The Law of Arms Control: International Supervision and Enforcement

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4 The international legal framework of supervision in the law of arms control

1. Introduction

It has been observed in the previous chapter that many - especially recent - arms control treaties are characterised by an extensive body of institutional law as compared to the few substantive obligations that are generally to be found in arms control treaties. Supervisory mechanisms are a fundamental part of the institutional law of the arms control treaties. Clearly, it is not only important that the substantive obligations of States pursuant to the law of arms control are duly defined, but also that there is agreement on the supervisory mechanisms to be applied. Supervisory mechanisms are legal arrangements providing for international control of compliance as well as for reactions in the event of established non-compliance. Apparently, it is felt that the substantive norms of arms control treaties need a vast amount of (international) control before adhering to them becomes feasible.

Now that the special characteristics of the substantive law of arms control and its strong embedment in the international legal and political system have been extensively discussed, the present chapter focuses on the international legal framework of supervision in the (institutional) law of arms control. The purpose of this chapter is to describe and analyse the place, role and function of (the process of) supervision in the law of arms control. To that end, first, forms of supervision in arms control law will be distinguished. Then, a theory of international supervision will be elaborated which is suitable for the general analysis of supervisory mechanisms in arms control treaties. Both the methods and the institutional design of the different phases of supervision will be discussed, as well as the role of supervising bodies in arms control treaties. Finally, the topic of supervision and compliance will be addressed.

The issues raised in this chapter do not relate to the question why States choose some particular form of supervision but instead are concerned with the questions how the existing supervisory mechanisms in arms control

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treaties can be characterised and analysed and what are the general features of the role of supervising bodies in arms control law. It should be noted that Part IIA of this study (chapters [5] and [6]) offers an in-depth, treaty-specific analysis of the mechanisms of supervision that can be found in multilateral arms control treaties.

2. Unilateral supervision, diplomatic supervision and supervisory mechanisms in arms control law

2.1 The notion of supervision at the international level
Supervision can be very generally defined as 'the procedure through which a subject of law exercises more or less extensive control over the activities of other subjects of law.'

In the international legal community supervision is generally exercised without an implied hierarchy, between sovereign and equal States. Supervision at the international level is conducted by the States themselves, either unilaterally or on a diplomatic or treaty basis, or by a supervising body at their request. The presence of supervisory mechanisms in international law indicates that States have agreed to submit their behaviour in respect of a treaty or other international agreement to external examination, which may be done by their peers or by an international body.

Supervision is however bound to play a more extensive role than that in the international legal order. The actors in supervision at the international level have few opportunities for the enforcement of decisions or the imposition of sanctions in order to compel States into harmonising their behaviour. At the international level supervision not only fulfills an important role in bringing the particular activities of individual States into harmony with the interests of the majority of States, but it also functions as a means of integrating States into international bodies for the purpose of pursuing collective objectives.

2.2 Unilateral and diplomatic supervision
The most ancient and at the same time rudimentary form of supervision, which to a large extent remains within the national context, is unilateral supervision. Unilateral supervision is supervision exercised by one State without the co-operation of the States that are supervised being necessary. States may employ all national means legally at their disposal for the purpose of monitoring the behaviour of other States; this activity is not even necessarily linked to specific treaties. Unilateral supervision uses national

262 Cf. Merle (1959), p. 411. This general definition includes the possibility of a hierarchy between the supervisor and the supervised and is inspired by the role supervision plays in national administrative law systems.


technical means (NTMs), especially satellites, which enable the gathering of information through observation and by way of making (satellite) images. As we will see, today NTMs are often incorporated into international supervisory mechanisms where they may be utilised as methods of general fact-finding, usually with the additional reciprocal obligation for the States Parties not to interfere with their use. But also without such incorporation, de facto use of NTMs takes place in practice.  

It is obvious that unilateral supervision by itself does not bring co-operation between States any closer. In order to avoid the situation of ‘leaving the supervision to the supervised’ and to prevent all kinds of unprovable allegations of non-compliance from occurring, a form of reciprocal supervision is needed requiring at least some kind of co-operation between States. But where in national societies supervision is entrusted to the State as the only entity with authority over the subjects within its territory, in international society supervision has remained mainly with the individual States themselves. As a consequence, States have exercised supervision over each other ‘horizontally’ from the outset, through the intermediary of their diplomatic organs. This type of supervision shall be referred to as diplomatic supervision. The diplomatic agents have been entrusted with the task of scrutinising the compliance practice of their host-State. Of course, this type of supervision has many defects. Diplomatic supervision is ‘subjective’ and informal and it lacks ‘institutionalisation’, rendering its exercise vulnerable to partiality and perhaps even arbitrariness. A State will supervise more diligently when its own interests are involved and may not even wish to make the effort of exercising control and risk spoiling its relations with another State if it has no direct interests at stake. Moreover, the effectiveness of diplomatic supervision is usually dependent upon the strength of the supervising Party in relation to that of the Party over whom supervision is exercised.

