This is reflected   
in the measures they are entitled to adopt. For example, the Facilitation Branch   
of the Committee established under the Kyoto Protocol can conclude to the   
‘(p)rovision of advice and facilitation of assistance’ or the ‘(f)acilitation of   
financial and technical assistance, including technology transfer and capacity   
building’.109 The same applies to all other committees that administer NCPs.   
But the analysis of the causes of non-compliance in a given case may also lead to a   
stronger stance, including the adoption of sanctions. These can range from simple   
requests for additional information110 to the issuance of warnings111 or findings of   
non-compliance,112 or even the adoption of real sanctions such as the suspension   
of certain benefits under the respective treaty or the application of penalties.113

107 See Urbinati, supra n. 71, pp. 58-9.

108 See G. Handl, ‘Compliance Control Mechanisms and International Environmental

Obligations’ (1997) 9 Tulane Journal of International and Comparative Law 29, 37. 109 Kyoto NCP, supra n. 75, para. XIV.

110 See, e.g., Montreal NCP, supra n. 74, paras. 3 and 5(c); Basel NCP, supra n. 79, para. 22(a);   
 CITES NCP, supra n. 80, para. 29(b); Cartagena NCP, supra n. 76, para. VI.1(d); Kyoto NCP,   
 supra n. 75, para. IX(3).

111 See, e.g., Basel NCP, supra n. 79, para. 20(b); CITES NCP, supra n. 80, para. 29(c) and (g);   
 Cartagena NCP, supra n. 76, para. VI.2(b); Aarhus NCP, supra n. 77, para. XII.37(f).   
112 See, e.g., Montreal NCP, supra n. 74, para. 9; Kyoto NCP, supra n. 75, paras. IX(4)(a) and (7)   
 and XV(1)(a); CITES NCP, supra n. 80, para. 29(g); Aarhus NCP, supra n. 77, para. XII.37(e). 113 See, e.g., Aarhus NCP, supra n. 77, para. XII.37(g); CITES NCP, supra n. 80, paras. 30 and 34;   
 Kyoto NCP, supra n. 75, para. XV(5).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 292 [270-294] 24.2.2015 3:45PM



292 New approaches

The transition from facilitative measures to firmer measures is also characterised by the passage from a non-confrontational approach to a logic that is closer to the traditional methods of implementation in international environmental law studied in Chapter 8.

Select bibliography

Andrusevich, A., T. Alge and C. Konrad (eds.), Case Law of the Aarhus Convention   
 Compliance Committee (2004-2011) (Lviv: RACSE, 2nd edn, 2011).   
Biermann, F., ‘Financing Environmental Policies in the South: Experiences from the   
 Multilateral Ozone Fund’ (1997) 9 International Environmental Affairs 179.   
Boisson de Chazournes, L., ‘La mise en œuvre du droit international dans le domaine de   
 la protection de l’environnement: Enjeux et défis’ (1995) Revue générale de droit   
 international public 37.

‘Le Fonds pour l’environnement mondial: Recherche et conquête de son identité’   
 (1995) 41 Annuaire français de droit international 612.

‘Technical and Financial Assistance’, in D. Bodansky, J. Brunnée and E. Hey (eds.),   
 The Oxford Handbook of International Environmental Law (Oxford University   
 Press, 2007), pp. 948-72.

Brown Weiss, E. and H. K. Jacobson (eds.), Engaging Countries: Strengthening   
 Compliance with International Environmental Accords (Cambridge MA: MIT   
 Press, 1998).

Brunnée, J., ‘COPing with Consent: Law-making under Multilateral Environmental   
 Agreements’ (2002) 15 Leiden Journal of International Law 1.

Chayes, A. and A. Handler Chayes, The New Sovereignty, Compliance with   
 International Regulatory Agreements (Cambridge MA: Harvard University Press,   
 1998).

Correa, C., ‘Innovation and Technology Transfer of Environmentally Sound

Technologies: The Need to Engage in a Substantive Debate’ (2013) 22 Review of European, Comparative and International Law 54.

Diaz Anadon, L., ‘Missions-oriented RD&D Institutions in Energy Between 2000 and   
 2010: A Comparative Analysis of China, the United Kingdom, and the United   
 States’ (2012) 41 Research Policy 1742.

Fitzmaurice, M. and C. Redgwell, ‘Environmental Non-Compliance Procedures and   
 International Law’ (2000) 31 Netherlands Yearbook of International Law 35.   
Freeman, J. and C. Kolstad (eds.), Moving to Markets in Environmental Regulation.   
 Lessons from Thirty Years of Experience (Oxford University Press, 2006).   
Freestone, D., ‘The World Bank’s Prototype Carbon Fund: Mobilising new   
 Resources for Sustainable Development’, in S. Schemmer-Schulte and K.-Y.   
 Tung (eds.), Liber Amicorum Ibrahim S. I. Shihata (The Hague: Kluwer, 2001),   
 pp. 265-341.

‘The World Bank and Sustainable Development’, in M. Fitzmaurice, D. Ong and

P. Merkouris (eds.), Research Handbook on International Environmental Law (Cheltenham: Edward Elgar, 2010), pp. 138-60.

Gündling, L., ‘Compliance Assistance in International Environmental Law: Capacity-  
 Building, Transfer of Finance and Technology’ (1996) 56 Zeitschrift für   
 ausländisches öffentliches Recht und Völkerrecht 796.

