Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order

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1. INTRODUCTION

Recently, states and other interested actors have put much effort into the development of procedures that seek to assess and, whenever necessary, correct non-compliance of states with their obligations pertaining to the protection of the environment. These procedures (hereinafter referred to as procedures for “compliance control”) have primarily been established at the international level. They are established by international law, they are executed by institutions consisting of representatives of more than one state, and they apply international law. International procedures for compliance control encompass both traditional dispute settlement procedures and the modern “non-compliance procedures” that in recent years have been established with regard to, for example, the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol),1 the protocols to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone,2 and the 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change (UNFCCC) (Kyoto Protocol).3 Legal scholars have spent much

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2 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, 18 ILM 1442 (1979).
3 Kyoto Protocol to the 1992 Framework Convention on Climate Change, 37 ILM 32 (1998) [hereinafter Kyoto Protocol]. These procedures are primarily distinguished. It often is said that non-compliance procedures would provide a “softer,” less legalistic mechanism than is offered by traditional dispute settlement procedures. Non-compliance procedures generally would apply a less rigid test by which compliance is measured and the first object would be to obtain a return to full compliance by the “defaulting” state rather than to impose a sanction for non-compliance or award compensation to an injured party. See, for example, M. Fitzmaurice and C. Redgewell, Environmental Non-Compliance Procedures and International Law, 31 Netherlands Y. B. Int’l L. 35-67 (2000). However, the similarities are as important as the differences. Both types of procedures can seek to determine conformity with behaviour and changes that are required to promote compliance. This is also true for dispute settlement procedures. When a dispute arises
effort in analysing these procedures and in making proposals for improvement. All of this activity seems to be inspired by the idea that more and better compliance procedures can help achieve the objectives of the agreements.

In certain fields of international law, international procedures for compliance control have been supplemented by procedures at the national level. In international human rights law and in international criminal law, international institutions function next to national institutions. This integration of national institutions in these international systems for compliance control (or enforcement) is based on the idea that national institutions are critical to the effective application of international law.

In contrast, in both international legal practice and scholarship, attention to the role of national institutions in securing compliance with international environmental law has been limited. The one comparative study that has been conducted on the application of international environmental law by national courts shows that the role of national courts has been marginal.

out of an alleged case of non-compliance by one state with an international norm, a dispute settlement procedure may seek to establish whether indeed the behaviour violated the norm and, if so, whether measures need be taken to remove that gap and secure compliance. In this respect, the function of these procedures is similar to that of non-compliance procedures.


5 See, for example, Article 2(3) of the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (no. 16) at 52, UN Doc. A/6316 (1966), reprinted in 61 Am. J. Int'l L. 870 (1967) and Article 13 of the European Convention on Human Rights, 4 November 1950, 213 UNTS 221 CHR. In the Kudla v. Poland case, 26 October 2000, ECHR appl. no. 30210/96, para. 152, the European Court noted on Article 13: "The object of Article 13...is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority" (emphasis added).


7 For a forceful argument to this effect, see Benedetto Conforti, International Law and the Role of Domestic Legal Systems (1993).

8 The results of this study, which was organized within the American Society for International Law, are published in 7(1) Rev. Eur. Comm. & Int'l Env'tl. L. (1998) and in M. Anderson and P. Galizzi, International Environmental Law in National Courts (2002).
The number of cases reported in the country reports of the *Yearbook of International Environmental Law* is very limited. International agreements seeking to protect the environment do not seek to change this tendency. In scholarship, the discussions of dispute settlement and compliance control are typically confined to the international level.\(^9\)

Of course, many if not all states have established national administrative or judicial procedures that assess whether the state or other actors conform to legal obligations and that, whenever it is established that a gap exists between the norm and other behaviour, will seek to promote compliance. Such procedures will form a key part of national environmental law. As large parts of national environmental law implement international environmental law, these procedures are also indirectly pertinent to the eventual effectiveness of international environmental law. However, the point is that these procedures are not concerned with international environmental law and that international environmental agreements or institutions, with a few exceptions (see section 2 of this article), do not attempt to guide, steer, or develop these mechanisms. It allocates the function of compliance control exclusively to the international law level.

There is little doubt that unless national institutions actively engage in the application and enforcement of international environmental law, the efforts aimed at securing compliance at the international level will remain ineffective. Many (although not all) rules of international environmental law depend for their effectiveness on acts by private parties that otherwise operate in the national domain. Acts that deplete the ozone layer, change climate, deplete fish stocks, clear-cut forests, move waste across boundaries, and so on, usually are not performed by states in the international public domain. They tend to be performed by private parties who in legal terms function in the national domain. In addition, acts or omissions by the public authorities themselves, which contravene provisions of international environmental agreements, may persist for a long time if no institutions are empowered to review these acts and if the task of compliance control is left to relatively powerless international institutions. If there is no proper connection between the international domain and national institutions, it will not be uncommon that international prescriptions fail to reach their objectives.