2.3 The legal basis for the exercise of unilateral and diplomatic supervision

Supervision of States, in whatever form, is concerned with behaviour and norms of international law; it is at least in part a legal activity. A norm is a legal standard of behaviour; it not only reflects behaviour (in that a norm has developed through interaction in social reality), but is also meant to guide behaviour. One may test the behaviour of others against a norm and approve

\[265\text{ E.g., although the Rarotonga Treaty (1985) does not incorporate NTMs as a monitoring method, the region covered by the Treaty is being monitored by American and Russian satellites, as well as with seismic and atmospheric fallout monitoring equipment of Australia and New Zealand. See Findlay (1991), p. 295.}\]

\[266\text{ Cf. van Hoof & de Vey Mestdagh (1984), p. 6; Lang (1995), p. 72; Kaasik (1933), p. 339-351. Diplomatic supervision is also referred to as ‘inter-State supervision’.}\]

or condemn such behaviour on those grounds. This is what constitutes the normative force of the norm, which is the quality that makes it a legal standard of behaviour. But normative force means more: it is the quality that determines whether supervision of observance of the norm is practicable. Supervision of compliance with a ‘norm’ that lacks any normative force is impossible.

The normative force of a norm is stronger according to its specificity and clarity. For this purpose three types of norms can be distinguished: policies, principles and rules. Only the category of rules refers to norms that are formulated so specifically and clearly, that they describe a particular type of behaviour and explicitly or implicitly lay down who is obliged to engage in that behaviour and who is the beneficiary of it. Therefore, supervision of compliance with rules, that lend themselves to be applied as such, must be deemed feasible. In contrast, principles and especially policies first need to be specified into rules before supervision can take place.

Supervision of compliance with rules can be exercised unilaterally or on an inter-State basis. States Parties to a treaty are allowed to monitor each others’ compliance through their own NTMs or through their diplomatic organs. To that end they do not need explicit treaty provisions to exercise supervision. Consequently, this supervision operates outside the framework of treaty regimes: the law provides no specific procedures and does not protect the interests of States that allegedly fail to comply with their obligations. In the course of its monitoring activities each State Party may decide for itself that another State by acting the way it did, has not lived up to some of the norms laid down in the treaty. These individually defined conclusions obviously do not bind other States Parties (unless they would afterwards support the conclusions). All beneficiaries of the rules, i.e. those persons having a preponderant interest in the execution of the obligations that have been laid down in the rules - in principle all States Parties to the treaty, are deemed to have this possibility of individually appreciating the other States Parties’ behaviour. States do not need an explicit legal basis

268 See van Dijk (1987), p. 13-15. A policy is described as a norm in which only an abstract objective is laid down. A policy does not define procedures and means through which the objective must be realised, nor does it establish the criteria for determining whether the objective expressed in the policy has been realised. A principle is a highly abstract norm as well, which serves as a guideline for the acts of the State organs rather than as a basis for concrete rights and obligations. Unlike a policy, a principle does not always require that a particular purpose be the central point; the normative standard contained in it may concern a set of values and the quality of the behaviour as such. Principles are ‘norms of aspiration’ rather than ‘norms of obligation’.

269 See Kaasik (1933), p. 8. The question whether some obligations in arms control law are of a nature to justify the view that all States in the world, whether Party to the relevant treaties or not, have a preponderant interest in the execution of these obligations, relates to the erga omnes character of specific norms. See on this concept the ‘Case concerning the Barcelona Traction Light and Power Company, Ltd.’, ICJ Rep. 1970, p. 33 and see Art. 40 of the Draft Articles on State Responsibility (1998).
for their individual supervisory activities. Unilateral and diplomatic supervision both constitute a perfectly legitimate exercise of governmental power.

