

Monitoring as the cornerstone of Compliance Control in International Environmental Law

-Dilraj Singh

Introduction

Each stage of compliance has its own significance and one cannot be undermined in comparison to the other. But, if one has to necessarily single out one of these commandments as the most important one, it has to be “Monitoring”. The reason for this answer is that monitoring is a continuous process which may be repeated year after year. If conducted sincerely, the process of monitoring can ensure a thorough implementation of adopted frameworks for a long period of time depending on efficiency of monitoring.

The Scheme or chronology of the paper is as described below-

- (i) What is monitoring?
- (ii) Why is monitoring important for compliance?
- (iii) Advantages of monitoring.
- (iv) Rio Declaration Vs Global Pact for Environment- A strong case for monitoring.
- (v) Other examples of monitoring in international treaties and documents.
- (vi) Drawbacks of not adopting monitoring
- (vii) Conclusion.

Monitoring

Monitoring is a process of constant evaluation of implementation process of the treaty or other instruments wherein concerned authorities or designated actors gather information on the activities undertaken by the member parties to effectively implement the provisions of instrument. Such gathered data is reported to the Conference of Parties or other assigned authority on regular basis. Based on contents of these reports, the conference of parties decides the next course of action for effective implementation of treaty or concerned document.

Monitoring is an integral component of compliance and compliance can be aptly defined as “conformity of behavior with legal rules, and the real problems are pertaining to matters such as monitoring, measuring and optimizing the levels of compliance and rigor of relevant standards”.¹

¹ B Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’

Why is Monitoring important for compliance?

Before I delve into further details, I must begin by saying that the International Law is often criticized for not being binding enough on its member states. In my opinion, the bindingness of any legal document arises out of the penalties provided for its non-compliance. For example, in domestic law, any party to a litigation which refuses to comply with the judgement of the court is liable to face contempt proceedings itself. This apprehension of contempt proceedings acts as a deterrent on a party owing to which most of the parties readily comply with the judgement in domestic law. For example, Section- 2 (a) of the Contempt of the Courts Act, 1970 in India.²

However, the scenario mentioned above is hard to replicate in the international law sphere because it comes in direct conflict with the territorial sovereignty of member states. “The open-endedness of terms of standard framework conventions and the uncertainty about their binding character have made it difficult to guarantee – even to assess a state’s performance of their obligations under those treaties.”³

In order to overcome this conflict, it is important for the framers of global framework to draft the same with as much persuasive language as possible. Instead of a completely binding framework which might not meet compliance from member states on account of their territorial sovereignty, it is more realistic to draft a strongly persuasive framework backed by efficient monitoring mechanism to measure progress of the framework.

A clear example is that of Japanese withdrawal of membership from the IWC (International Whaling Commission) and ICRW (International Commission for Regulation of Whaling) in response to constant criticism by international community for its whaling activities. The Japanese Government stated that the IWC has disregarded the scientific data on whaling and has not made any effort to understand Japanese culture in which whaling plays an integral part. Due to stringent provisions, Japan bowed out of the IWC and announced the resumption of commercial whaling in 2019.⁴ The attempt to create a domestic law type of bindingness on a sovereign state backfired and it withdrew all types of cooperation from its side⁵. Instead of

(1998) 19 Michigan Journal of International Law 345;

² THE CONTEMPT OF COURTS ACT, 1971 1971 2, 2.

³ M Koskeniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of Montreal Protocol' (1992) 3 Yearbook of International Environmental Law 1.

⁴ 'DRAFT GLOBAL PACT FOR THE ENVIRONMENT' ([globalpactenvironment.org](https://globalpactenvironment.org/uploads/EN.pdf)) <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://globalpactenvironment.org/uploads/EN.pdf>.

⁵ 'When Shaming Fails: Japanese Withdrawal from the International Whaling Commission' - Michael Kolmas

creating this type of pressure on Japan, it would have been better to adopt a positive approach of compliance and inculcate persuasive provisions for constant monitoring.

Advantages of Monitoring-

- (i) *Early detection of damage*- Monitoring is a continuous process and helps the parties to detect the possible damage early. This is important because the anthropogenic damage caused to environment is usually irreversible in most of the cases, “making it impossible to restore the *status quo ante* through a claim for *restitutio in integrum*.”⁶ To prevent such a situation, an efficient monitoring mechanism is really important to be incorporated in the concerned document.
- (ii) *Promotes Transparency in functioning*- Monitoring includes thorough evaluation of activities undertaken by the parties, agencies and institutions for implementation of a framework and the evaluation is produced in written reports. These reports are no substitute to a binding legal penalty but provide reasonable deterrence for a member party to act fairly in order to make the reports look reliable to the Conference of Parties.
- (iii) *Encourages participation of NGOs*- For a major part of 20th Century, the NGOs were not readily included in the subjects of international law. It is only during the course of transition of global framework from “subjects” to “participants” in international law that the role of NGOs came to be acknowledged as a deserving actor to be included in the list of participants in international law.⁷

Now with greater stress on monitoring, the need for member states to gather relevant data from ground requires involvement of general public. Here, the NGOs act as a bridge between the Government and common populace. The NGOs are after all, the founding pillars of civil society and a credible reflection of opinion of masses.