\(^9\) For example, Malgosia Fitzmaurice, *International Protection of the Environment*, 293 Recueil des cours, ch. VII (2002). Also Cesare Romano, *The Peaceful Settlement of International Environmental Dispute: A Pragmatic Approach* (2000), which seeks to provide a comprehensive overview and confines itself to international procedures. The main exception and probably most comprehensive discussion of the role of national institutions is Peter Sand, *The Role of Domestic Procedures in Transnational Environmental Disputes*, in Peter H. Sand (ed.), *Transnational Environmental Law: Lessons in Global Change* 87–128 (1999). The focus of the present study is different, though. Apart from the fact that Sand confines himself to transboundary issues, his focus is on the use of national procedures in response to environmental harm as such, whereas this article focuses on the application of national procedures to the non-implementation of international environmental law. Obviously, in several cases, the two perspectives will overlap.
Against this background, this article explores the role of national institutions and, in particular, national courts, in the system for compliance control with international environmental law. It examines the primary ideas that may hinder national institutions from taking a more substantial role and explores ways in which this role may be changed. The article proceeds in three parts. Section 2 provides a brief overview of the international arrangements pertaining to the role of national institutions. Section 3 examines possible explanations for the relatively modest role of national institutions. Section 4 reviews certain developments that may strengthen the role of national courts. Section 5 contains conclusions.

II. LINKS BETWEEN INTERNATIONAL ENVIRONMENTAL AGREEMENTS AND THE NATIONAL LEGAL ORDER

Most international agreements pertaining to environmental protection require that states adopt, in their national legal order, measures to implement the agreement. One example of many is the 1992 Convention on the Transboundary Effects of Industrial Accidents, which holds that "to implement the provisions of this Convention, the Parties shall take appropriate legislative, regulatory, administrative and financial measures for the prevention of, preparedness for and response to industrial accidents."\(^{10}\) Treaties contain a wide variety of more specific provisions (on emission standards, prohibited chemicals, endangered species, and so on) that must be implemented in the national legal order. In contrast, agreements generally are silent on what states need to do to ensure that the terms of the agreement are complied with. They leave matters of compliance control and enforcement to national law. States simply have to implement the agreements. A failure to do so may give rise to an issue in an international compliance control procedure. The question of whether or not the state itself has established procedures that might correct non-compliance is left to the judgment of the state itself.

There are certain exceptions to this pattern. These can be divided into three categories, distinguished according to the different functions of the process of compliance control: information gathering, enforcement, and the assessment of compliance.\(^{11}\) Many international environmental agreements require national authorities to monitor data that may be relevant to an assessment of compliance. For instance, Article 2(2) of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) provides: "The Contracting Parties shall provide for a system

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\(^{11}\) See, more generally, André Nollkaemper, The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint, chap. 6 (1993).
of regular monitoring and inspection by their competent authorities to assess compliance with authorisations and regulations of releases into water or air.”

Similarly, Article 5(1) of the Kyoto Protocol provides: “Each Party included in Annex I shall have in place, no later than one year prior to the start of the first commitment period, a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol.”

Many agreements have elaborated these types of obligations in order to specify what, when, and how states need to monitor. For instance, Article 5(1) of the Kyoto Protocol provides that each party included in Annex I “shall have in place, no later than one year prior to the start of the first commitment period, a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol.” Guidelines for such national systems were adopted at the seventh Conference of the Parties to the Framework Convention on Climate Change. The guidelines define national systems as “all institutional, legal and procedural arrangements made within a Party included in Annex I for estimating anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and for reporting and archiving inventory information.” The guidelines detail the modalities of the estimations and the procedures for reporting to the competent international institutions. The guidelines do not state that the estimations serve to establish whether the states, or other actors, comply with their obligations. Maybe it is expected that if the estimations were to show that a state had failed to comply with its obligations under the protocol, that state would thereby improve its efforts and be able to achieve compliance after all. This is suggested by the description of the objective of the guidelines, namely to assist national systems in such a manner that they “support compliance with Kyoto Protocol commitments related to the estimation of anthropogenic GHG emissions by sources and removals by sinks.” However, the guidelines do not say so, and, indeed, they do not even say that the estimations have to be examined in light of the obligations. They seek data compilation and not the assessment of compliance.

The second approach to compliance control and enforcement at the national level is that some agreements explicitly stipulate measures to enforce the provisions of the agreements. Some treaties state that conduct that is not

12 Convention for the Protection of the Marine Environment of the North-East Atlantic, 32 ILM (1993), 1072.
13 Kyoto Protocol, supra note 3.
15 Ibid. at para. 2.
16 Ibid. at para. 8 [emphasis added].
in conformity with the agreement is to be punished. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) provides that "[e]ach Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention." Other treaties contain comparable provisions. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) requires parties to penalize trade in species that is prohibited by the convention. In 2000, the contracting parties recommended that the parties "ensure strict compliance and control" with respect to the regulation of trade in animal and plant species and, in the case of the violation of the relevant provisions, immediately take appropriate measures "in order to penalize such violation and to take appropriate remedial action." The 1996 protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) obliges parties to prevent and, if necessary, punish acts contrary to the provisions of the protocol. In 2001, the contracting parties adopted a Guidance to the National Implementation of the 1996 protocol that recommends that states "prepare legislation and/or regulations required to establish offences and penalties for infringements of national laws implementing the 1996 Protocol" and "designate an authority or authorities responsible for compliance with and enforcement of permit conditions." Comparable initiatives to improve enforcement and punishment have been undertaken in the framework of the Basel Convention with respect to illegal traffic in hazardous wastes. What is typical of these types of provisions is that they seek enforcement vis-à-vis private parties that act in contravention of the provisions of the convention (or, rather, in contravention of the national provisions that give effect to the convention). They do not appear to be concerned with enforcement against the state itself, in case that state would be in breach of its obligations.