2.4 *International supervision*

This study is primarily concerned with international supervision of arms control treaties. International supervision in its real sense is to be performed by a body that is placed above the States Parties and not among them, since its purpose eventually is to redress deviant behaviour of a State Party after it has been established that this State has violated its obligations. The process of international supervision therefore ‘needs’ an institutionalised procedure and a body specifically designed and designated to perform the supervisory task, which in itself reflects the ever increasing need for international co-operation. Thus, in many arms control treaties a neutral ‘third party’ is involved in the supervisory process, with the consent of the States Parties. Of course, different kinds of this ‘third party’ may be conceivable, depending on, and determined by, the purposes, scope and nature of the arms control treaty. Apart from international organisations, the ‘third party’ may be a regional organisation, a group of States or even an individual State. Yet, all of these variants in essence provide for the ‘third party’ machinery for the ‘objective’ establishment of the facts about States Parties’ behaviour and for authoritative review of that behaviour as tested against the law. Especially when this ‘third party’ is an independent organisation there is a guarantee that all the information supplied meets at least a minimum degree of reliability.

As a principle, all States have equal rights to participate in the process of international supervision with regard to the arms control treaties to which they are Parties. This principle can be upheld by establishing an institutional framework of supervision with ‘co-operative’ methods such as data exchanges, notifications and on-site inspections. In ‘co-operative’ methods the State Party being supervised, as part of the agreed mechanism, assists the supervising body in order to facilitate the supervisory process.

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274 See UNS-G Report (1995), par. 19. Unilateral methods of verification, such as the use of NTMs, require no such assistance by the Party being verified. Both types of methods are required for ‘adequate and effective verification’, as stated in principle (4) of the principles of verification affirmed by the Disarmament Commission (2-20 May 1988), annexed to Sur (1988), p. 67.
Treaty-based supervisory mechanisms display a gliding scale of international supervision. In its most basic form, a treaty-based supervisory mechanism provides no more than an extra incentive for States to comply with their obligations; as such, it is perfectly compatible with the concept of State sovereignty. In its most developed, ‘supranational’ form, which will only be accepted in very exceptional political circumstances, international supervision is not only hierarchic but also dominant: the supervising body may substitute the supervised subject by virtue of its power of decision. As may be explained from the direct impact that arms control law has on the national and international security of States, in the law of arms control ‘supranational’ forms of supervision cannot be found. Still, as noted earlier recent arms control treaties show a certain tendency towards the building of comprehensive supervisory mechanisms, infringing quite severely upon the State Parties’ sovereignty.

As a final remark, it can be noted that supervision by individuals is not to be found in arms control law. Even though in modern international law an increasing number of rules directly concern individuals, the law of arms control still is an inter-State affair. Mechanisms of supervision in arms control law do not encompass ‘individual’ supervisory methods, such as petitions and individual complaint procedures before Courts. This may be explained by the fact that in the field of arms control the interests of individuals are necessarily of minor importance. The primary interest in arms control is the interest of the States to maintain (inter) national peace and security. Hence, the primary field of application of international supervision in arms control law is constituted by the legal acts of the State that are of international interest. The national law of the State is only relevant to the application of supervision insofar as the arms control treaty prescribes that certain ‘national implementation measures’ be taken.

2.5 The legal basis for the exercise of international supervision
Under general international law, no State has the power to officially determine what facts exactly correspond to the behaviour displayed by another State during a given period of time, and, furthermore, no State has the power to provide an interpretation of treaty provisions that is authoritative and therefore binding on the other States Parties to the treaty; finally, no State has the power to authoritatively assess that another State through its behaviour has violated the provisions of a treaty to which they both are Parties. Such powers would defy the basic principle of sovereign

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275 See Charpentier (1984), p. 152. Naturally, the European Union can be mentioned as an example of an organisation with ‘supranational’ features in its supervisory tasks, see e.g. Wessel (1999), p. 254.