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 293 [270-294] 24.2.2015 3:45PM



293 Select bibliography

Handl, G., ‘Compliance Control Mechanisms and International Environmental

Obligations’ (1997) 9 Tulane Journal of International and Comparative Law 29.   
Impériali, C. (ed.), L’effectivité du droit international de l’environnement. Contrôle de la   
 mise en œuvre des conventions internationales (Paris: Economica, 1998).   
Keller, W., ‘International Technology Diffusion’ (2004) 42 Journal of Economic   
 Literature 752.

Kiss, A., D. Shelton and K. Ishibashi (eds.), Economic Globalization and Compliance   
 with International Environmental Agreements (The Hague: Kluwer, 2003).   
Kohona, P., ‘UNCED - The Transfer of Financial Resources to Developing Countries’   
 (1992)1 Review of European Community and International Environmental Law 307. Koskenniemi, M., ‘Breach of Treaty or Non-Compliance? Reflections on the   
 Enforcement of the Montreal Protocol’ (1992) 3 Yearbook of International   
 Environmental Law 123.

Langer, M.-J., ‘Key Instruments of Private Environmental Finance: Funds, Project   
 Finance and Market Mechanisms’, in P.-M. Dupuy and J. E. Viñuales (eds.),   
 Harnessing Foreign Investment to Promote Environmental Protection: Incentives   
 and Safeguards (Cambridge University Press, 2013), pp. 131-75.

Lawrence, P., ‘Technology Transfer Funds and the Law: Recent Amendments to the   
 Montreal Protocol on Substances that Deplete the Ozone Layer’ (1992) 4 Journal of   
 Environmental Law 15.

Maljean-Dubois, S., ‘Mécanismes internationaux de suivi et mise en œuvre des con-  
 ventions internationales de protection de l’environnement’ (2004) 9 Analyses 1. Maskus, K. E., ‘Differentiated Intellectual Property Regimes for Environmental and   
 Climate Technologies’, OECD Environment Working Papers, No. 17 (2010).   
Miller, A. S., ‘The Global Environmental Facility and the Search for Financial   
 Strategies to Foster Sustainable Development’ (1999-2000) 24 Vermont Law   
 Review 1229.

Monk, A. H. B., ‘The Emerging Market for Intellectual Property: Drivers, Restrainers,   
 and Implications’ (2009) 9 Journal of Economic Geography 469.

Nanda, N., ‘Diffusion of Climate Friendly Technologies: Can Compulsory Licensing   
 Help?’ (2009) 14 Journal of Intellectual Property Rights 241.

Nollkaemper, A., ‘Compliance Control in International Environmental Law:

Traversing the Limits of the National Legal Order’ (2002) 13 Yearbook of International Environmental Law 165.

Ponce-Nava, D., ‘Capacity-Building in Environmental Law and Sustainable

Development’, in W. Lang (ed.), Sustainable Development and International Law (London: Springer, 1995), pp. 131-6.

Richardson, B. J., Socially Responsible Investment Law: Regulating the Unseen Polluters   
 (Oxford University Press, 2008).

Romanin Jacur, F., The Dynamics of Multilateral Environmental Agreements.   
 Institutional Architectures and Law-Making Processes (Naples: Editoriale   
 Scientifica, 2013).

Schalatek, L. and S. Nakhooda, ‘The Green Climate Fund’, in Climate Finance

Fundamentals, No. 11, November 2012.

Steenblink, R. and J. A. Kim, ‘Facilitating Trade in Selected Climate Change Mitigation   
 Technologies in the Energy Supply, Buildings, and Industry Sectors’, OECD Trade   
 and Environment Working Paper, No. 2009-02 (4 May 2009).

C:/ITOOLS/WMS/CUP-NEW/5963894/WORKINGFOLDER/DUPUY/9781107041240C09.3D 294 [270-294] 24.2.2015 3:45PM



294 New approaches

Streck, C., ‘The Global Environmental Facility - A Role Model for International   
 Environmental Governance?’ (2001) 1 Global Environmental Politics 71.   
Treves, T., L. Pineschi, A. Tanzi, C. Pitea, C. Ragni and F. Romanin Jacur (eds.), Non-  
 Compliance Procedures and Mechanisms and the Effectiveness of International   
 Environmental Agreements (The Hague: TMC Asser Press, 2009).   
 Ulfstein, G. and T. Marauhn (eds.), Making Treaties Work: Human Rights, Environment   
 and Arms Control (Cambridge University Press, 2007).

United Nations Environment Programme, Manual on Compliance with   
 and Enforcement of Multilateral Environmental Agreements (Nairobi:   
 UNEP, 2006).

Urbinati, S., Les mécanismes de contrôle et de suivi des conventions internationales de   
 protection de l’environnement (Milan: Giuffrè, 2009).

Viñuales, J. E., ‘Managing Abidance by Standards for the Protection of the

Environment’, in A. Cassese (ed.), Realizing Utopia (Oxford University Press, 2012), pp. 326-39.

Wolfrum, R., P. T. Stoll and U. Beyerlin (eds.), Ensuring Compliance with Multilateral   
 Environmental Agreements. A Dialogue between Practitioners and Academia (The   
 Hague: Martinus Nijhoff, 2006).