The third function of compliance control is the assessment of whether a state actually complies with its obligations. In contrast to the other two

18 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 UNTS 243, Article 8(1) [hereinafter CITES].
20 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, 1046 UNTS 120, Article 10(2) [hereinafter London Convention].
22 Basel Convention, supra note 17; Decision VI/16 on Guidance Elements for Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes, which was adopted by the sixth Conference of the Parties, UNEP/CHW.6/40 (2005).
functions, international agreements commonly are silent on the formal review of compliance by a state. They do not provide for review by national courts. One treaty that provides expressly for judicial review is the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. This convention provides:

Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

While this provision will apply to national laws that give effect to international obligations, it does not seek to allow a challenge to acts and omissions that contravene provisions of international law relating to the environment. National judicial review of the compatibility of acts or omissions with international law is left to the domestic sphere of the contracting parties. In addition, other environmental agreements do not provide for a requirement that states should empower their courts, or other institutions, to determine whether states have complied with the obligations under the agreement.

In summary, there seems to be an increasing recognition of the need to improve compliance with international environmental law by action at the national level and by integrating national systems in the overall system of compliance control. Attention has primarily been focused on, first, the monitoring of data and, second, enforcement vis-à-vis private persons. The relevant treaties generally remain silent on the key function of compliance procedures at the international level, namely to assess and enforce compliance with the terms of the treaties by states.

III. POSSIBLE EXPLANATIONS OF THE MODEST ROLE OF NATIONAL INSTITUTIONS

A number of possible explanations, which are not mutually exclusive, may help to explain the relatively limited role that has been accorded to national institutions.

1. Boundary between International Law and National Law
The obvious starting point in an examination of the role of national authorities in promoting compliance with international law is the divide between international and national law. Similarly to all other parts of public

24 Ibid., at Article 9(3).
international law, international environmental law is separated from the national legal order. International environmental law forms part of the international public domain. Multiple formal and informal boundaries delimit this international domain from the national domain.

As a matter of positive international law, rules that flow from the sources of international law do not automatically and out of their own authority have legal force in another (national) legal order. Some authors have argued that particular areas of international law could constitute semi-autonomous "constitutional centres" that might have their own legal relationship with national legal orders. Special relationships obviously apply to the European Community (EC), and they have also been said to exist, or to have been possible, for human rights law, the law of the World Trade Organization, and other regional integration laws. However, while separate "fields" of international law do have their own features, there is little evidence that these features would include a special (more "monistic") relationship with the national legal order. There is certainly no ground for assuming a special position for international environmental law. The term "international environmental law" groups a wide variety of rules, procedures, and institutions that have been set up with a view to protecting the environment. Its main principles and procedures cannot be separated from general international law, and the general principles of international law governing the relationship with national law are fully applicable to international environmental law. The starting point, thus, is that international environmental law out of its own force is not valid in national law.

Can this boundary between international law and national law explain the modest role of national institutions in the system for compliance control? A possible explanation would run as follows. Since international environmental law is not necessarily part of the national law of states, international law would have no business in obliging or empowering national institutions to apply rules that are not part of the legal order of these institutions. This argument is to some extent supported if one compares international

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26 Following the Costa v. Enel case, Case 6/64 [1964] ECR 585, this is an integral part of the legal systems of the member states, which their courts are bound to apply.
27 These examples are discussed in Walker, supra note 25.
29 Even the European Court of Human Rights, which supervises the part of international law that is particularly integrated with national law, has held that the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (1950), was formally neutral as to the mode of implementation and does not require incorporation. Swedish Engine Drivers' Union v. Sweden (2 July 1976), Appl. 5614/72, ECHR, Series A, no. 20, para. 50. What matters is that the substance of the guaranteed rights should in fact be enjoyed by individuals. See Mark W. Janis, Richard S. Kay, and Anthony W. Bradley, European Human Rights Law: Text and Materials 472 (2000).
environmental law with European environmental law. The relatively important role of national courts in the application of EC (environmental) law can be explained precisely by the fact that EC law is valid law for national courts, irrespective of transformation or incorporation, and, moreover, it is supreme over conflicting national law.\(^{30}\) This also explains why the judicial reception of international environmental law appears to become more important once international environmental law has been implemented in EC law.\(^{31}\) The lack of automatic validity and supremacy of international environmental law as such means that in cases where the legislature or the executive has failed to give effect to a rule of international environmental law, the courts commonly will not be empowered to correct these failures.\(^{32}\)

However, the fact that it cannot be presumed that national institutions are not empowered to apply international environmental law as such (that is, irrespective of its incorporation or transformation) does not mean that international law could not allocate the task to review compliance to national institutions. States can conclude a treaty that requires the contracting parties to ensure that all or some of its provisions be enforced by their domestic courts and that leave it to the states themselves to determine whether or not these rules are applied as national law or as international law.\(^{33}\) This possibility is indeed the basis for the role of national courts in reviewing acts against human rights treaties.

The examples of international guidelines on national monitoring and enforcement (which are referred to in section 2 of this article) show that it is not alien to international environmental law to guide national institutions. It is not insignificant, though, that these examples are contained in guidelines and recommendations rather than in binding law and that contracting states seek to leave each other (and themselves) as much room as possible to determine how the objectives of monitoring and enforcement are secured in their national legal orders. Illustrative is the discussion in

\(^{30}\) Although it must be added that compared to other issue areas, the role of courts in EC environmental law has been relatively limited. See Han Somsen, *The Private Enforcement of Member State Compliance with EC Environmental Law: An Unfulfilled Promise?* 1 Y.B. Eur. Envtl. L. 311–60 (2000).