276 In case a treaty provides that the States Parties shall furnish reports on the national laws and regulations that have been enacted in the field of the subject matter of that treaty, the national laws are of course included in the field of application of international supervision.
equality of States and the principle that nobody can be judge in his own case.\textsuperscript{277} These obstacles can be overcome by introducing mechanisms of international supervision wherein the ‘third’ person is granted the power to authoritatively decide on the behaviour of a State during a certain period of time, to decide on the exact contents of the norms laid down in the treaty and to assess whether a violation of the treaty has occurred. Contrary to the State, the ‘third’ person, be it an international organisation or not, does not possess an ‘intrinsic’ power of supervision. It therefore needs an explicit legal basis, to be provided for in its constituent (or some other, related) treaty (or the \textit{ad hoc} consent of the State that is being supervised) without which fundamental elements of international supervision cannot be performed. Unless indicated otherwise in the arms control treaty concerned, becoming a Party to it implies acceptance of all obligations relating to supervision contained in it, but also no more than that. If a State e.g. consents to providing declarations and reports, this State cannot be considered to have also consented to accepting the conduct of on-site inspections in its territory to verify the contents of those declarations and reports. This would require the specific consent of the State concerned.

As mentioned, international supervision is characterised by at least some kind of ‘third party’ involvement in the supervisory process. In international supervision of arms control law, the ‘third party’ involved is as a rule a political not legal body. This observation has far-reaching consequences, for in the absence of legal authorities the law that is applied must be so clear that its interpretation in any particular case is as far as possible self-evident. It must always be asked whether a provision does in fact impose a clear and executory obligation on the States Parties, an obligation that is capable of only one single manner of application, running between the States concerned, or whether the treaty language is not so clear and sure-footed, and may be open to hopes and expectations regarding the conduct of the States concerned without actually going so far as to impose clear obligations. It is a fact that the fundamental substantive obligations of arms control treaties are in general formulated so clearly and precisely that they enable political authorities to determine whether or not the States Parties have been acting in accordance with them. In general, the substantive law provisions of arms control treaties set norms in the form of clear and executory obligations and are as such characterised by what can be termed ‘determinacy’.\textsuperscript{278} Determinacy refers to the ability of a text to convey a clear message, to appear transparent in the sense that one can see through the language to its essential meaning. Rules that are characterised by determinacy have a readily accessible meaning and clearly state what they


expect of those who are addressed, and hence are more likely to have a real impact on conduct. They bear an inherently strong normative force and leave little discretionary power to the addressees in regard to their behaviour. Obviously, international supervision can best be exercised with regard to norms that are characterised by determinacy.

To illustrate what is meant by ‘determinacy’ of substantive arms control law, some examples may be provided. The BWC contains the following substantive limitations on the freedom of behaviour of the States Parties to the treaty with regard to biological weapons:

“[E]ach State Party undertakes never in any circumstance to develop, produce, stockpile or otherwise acquire or retain biological weapons and each State Party undertakes to destroy, or to divert to peaceful purposes, as soon as possible but no later than nine months after entry into force of the Convention, all [biological weapons] which are in its possession or under its jurisdiction or control. Finally, each State Party undertakes not to transfer to any recipient whatsoever (...) and not to assist, encourage, or induce any State (...) to manufacture or otherwise acquire any [biological weapon]”.

All provisions mentioned set clear norms (one of them even sets a time-limit) that include ‘negative’ obligations, viz. to refrain from developing, producing, stockpiling or otherwise requiring or retaining the category of biological weapons, and ‘positive’ obligations, viz. to destroy or to divert to peaceful purposes the weapons that may - already or still - be in the possession or under the jurisdiction or control of the State Party concerned. This pattern of obligations can be retrieved in many other arms control treaties. The CWC even lists this kind of provision under the heading of ‘general obligations’, while the CTBT refers to them as ‘basic obligations’. Furthermore, perhaps one of the ‘purest’ examples of clear substantive obligations can be found in the 1963 LTBT. This treaty’s core article contains the substantive obligations to prohibit, to prevent and not to carry out any nuclear weapon explosion or other nuclear explosion in a circumscribed environment, as well as to refrain from causing, encouraging, or in any way participating in the carrying out of such an explosion. Even though the LTBT itself has no supervisory mechanism (the use of NTMs is considered sufficient), it is for the purpose of verifying compliance with similar types of substantive obligations that supervisory mechanisms have been adopted in later arms control treaties. The determinacy of the

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279 BWC, Art. I-III. For purposes of expediency, the extensive definitions in the BWC of what constitutes a biological weapon have been omitted here.


281 See LTBT, Art. I. The environment described (in Art. I(1(a, b))) is the atmosphere and any other environment if such explosion causes radioactive debris outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted.
Substantive law of arms control is an essential feature since it ensures an as high as possible degree of predictability and certainty of interpretation and application. This will in turn contribute to the avoidance of disputes and also to a swift implementation of the law.