A highly relevant example here is the Universal Periodic Review of the Human Rights Council wherein each UN Member State undergoes a peer review of its

(Australian Institute of International Affairs)

<<https://www.internationalaffairs.org.au/australianoutlook/when-shaming-fails-japanese-withdrawal-from-the-international-whaling-commission/>> accessed 29 November 2023.

⁶ Sachariew, K., 1991. Promoting compliance with international environmental legal standards: Reflections on monitoring and reporting mechanisms. *Yearbook of International Environmental Law*, 2(1), pp.32.

⁷ Sachariew, (n 19) 33.

human rights record after every 4.5 years. This can also be interpreted as a monitoring exercise. The UPR provides platform to the member states to report their human rights record to the United Nations and in return receive recommendations to make improvements therein. For this purpose, the member States engage with relevant NGOs to accept their submissions on human rights violations and convey the same to the United Nations General Assembly.⁸

Although this is in domain of human rights, the space separating social justice and climate justice is shrinking very fast. Thus, the violations of environmental rights can also in some cases qualify as human rights violations and thus UPR as a monitoring exercise is not only facilitating amendments in fixed goals but also providing a platform to the NGOs to voice the sentiments of mass populace in International Law.

- (iv) *Facilitates scientific research and furnishing of information-* Monitoring is instrumental in detailed documentation of process of implementation of a treaty or other instrument. The methods used in this documentation are highly scientific and on many occasions are carried out by independent experts. The information furnished in reports prepared by these experts or other monitoring agencies is very authentic and the member states can benefit from such information in not just implementing the treaty in question but also for their future policies to supplement the said treaty.

Global Pact for environment Vs. Rio Declaration- A strong case for monitoring.

The best way to gauge the importance of monitoring in contemporary era is to contrast the drafting of Rio Declaration, 1992 with the Draft Global Pact for Environment (hereafter GPE). The Rio Declaration was at the time of its adoption, a representative document of its subjects' aspirations. But with passage of time, the general sentiment around the world was that the environmental degradation is accelerating at a high speed and a strongly worded international framework was urgently required to stem the rot. Therefore, the draft for Global Pact for Environment was prepared and a resolution by United Nations General Assembly was adopted

⁸ 'Universal Periodic Review' (OHCHR) <<https://www.ohchr.org/en/hr-bodies/upr/upr-home>> accessed 30 November 2023.

on 10may,2018 which paved the way for negotiations on full-fledged adoption of the said pact.

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Although, both the above documents are based on similar environmental principles but what sets Global Pact apart from the Rio Declaration and Stockholm declaration is that it has a detailed provision for monitoring the progress on Implementation of pact. Article-21 of the GPE lays down the monitoring mechanism to oversee the implementation of the pact. It entails creation of a committee of independent experts for the facilitation of the same. It is worth acknowledging that the monitoring and reporting would be “non-punitive” in nature which signifies a positive approach to promote compliance.¹⁰ Otherwise, punitive or negative approach towards non-compliance can sometimes lead to complete withdrawal from its commitment by a Party such as Japan in the whaling convention.

The importance of monitoring as a fundamental tenet of compliance has been duly recognized in some of the most important conventions in the international environmental law framework. Some of these are worth-mentioning and are discussed as under-

- (i) *Montreal Protocol*- The Montreal Protocol on substances that deplete the ozone layer is a significant document from compliance point of view. It is believed to be the first international document which started the “proceduralization” of the compliance process.¹¹ This protocol also places high importance on monitoring which is enshrined in Article-7 of the protocol. This article has two clauses. The first clause requires the member party to submit a report within three months of becoming the party regarding the levels of imports and production of concerned substances in its territory.

The second clause requires the parties to keep submitting such reports every year thereafter. Thus, signifying the importance of monitoring as a continuous process which can invigilate the progress made by a member state for long period of time.¹²

- (ii) *Kyoto Protocol*- The Kyoto protocol to the United Nations Framework on Climate Change was a significant treaty which created binding obligations on the signatory parties to commit to reduction of emission of greenhouse gases.¹³ The intent to

⁹ 'DRAFT GLOBAL PACT FOR THE ENVIRONMENT' (n 4).