\(^{31}\) For instance, the 2001 edition of the *Yearbook of International Environmental Law* reported cases from Sweden (p. 419) and the Netherlands (p. 465) on EC regulations that gave effect to, respectively, the Montreal Protocol and the Basel Convention.

\(^{32}\) Of course, a state that precludes the domestic validity of international law and acts in violation of that law (but in conformity with national law) may engage responsibility under international law *vis-à-vis* injured parties (or be subject to calls for improvement emanate from "softer" international compliance procedures) and may under certain circumstances be required to provide remedies, for example, by changing its law so as to ensure conformity. What is important for our purposes, however, is that in such a case it will be for the executive or the legislature, and not for the national courts, to provide that remedy.

\(^{33}\) *Permanent Court of International Justice, Jurisdiction of the Courts of Danzig*, Ser. B, no. 15 (1928), pp. 17–18; *International Court of Justice, LaGrand (Germany v. United States of America)*, in particular para. 77 and para. 91.
the consultative meeting of the 1972 London Convention on the guidance for national implementation. The meeting agreed that the guidance "was supported as guidance only, underlining its non-binding approach and the fact that it makes clear that Contracting Parties to the Protocol would need to decide how best to implement the obligations of the Protocol in their national systems." In this manner, the international-national divide does appear to contribute to the modest role of national institutions.

2. Unity of the State
A second and directly related factor that may help to explain the role allocated to national institutions is the notion of the unity of the state. Traditionally, international law addresses itself to the state as a whole and is not concerned with individual state organs. This idea is deeply rooted in international law. It underlies, for instance, the substantive interpretation of the local remedies rule, which holds that a state does not breach international law unless and until the courts have failed to provide redress. The unity of the state may be relevant for present purposes since it might be said that the organs of the state (such as national courts) cannot be seen to be institutions that review compliance by the state, because they are part of that state.

The explanatory power of this idea of the unity of the state, however, appears limited. For one thing, the substantive interpretation of the local remedies rule is of little relevance in this context, since violations of international environmental law do not, or at least not exclusively, involve injury to particular nationals of one state within the jurisdiction of another state. In most cases, acts or omissions of the legislature and/or the executive in contravention of an agreement can be construed as a breach of international law, irrespective of a failure of remedial action by a national court. If a court would make a finding of such a contravention, there is no reason to consider it to be anything other than a finding of non-compliance by the state. In any case, this is no reason not to charge national institutions with the task of assessing whether acts or omissions of the legislature and/or the executive are compatible with the agreement.

The notion of the unity of the state has never prevented states from concluding treaties that prescribe particular procedures that have to be followed within states. Although treaties are addressed to the state as a whole, they may, by virtue of their contents, be controlling of certain organs.

35 See 2(2) Y.B. of the Intl. L. Commission 47 (1977) ("the real reason for the existence of the principle of the exhaustion of local remedies...is to enable the state to avoid the breach of an international obligation").
36 The facts of the Trail Smelter Arbitration (U.S. v. Can.), III UN Reports of International Arbitral Awards, 1906 (16 April 1938; 11 March 1941), are typical.
within the state. Again, international human rights law provides examples.\(^37\) In particular cases, international environmental law can even address itself directly to state organs.\(^38\) An example in international environmental law are the provisions of CITES on the role of the management authority of the contracting parties.\(^39\) To the extent that international environmental law is silent on any particular internal procedures for assessing compliance, it cannot be explained by a legal principle that treaties have to respect the unity of the state. It is not implausible though that in a less formal manner the notion of the unity of the state, combined with the separation between the international and the national legal order, induces states to leave other states (and themselves) as much freedom as possible in devising national procedures. Once again, the guidelines for national systems established in regard to the Kyoto Protocol are illustrative, as they direct themselves towards "national systems," leaving it to the states to determine whether these cover "institutional, legal or procedural" arrangements.\(^40\)

3. Limited Expectations of Compliance

A third possible explanation of the modest role allocated to national institutions in securing compliance with international environmental law is that states do not (always) appear to expect and seek compliance with the law in the international public domain as they do in the national public domain. There is considerable support for this idea in legal scholarship. Compliance with international environmental law would have to be managed rather than enforced.\(^41\) It is said that states rarely wilfully violate obligations. Non-compliance would primarily be caused by the fact that norms almost invariably leave ample room for reasonable differences in interpretation and resulting state behaviour due to the fact that there is often an unavoidable time lag between fundamental reform and performance as well as by the fact that states may lack technical or administrative capacity to implement complex environmental regulation.\(^42\) Furthermore, it is said that adjudication

\(^{37}\) See note 5 in this article.

\(^{38}\) See generally Rosalyn Higgins, The Concept of "the State": Variable Geometry and Dualist Perceptions, in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds.), The International Legal System in Quest of Equity and Universality 547-61 (2001).

\(^{39}\) CITES, supra note 18, at Article IX(1). See, for example, Resolution 11.3 (2000), which recommends that importing parties do not accept under any circumstances or pretext export or re-export documents issued by any authority, irrespective of its hierarchical level, other than the management authority.