With regard to a provision containing an international obligation that is characterised by determinacy, it will be relatively easy to establish that certain behaviour of a State that is subjected to supervision is controlled by that provision. This applies to provisions of both substantive and institutional arms control law. The majority of the provisions of the supervisory mechanisms of arms control treaties, however, do not contain such clear obligations. Still, at some points, provisions that are part of the supervisory mechanism of an arms control treaty establish norms with a clearly definable obligatory character. For example, pursuant to the provisions of institutional law of many arms control treaties, States Parties are required to submit declarations within a specified time-frame or to submit (semi-) annual reports. Supervision of compliance with this kind of time-related provisions may be performed without going directly into the contents of the declaration. Opportunities for the supervision of compliance as exercised by political bodies may thus concern different ‘levels’ of regulation, i.e. substantive as well as institutional obligations.

The restraint placed on the freedom of behaviour of a State through interventions of the supervising body will be more severe as the substantive or institutional law provisions are of an obligatory character demanding certain behaviour of the State Party, and the rules are more precise, leaving little discretionary power to the State Party. Or, conversely: the supervising body has a more autonomous position (and more power at hand) as the obligations that are being supervised are characterised by a high degree of determinacy.

At first sight, the absence of legal bodies in the practice of arms control supervision might be considered a weakness or even a failure of the system. However, usually the political bodies that are set up by the arms control treaty are manned with independent experts that are not under instructions of any government. As such, there is no reason to consider these political bodies inferior to judicial bodies, let alone less fit for the supervisory task. On the contrary, the overwhelming political concern with arms control suggests that a pragmatic, policy-oriented approach works best in the context of arms control supervision. This feature, combined with the determinacy of many obligations, counterbalances potential shortcomings of the supervisory mechanism that might result from the absence of third-party adjudication or arbitration in arms control law.

282 See e.g. the CWC, Article III(1): “Each State Party shall submit (...) not later than 30 days after this Convention enters into force for it, the following declarations (...)”.
2.6 Supervision and types of rules

In close connection to the determinacy of rules, the potential for supervision also depends on the type of rule concerned. Generally speaking, two main types of rules can be distinguished, viz. 'rules of conduct' and 'rules of result'\(^283\) Rules of conduct try to direct the behaviour of the subject - the State - towards the achievement of a specific goal. Rules of result add to this behavioural standard the obligation to achieve a specific result. It goes without saying that rules of result place more restrictions on the discretionary power of the State.

In the substantive law of arms control, many rules of conduct may be found, mostly in the form of negative obligations, or prohibitions. A good example is the prohibition contained in Art. I(1) of the CTBT: "Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion (...)". This is a clear prohibition, the specific goal of which is to achieve the absence of nuclear weapon test explosions. The State that becomes a Party to the CTBT deprives itself of all freedom of behaviour with regard to the subject of the prohibition of this treaty. In the law of arms control (positive) rules of result may also be found. All purely 'factual' obligations, such as the obligation to send in a report every six months or to notify the supervising body of a certain intention within a specific timeframe, are (positive) rules of result. These obligations leave as little discretionary power to the States Parties as they do to the supervising body.

More important (and more exceptional) are substantive obligations that as a result require disarmament by way of destruction of stockpiles of weapons, delivery mechanisms or factories. When the result that is to be achieved is circumscribed in a clear and precise manner, e.g. by indicating the number of weapons that must have been destroyed after a certain period of time, the supervising body legally speaking takes up a powerful position vis-à-vis the States Parties. The high degree of determinacy of this type of rules, leaving very little discretionary power to the States Parties regarding their behaviour, renders supervision of compliance with these rules uncomplicated and potentially effective. Arms control treaties that require disarmament will always comprise rules of conduct as well, either explicitly or implicitly. For as soon as the required level of disarmament has been reached by implementation of that part of the treaty, an obligation will exist for the States Parties to never again build up the level of armaments above the limits that have been reached (a rule of conduct).