¹⁰ *ibid* 2.

¹¹ Montreal Protocol on Substances that Deplete the Ozone Layer 2022 (NO 26369) 35.

¹² *ibid*.

¹³ Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (FCCC/CP/1997/L7/Add1) 8.

bind the parties legally was so strong that it was one of the rare treaties where the provision for verification was also included. This treaty had different branches for facilitation as well as enforcement. Although it must be mentioned that the differentiation of these branches was also interpreted as an adoption of a negative approach towards non-compliance instead of including provisions that promote compliance.

Nevertheless, the treaty included strong provisions for monitoring in Articles 3,6 and 8 which laid down procedures for reporting the progress made by parties. These articles include provisions for setting up expert review teams which shall prepare reports on implementation of commitments undertaken by the member states.¹⁴

- (iii) *Cartagena Protocol*- The Cartagena Protocol on Biosafety to the Convention on Biodiversity is a very important international instrument with regards to safe handling of living modified organisms.¹⁵ Due to the possible dangers of such modified organisms going out of control, it was necessary that this protocol wasn't reduced to a mere rhetoric and important monitoring provisions were included to measure its progress.

Article-33 of this protocol includes the provision for monitoring. It states that parties shall have to report the implementation of protocol in their territories at regular intervals decided by meeting of Conference of Parties.¹⁶

- (iv) *Aarhus Convention*- The convention on access to information, public participation on decision making and access to justice in environmental matters signed at Aarhus in 2000 is highly credible document which can play a vital role in climate justice globally.¹⁷ It is worth-mentioning here that since the convention is about access to justice, one cannot expect the fulfillment of its objective without a thorough reporting of court cases filed on issue of environment rights and the percentage of their disposal.

Therefore, a constant monitoring and reporting mechanism was needed in this convention. The same was addressed by the Articles 5 and 10 of this convention. The Article-5 lays down provisions for collection and dissemination of environmental information. It requires the member parties to publish national

¹⁴ *ibid* 3-8.

¹⁵ Cartagena Protocol on biosafety to the Convention on Biological Diversity 2003 (XXVII8a) 24.

¹⁶ *ibid*.

¹⁷ CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS 1998 (cep43e).

reports regarding state of environment within intervals not exceeding three to four years.¹⁸

Article-10 of this convention requires a review of methodology used to procure information at the meeting of parties. This provision lends dynamism and flexibility to this convention whereby the parties can regularly review and adapt their methods of implementation and monitoring.¹⁹

- (v) *Basel Convention*- The Basel Convention on the transboundary movement of hazardous wastes and their disposal is the most important environmental treaty dealing with waste management in the global framework. Waste -management is not a one-time affair but an everyday process and hence any document pertaining to it must necessitate constant monitoring to ensure that the objective of the treaty is duly complied with day in and day out.²⁰

This is why the Articles 5, 13 (3), 15, 16 (1)(c), 24, and 25 have been enshrined in this treaty. Article 5 provides for designation of competent authorities and focal points to coordinate the implementation and monitoring of commitments undertaken by member parties. This is required to be done by the parties within three months of the date of entry into force of this convention. The quality of submitted data has been uneven but as per the Secretariat, there has been a constant improvement. This signifies that monitoring might not generate sufficient data from the word go but may improve gradually.²¹

Thereafter the article-15 provides that the parties shall evaluate the effectiveness of the convention after at least every six years and decide on basis of available reports and data, if they would intend to partially or fully ban the movement of transboundary wastes in light of prevailing circumstances.

- (vi) *United Nations Framework Convention on Climate Change (UNFCCC)*- The UNFCCC was passed with the objective to stabilize Greenhouse Gas emissions to a level that would prevent dangerous anthropogenic interference with the climate system”. This was considered to be a lofty goal by some experts at that time and

¹⁸ Convention On Access to Information, Public Participation in Decision-making and access to justice in Environmental Matters 1998 (cep43e). Article-5

¹⁹ *ibid.* Article-10

²⁰ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989.

²¹ Krueger, J., 2001. The Basel Convention and the international trade in hazardous wastes. *Yearbook of international co-operation on environment and development*, 2002, pp.46.

that was precisely the reason why it was important to have credible monitoring provisions in this convention.²²

Article- 7 (f) entails regular consideration and publication of reports by the Conference of Parties. Since the objective of the convention requires a lot of scientific expertise regarding greenhouse gas emissions, Article-9 lays down provisions for setting up of a subsidiary body for scientific and technological advice. This body shall carry out scientific assessment of the measures taken for implementation of this convention and forward the reports on the same to the Conference of Parties.²³

It is possible that with scientific evaluation on regular basis by the above-mentioned body, the monitoring exercise would be much more effective and is likely to grant opportunity to the Conference of Parties to change their methodologies of implementation on basis of reports submitted by subsidiary body, if they are of opinion that the methodology adopted by them is not yielding desired results. Again, it is monitoring which plays a vital role in ensuring this change of methodology.