\(^{40}\) Guidelines for National Systems, supra note 14, para. 2.


\(^{42}\) Downs, Danish, and Barsoom, supra note 41, at 482-3; Abram Chayes and Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (Cambridge, MA: Harvard University Press, 1995).
processes that result in a one-time determination of liability are ill-suited to address the mutable, highly technical nature of the issues involved.\textsuperscript{43} The confrontational forms of advocacy on which such processes rely also would do little to build the necessary confidence and trust in a regime.\textsuperscript{44} Developing mechanisms that result in binding outcomes would be premature in view of the regime formation processes that characterize most international environmental agreements.\textsuperscript{45} More generally, it has been said that to focus on compliance would neglect essential and ongoing political processes.\textsuperscript{46} It also has been said that states may allow breaches of treaties since compliance may be too costly. It may be in the interest of society to allow or to even encourage breaches rather than insisting on full compliance (the notion of an "efficient breach")—although this argument is easier applied to contractual relationships than to obligations to protect common interests.\textsuperscript{47} And, finally, the limited legitimacy of international environmental law-making\textsuperscript{48} may also provide an argument not to strive for full and automatic compliance with international environmental law in the same manner as states expect full compliance with national environmental law.

These considerations are all related to the international/national law divide. One is reminded of the observation made by Philip Allott that states can behave in the international public domain in ways that are unthinkable in the national legal order because they do not consider law to be similarly controlling of the behaviour of state organs as national law.\textsuperscript{49} For the present purposes, these considerations support the view that in case of "violations" of international environmental law there is no useful role to be played by adjudication in the national courts. Moreover, given the normative incompleteness of the law it is not evident that acts or omissions by states can at all be qualified as violations. Dialogues, incentives, assistance, and, above all, the political process may be more helpful.

It is difficult to assess in empirical terms to what extent this set of considerations explains the role accorded to national institutions in the system of compliance control. However, when one also considers the relative weakness of international compliance control, which indeed is less focused on legal

\textsuperscript{43} Downs, Danish, and Barsoon, supra note 41, at 484.
\textsuperscript{45} Ibid., at 47.
\textsuperscript{46} Compare with Martti Koskenniemi, The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960, 485 (2001) (noting that "focus on compliance silently assumes that the political question—what the objectives are—has already been resolved").
determinations and enforcement than on dialogue, it appears not implausible that these factors contribute to the fact that states have not resorted to what potentially is the “hardest” mode of enforcement—their own courts.

4. Boundary between the Public and the Private Domain

A fourth, and arguably the most influential, image determining the role of national organs in the system of international compliance control is the divide between the public and the private domain. Generally, international environmental law does not address itself to private parties—either as rights-holders to whom states owe obligations or as duty-bearers. This factor is immediately related to the separation between international law and national law, since, in the traditional scheme of things, international law addresses states and only indirectly reaches private actors. International law obliges the state, and the state, in its national legal order, determines which private actors are obliged and authorized. In this respect, the dualities between state and individual and between international law and national law are mutually supportive.\(^5\)

This duality appears to have some explanatory power with respect to international environmental law. In their assessment of the ASIL project on the application of international environmental law in national courts, Dan Bodansky and Jutta Brunnee conclude that the most significant barrier to the implementation of international environmental law by domestic courts is the idea that international environmental norms “generally create rights and obligations for states, not individuals.”\(^5\)\(^1\) Courts generally consider international environmental law in terms of a horizontal (interstate) conception of international law.\(^5\)\(^2\) Since private parties are not considered injured in the legal sense by breaches of international environmental law, courts primarily refuse to handle claims by private parties based on international environmental law.

A few examples illustrate this point. The Federal Administrative Court of Hamburg rejected a claim by fishermen, who were challenging an authorization permitting the dumping of acid residues in the North Sea, based on the London Convention\(^5\)\(^3\) and the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft.\(^5\)\(^4\) The court held that these treaties establish the rights and duties between states only and cannot found

\(^{5}\) For the relationship between the dichotomy of state/individual, on the one hand, and international law/national law, on the other, see H. Kelsen, Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-41 96 (1942); P. Allott, supra note 49, at 14; and David Bederman, The Spirit of International Law 153 (2002).


\(^{5}\) For the distinction between horizontal and vertical conceptions of international law and its implications for the role of national courts, see Lea Brilmayer, International Law in American Courts: A Modest Proposal, 100 Yale L. J. 2277–2314 (1991).

\(^{5}\) London Convention, supra note 20.

\(^{5}\) Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Oslo, 15 February 1972, 932 UNTS 3.
the subjective rights of private parties. Another example is the decision of the Court of Appeal of The Hague, which overturned the revolutionary ruling by the District Court of Rotterdam and held that the customary law prohibition of transborder pollution applies only between states. It also held that the 1976 Convention for the Protection of the Rhine against Pollution by Chlorides applied only between states and not between private parties. The Hoge Raad (Supreme Court) of the Netherlands later confirmed this judgment. A third example is the decision of the US District Court in Eastern Louisiana in Beanal v. Freeport-McMoran, which held that the polluter-pays principle and the precautionary principle apply only between “members of the international community,” presumably referring to states. These cases illustrate that because in the leading construction international environmental law applies to states, national courts are not a factor of significance in the enforcement scheme of international law.

In technical terms, the horizontal conception of international environmental law often translates itself in the doctrine of “standing” and is decisive for the admissibility of claims based on international environmental law. Alternatively, it translates itself in the technique of direct effect. The ASIL project yielded precious few cases where courts accepted that norms of international environmental law had direct effect. Examples of negative findings include the decision by the District Court of Hawaii in Greenpeace v. Stone, which held that the Basel Convention and the London Convention had no direct effect; the decision of the District Court of The Hague in Mines de Potasse d’Alsace S.A. (MDPA) v. Onroerend Goed Maatschappij Bier BV, Firma Gebr. Stik, Handelskwekerij Jac. Valstar BV, Court of Appeals of The Hague, 10 September 1986, reprinted in 19 Netherlands Y.B. Int’l L. 496 (1988) [hereinafter Mines de Potasse]; and Handelskwekerij G.J. Bier, Stichting Reinwater v. Mines de Potasse d’Alsace S.A. (MDPA), District Court of Rotterdam, 8 January 1979, NJ 1979, No. 113 [hereinafter Mines de Potasse] (holding that the principle that no state has the right to permit the use of its territory to cause injury to other states or to persons therein, as well as the principle that an act in contravention of that principle entails an obligation to provide reparation, could directly be applied between private persons in the national legal order).

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Vereniging tot Behoud van Natuurmonumenten v. Staat der Nederlanden, which held that the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)\(^6\) lacked direct effect;\(^6\) and the decision by the New South Wales Land and Environment Court in Greenpeace v. Redbank Power Company and Singleton County, which held that, in effect, the 1992 UNFCCC lacked direct effect.\(^6\)

The fact that international environmental law is considered in horizontal (that is, interstate) terms has nothing to do with the fact that it is environmental law. The substance of many treaties on environmental law is similar to, or, in any case, extremely closely related to, national environmental law. In fact, in many states, the courts can, at the request of private parties, apply environmental law. However, the fact that private parties cannot invoke international environmental law follows from the fact that international environmental law is international law. In this indirect manner, the general dichotomy between international and national law (see section 3.1 in this article) precludes applying international environmental law in national courts in the same manner that national environmental law is applied.

This horizontal conception of international environmental law does not necessarily preclude that states establish and/or empower other institutions, particularly those of an administrative nature, to examine the compatibility of acts and omissions with international environmental agreements. It might be possible to empower the "national systems" that are addressed in the guidelines under the Kyoto Protocol to undertake such examinations, irrespective of a role of individual plaintiffs. However, as far as the courts are concerned, this factor appears to hold decisive explanatory power.

IV. APPROACHES TO TRAVERSE THE LIMITS OF THE NATIONAL LEGAL ORDER

In practice, a variety of approaches can be seen to have the aim of involving national institutions and particularly national courts to a greater extent in the system of compliance control. These approaches address, in varying degrees, one or more of the barriers discussed earlier in this article.

1. Principle of Consistent Interpretation

The first approach that enhances the role of national courts in assessing the conformity of acts or omissions of the executive or the legislature with international environmental law is to resort to the principle of consistent interpretation—that is, the principle that courts should, whenever possible,
construe national law in conformity with, respectively, public international law.

The aforementioned ASIL project yielded several examples of decisions in which international environmental law was given effect through the principle of interpretation. One example from many is a decision by the Ninth Circuit in *Alaska Fish and Wildlife Federation v. Dunkle*, which construed the US Migratory Birds Treaty Act in light of bilateral migratory bird treaties.69 Another example in this category is the ruling by the Supreme Court of Canada in *Spraytech v. Hudson*, in which it was held that interpretations of national law that respect “the values and principles enshrined in international law” are preferred, and, on this basis, it was established that a local law was consistent with the precautionary principle.70

This construction potentially circumvents two barriers that otherwise relegate national courts to a secondary role: the international/national divide and the public/private divide. With respect to the former, the principle is not contingent on the formal validity of international environmental law. As to the latter, because the court does not directly base itself on international environmental law as a rule of decision, it need not consider the question of whether the rule of international environmental law in question accords a right to a private person.

An alternative approach, which likewise circumvents these two barriers, is to consider international environmental agreements in the review of the exercise of discretionary powers of the executive branch. In a number of cases, courts have held that international law should be taken into account in application of the principles of administrative review. Whether a rule of international law has a direct effect or not is immaterial. Thus, it was ruled that the regional executive authority of the province of Gelderland in the Netherlands had acted “unreasonably” by approving a zoning plan that threatened the habitat of the combed salamander, which was protected by the 1979 Bern Convention.71 The unreasonableness was partly based on the province’s neglect of the convention provisions. This method may enable national courts to assess compliance with the Bern Convention without the courts having to recognize the convention’s invocability by private persons.

These constructions may go some way towards engaging national courts in the larger system of compliance control. The role of national courts is not envisaged by the relevant agreements, but rather assumed by the courts themselves, possibly in furtherance of some general principle of international

69 *Alaska Fish and Wildlife Federation v. Dunkle*, 829 F.2d 933 (9th Cir. 1987); US Migratory Birds Treaty Act of 1918 (16 USC 703-712; Ch. 128; 13 July 1918; 40 Stat. 755) as amended; see generally Bodansky and Brunnee, supra note 51, at 15.


law that might require consistent interpretation. This underscores the conclusion that in considering problems and prospects of compliance control with international environmental law, it is not helpful to confine oneself to those procedures provided for in international environmental agreements.