Drawbacks of not adopting Monitoring-

- (i) *No means to check the impact of policies-* The international Environmental Law framework must go beyond mere declarations. As long as the data on impact created by its instruments is not available, the actual purpose of these legal instruments cannot fructify.

For example, Article 3 (1) of the United Nations Declaration on Rights of Peasants and other people working in rural areas lays down that the peasants and other rural workers must be free from all modes of discrimination such as race, religion, birth etc. ²⁴

It is interesting to note that India already has national legislations to tackle all modes of discrimination mentioned in the above article. A few examples of such legislations are , (1) The Scheduled Castes and Scheduled Tribes (Prevention of

²² 'What Is the United Nations Framework Convention on Climate Change? | UNFCCC'
<<https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change>> .

²³ United Nations Framework Convention on Climate Change 1992 13.

²⁴ UN Human Rights Council (39th sess : 2018 : Geneva), 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas :: Resolution /: Adopted by the Human Rights Council on 28 September 2018' 6 <<https://digitallibrary.un.org/record/1650694>> .

Atrocities)Act, 1989 to penalize caste-based discrimination.²⁵ (2) The payment of minimum wages act, 1948 to prevent economic exploitation of workers.²⁶(3). The Prohibition of employment as manual scavengers and their Rehabilitation Act, 2013 and many other legislations.²⁷

However, the violations prohibited in above legislations still continue on large scale and the plight of workers hasn't changed much. If there was an international instrument to prevent these atrocities with an efficient monitoring mechanism, it would have required the Indian Government to furnish regular reports as to convictions in above legislations and the reasons for its unsatisfactory implementation.

- (ii) *Wastage of time and resources*- A classic example is Rio Declaration. This declaration was the need of the hour in the era it was adopted. But the drafters could not envisage the pace at which environmental situation was changing. This declaration had no provision for monitoring and thus the member parties had no instructions as to how to adapt to changing circumstances in global environment. Moreover, in absence of non-binding principles, the rate of compliance was far from satisfactory.

These low rates of compliance have persisted for almost three decades since adoption of this declaration in 1992, wasting a lot of time and resources. Moreover, since anthropogenic harm caused to environment is usually irreversible, it is important to make swift amendments. This dissatisfaction paved the way for formation of Draft Global Pact for Environment which has a strong provision for monitoring in its Article-21.²⁸

- (iii) *Member parties may mislead the CoP* – In absence of an effective monitoring or reporting mechanism, the deterrent effect on member parties to duly implement the provisions of treaty or concerned instrument takes a dip. In such a scenario, the member parties may formulate a national legislation to show that they are complying with the provisions of treaty but it would be tough to ascertain for CoP that whether those national legislations have contributed in any progress in the

²⁵ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 1989.

²⁶ Minimum Wages Act, 1948 [11 of 1948].

²⁷ THE PROHIBITION OF EMPLOYMENT AS MANUAL SCAVENGERS AND THEIR REHABILITATION ACT, 2013 2013.

²⁸ Yann Aguila and Jorge E Viñuales, 'A Global Pact for the Environment: Conceptual Foundations' (2019) 28 Review of European, Comparative & International Environmental Law 3, 10.

goals sought to be achieved by the treaty or not. Monitoring mechanism acts as an efficient watchdog to ensure compliance.

Conclusion

As already stated in the beginning, each of the ten commandments of compliance has a unique importance of its own and all constitute different stages of compliance. But it can be rightly inferred that the success of most of the other commandments would depend on the monitoring process. In fact, monitoring can be helpful in early detection of any existing flaw in the other commandments as well. It gains even more importance in the current scenario where the public opinion worldwide is growing anxious due to fast paced environmental degradation and a corresponding lack of adequately binding frameworks on the states to cut down their greenhouse emissions.

While an absolutely binding international legal framework is hard to formulate on account of territorial sovereignty of member states, it is the persuasive actions like monitoring which play the most important part in ensuring compliance by the parties. Monitoring mechanisms which are non-punitive in nature promote positive compliance among member states and keep a constant obligation on them to perform without public-shaming them. Although, monitoring as a concept is not confined to the domain of environmental law, its significance is highest in international environmental law because the anthropogenic harm caused to environment is usually irreversible and cannot be compensated monetarily. Therefore, time is of utmost essence in environmental actions and monitoring is the only commandment which ensures constant evaluation of progress made by member parties on a regular basis for a long period of time.

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