2. Individualization of Rights
A second way to upgrade the role of national courts is to conceive of international environmental law in terms of individual rights. International courts and other institutions have recognized that there may be an overlap between the protection of individual rights and environmental protection.72 There have also been some attempts to broaden the recognition of human rights in relation to the environment.73 Potentially, the individualization of rights may have consequences for the involvement of national organs in the system of compliance control. When international law directs itself towards individuals rather than states, the boundaries between international law and national law will become permeable. At this point, the national legal order is no longer the controlling force with respect to the question of whether individuals derive rights from international law. For instance, an obligation of states not to discharge waste in surface waters in principle is an interstate obligation that will not be litigated in national courts. Whether individuals are benefited by this provision is a matter of national law. When the obligation is translated into a right to privacy or a right to property, international law rather than national law determines the individual entitlement. In many states, the individual concerned will be able to enforce that right, as well as the obligation of the state indirectly, in a national court.

The potential of this approach74 for the involvement of national organs in the system of compliance control seems to depend on a number of factors. First, only in particular circumstances is it possible to translate environmen-

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tal harm, resulting from non-compliance with international environmental obligations, into individual rights, such as the right to privacy or to property. Harm to the commons, to unpopulated areas, to wildlife, or to natural values will not be covered. Second, and this point is directly related to the previous factor, it is the very nature of (international) environmental law that it seeks to protect public goods that cannot be translated, or that can be translated only in a limited extent, into individual rights. A rights-based approach is not suitable for a problem that involves substantial re-allocation and the balancing of collective interests. For this reason alone, the potential contribution of individualization of rights to the involvement of national courts is limited. This problem may be mitigated if public interest groups were to be allowed access to the courts—as this has been instrumental in many states in triggering the review of acts that may violate environmental law. However, there are no indications that such a liberalization of standing doctrine will be initiated by international environmental law. Third, even if environmental obligations can be translated into individual rights, national courts will only adjudicate their rights if these rights are sufficiently precise ("justiciable"). While the right to privacy and the right to property generally are considered justiciable, that is much less obvious for the "right to a clean environment". This right, which was recognized as an independent right by the African Commission would be comparable to social economic rights, which are primarily considered as non-justiciable. Within these limitations—particularly for the more traditional civil and political rights, such as the right to life, the right to privacy, and the right to property—however, the rights-based approach in many states will be an avenue to invite the national courts to engage in reviewing acts or omissions of the government.

75 The silence of the Aarhus Convention on this matter is noteworthy. However, see Article 11 of the 1998 Convention on the Protection of the Environment through Criminal Law, 4 November 1998, ETS no. 172 (hereinafter Criminal Law Convention) (providing that each party may, at any time, in a declaration addressed to the secretary general of the Council of Europe, declare that it will, in accordance with domestic law, grant any group, foundation, or association that, according to its statutes, aims at the protection of the environment, the right to participate in criminal proceedings concerning offences established in accordance with this convention). For a critical discussion of the role of public interest groups in the enforcement of environmental law, see Lucas Bergkamp, Are Standing Rights for Environmental Groups in the Public Interest?, 15 Envtl. Liability L. Rev. 153 (2001).

76 Decision of the African Commission, supra note 72; see also Birnie and Boyle, supra note 74, at 254.

77 See Kitty Arambulo, Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects (1999). It must be added that even if environmental obligations can be translated into individual rights that generally are considered justiciable, states may still preclude access to courts, as is done in the United States, which has declared the International Covenant on Civil and Political Rights, 999 UNTS 171 (1976), to be non-self-executing. See Multilateral Treaties Deposited with the Secretary-General: Status as on 21 March 2003, UN Doc. ST/LEG/SER.E/, available at <http://www.un.org/Depts/Treaty>.
3. Individualization of Responsibilities
The mirror image of the individualization of rights is the individualization of obligations and responsibilities. Obligations to protect the environment normally rest on states, which are expected to transpose these obligations into individual obligations in national law. In international environmental law, one can see certain attempts to initiate a translation of traditional international environmental obligations and responsibilities to private parties. These responsibilities are, in part, of a criminal law nature and, in part, of a civil law nature. Comparable to the individualization of rights, this individualization of responsibility may engage national organs.

A number of environmental treaties consider the transgression of their provisions in criminal terms. The common construction is that a treaty states that certain acts must be prohibited or are illegal (such as the dumping of waste or trade in a hazardous waste) and that contraventions of these prohibitions are to be made a criminal act and punished under criminal law. The most comprehensive example of the establishment of international criminal responsibility in international environmental law is the 1998 Convention on the Protection of the Environment through Criminal Law. The convention, which is not in force, obliges parties to establish as criminal offences a number of acts that are harmful to the environment, to establish jurisdiction, and to impose sanctions. The convention is not expressly related to the infringement of norms established by other treaties, and, in this respect, it does not properly qualify as a procedure that furthers “compliance” with international environmental law, although in substance there may be some overlap. Potentially, these constructions may engage national courts in a similar manner as other parts of international criminal law. However, the author is not aware of empirical studies on the application of these provisions in the national sphere, and their role in practice is uncertain.

A separate strand of “individualization of responsibilities” is the attempt to formulate obligations and responsibilities for (multinational) corporations. These attempts may also potentially reallocate enforcement powers from the international to the national sphere. This possibility can be illustrated by the litigation in the United States under the Alien Tort Claims Act. International law can provide a direct basis for liability that can be enforced in the national courts of the United States. In several cases, US

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78 Birnie and Boyle, supra note 74, at 282–5.
79 Ibid., at 267–82.
80 See the examples provided in section 2 of this article.
81 Criminal Law Convention, supra note 75.
82 Fischer, Kress, and Lüder, supra note 6.
84 Alien Tort Claims Act, 28 USC § 1350 [hereinafter ATCA].
courts have accepted that corporations may be liable for violations of international law. These cases have been more relevant for the enforcement of human rights than they have been for the enforcement of environmental law, although, somewhat oddly, some courts have doubted whether the principles of environmental law have the status of the "law of nations." On the international level, this has, as of yet, resulted in codes of conduct rather than in treaty obligations, and few national cases have been recorded in which this form of responsibility was effectuated. For the time being, in view of this apparently limited practice, the criminal law and the civil law approaches appear to be (apart from what is revealed in the next section on civil liability schemes) more of a theoretical, rather than of a practical, interest for the involvement of national institutions in the enforcement of international environmental law.

4. Civil Law Schemes

Probably the most express attempt to involve national courts in international environmental law is the establishment of civil liability schemes. These schemes are of interest for a variety of reasons. Relevant in this context is that, first, they provide expressly for the role of national courts and, second, in certain respects they can contribute to the application of (and compliance with) international environmental law.

A substantial number of treaties impose liability on the operator and oblige states to provide for jurisdiction in regard to claims. The most comprehensive treaty thus far is the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (which is not in force). The ongoing attempts within the International Law Commission to develop a liability scheme for what is now tentatively

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86 See overview in Joseph, supra note 83, at 182-3. See also Guidelines for Multinational Enterprises, in Organization for Economic Cooperation and Development, Declaration on International Investment and Multinational Enterprises, at <http://www.oecd.org/EN/document/0,EN-document-93-3-no-6-18925-0,00.html#title0> (last visited on 26 March 2003) ("Enterprises should... in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment etc." [emphasis added]).


89 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993, ETS no. 150.
called "international liability for failure to prevent loss from transboundary harm arising out of hazardous activities" is potentially of a worldwide scope, although it is confined to transboundary issues and with an uncertain future. If this project ever comes to a legally binding result, it would impose liability on operators, provide for the rights of victims to claim compensation, and thereby engage a role for national courts. In effect, both these existing and envisaged instruments involve national courts in the enforcement scheme of international law.

These arrangements are in certain respects relevant for the application of public environmental law. It has been said that civil liability treaties may seek to encourage compliance with public law. The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal to the Basel Convention seeks such compliance expressly. It requires unlimited and fault-based liability where the defendant has failed to comply with the provisions implementing the Basel Convention. Other instruments do not provide for an express link, but they may be related in substance. For instance, there is a connection between the obligation of states under the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes "to prevent, control and reduce pollution of waters causing or likely to cause transboundary impact" and the provision in the liability protocol that the operator will be liable for transboundary damage caused by industrial accidents, which may involve loss of income or loss resulting from adverse impacts on transboundary waters. Of course, the former obligation is imposed on the state, whereas the latter liability is imposed on a private operator. However, in several cases, the rationale of the obligation of states is that the state should control a limited number of private operators. Creating liability for these few operators then may pursue the same public law objective. In this respect, it may not be improper to consider the liability instruments as a part of the enforcement scheme and, more generally, as a part of the system for compliance control, which was established in international environmental law.

However, the connection between the private law liability and public law compliance is an indirect one. Primarily, liability is not contingent on (non)-compliance with public law. Liability can be imposed or denied, irrespective of the question of whether the state complies with its own obligations. Combined with the overall limited success of the civil liability instruments, their contribution to the strengthening of the role of national courts in the field of international environmental law is modest.

V. CONCLUSION

The above survey suggests that the relatively limited role of national institutions in the international system of compliance control is due to a combination of factors, which are all related to the international/national law divide. Particularly relevant appear to be the notion of the unity of the state, the idea that the nature of international environmental law opposes a quest for hard compliance, and the public/private divide. Through the allocation of individual rights and individual (criminal or civil) liability, it is only in rare cases that international environmental law more or less expressly engages national courts.

Nonetheless, one can witness a distinct trend towards the recognition that all international compliance control schemes are doomed to irrelevance unless national organs are involved in the process. In such diverse regimes as the London Convention, CITES, the Kyoto Protocol, and the Basel Convention, one can witness attempts to provide more guidance on the role of national organs in monitoring and enforcement.

These attempts are cautious. The texts are drafted in general terms and are not legally binding. They thus remain subject to the principle that the modalities of compliance control at the national level are to be left as much as possible to the states themselves. For the time being, this approach excludes judicial forms of compliance control from having any form of influence by international environmental law. It does not prevent national courts in incidental cases from playing a critical role, but they will do so on the basis of their national legal authority and context. Nonetheless, it appears proper to include both the national procedures that cautiously are provided for at the international level as well as the self-assumed role of national institutions in our understanding of the international system for compliance control. While this inclusion diversifies and complicates the system, it also brings, as Peter Sand notes, “a precious flow of alternative remedies for common problems.”

96 Churchill, supra note 88.
97 Sand, supra note 9, at 127.