The choice of a particular supervisory mechanism is closely related to the specific subject matter of the arms control treaty, in the sense that - apart from the all-embracing influence of the preferences of the States Parties concerned - the choice of specific methods of supervision and their institutional design are to a large extent determined by the character of the

substantive obligations to be supervised. An important distinction in this respect relates to the difference between complete elimination of some category of weapons or partial disarmament (limitation of armaments). A clear obligation to disarm to a zero-level has other implications for the supervisory mechanism than an obligation to reduce armaments to a given level does. In the latter case, for example, standards have to be drawn up in order to fix the starting point from which the reduction of armaments must proceed to the prescribed level. Moreover, in addition to verifying specific numbers of treaty-limited items, the monitoring activities must be able, depending on the terms of the treaty, to distinguish between treaty-limited items and non-treaty-limited items on the basis of less obvious criteria, for example, deployed and non-deployed missiles, converted and accountable bombers, new and existing types of missiles. Additional factors, such as the mobility of certain types of missiles (ICBMs in particular), may further add to the complexity of the verification tasks. Clearly, evasion of a general and complete prohibition will generally be much more difficult than evasion of a prescribed level of armaments, since discovering one single prohibited weapon will be much easier than establishing that a State possesses e.g. 11,000 battle tanks where only 10,000 are allowed. Therefore, an arms control treaty that purports to bring about complete disarmament with regard to a certain category of weapons will generally be in need of a less stringent and intrusive mechanism for the control of compliance than a treaty which contains a ban on the possession of a certain category of armaments above a given level. In the case of weapons of mass destruction, the problem of dual-use is an extremely complicating factor, which explains to a large degree the comprehensiveness of the supervisory mechanism of treaties like the CWC.

The substantive law of arms control also shows examples of ‘rules’ that are difficult to place in either the category of conduct or that of result. A characteristic example in this respect may be found in Art. VI of the NPT, which reads in part: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament (...)”. Due to the use of qualifications such as ‘to pursue negotiations’ on ‘effective’ measures ‘at an early date’, this behavioural obligation leaves so much

284 Compare, for example, the obligation in Art. I of the CWC, which in fact prescribes complete chemical disarmament, with the obligations of Art. IV of the 1990 CFE Treaty, which prescribe a reduction of certain categories of ‘heavy’ conventional armaments to a given level (e.g. 20,000 battle tanks (Art. IV(1(a)). The same applies to the INF Treaty as compared to the START Treaties: the INF Treaty requires the permanent elimination of treaty-limited items while the START Treaties call for reductions and subsequent limitations of treaty-limited items.

285 This is the case with the START Treaties. See UNS-G Report (1995), par. 70.

286 In the START-I Treaty, the problem of the verification of mobile missiles was resolved by the introduction of ‘restricted deployment areas’. See Kislyak (1992a), p. 54.
freedom and discretionary power to the State-Parties to the NPT, that it may be questioned whether it lends itself to supervision at all. It probably qualifies as a principle rather than a rule. It should be noted that even though there may be a strong connection between substantive and institutional rules, the institutional design of the supervisory mechanism of an arms control treaty cannot always be explained by referring to the nature and contents of the substantive obligations of that treaty. This can be demonstrated by simply comparing the LTB T of 1963 with the 1996 CTBT. Even though the substantive obligations of both treaties resemble each other to a large extent (they even partially overlap), the CTBT is characterised by a comprehensive supervisory mechanism whereas the LTB T has no supervisory mechanism at all. Again, political considerations evidently determine what is desirable in the law of arms control.

2.7 The rationale of supervision in arms control law
The context in which supervision takes place is that of the sovereign right of States to conclude arms control treaties and their subsequent obligation to implement such treaties. Taking into account the sensitivity of its subject-matter, in arms control law it is essential that States adhere to the agreements they have entered into. Whereas in many fields of law compliance decisions by States may eventually be based on self-interest independently defined, compliance decisions regarding obligations laid down in arms control treaties may easily touch upon the very heart of the international system and therefore need to be carefully monitored by the members of that system inter se. Compliance in the field of arms control must be perceived as interdependent self-interest. It will arise from decision-making whereby States, in their calculus of self-interest, will not only include their independent broader-term and longer-term concerns, but shall include their expectations regarding the impact that their own compliance will have on others as well. The central purpose of arms control, to prevent the outbreak of major armed conflict by strengthening international security and the security of the States Parties to the arms control treaties alike, is pursued through the enhancement of the stability and predictability of the States’ mutual behaviour. Obviously, the element of reciprocity, which pervades international law in general, is omnipresent in arms control law.

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289 According to Nollkaemper (1993), one of the potentials of supervision (‘compliance control’) is to ‘trigger the principle of reciprocity’ (p. 296). Reciprocity is allegedly at the basis of some of the principles of verification, as affirmed by the Disarmament Commission (2-20 May 1988, New York), such as the principle that each State Party undertakes not to interfere with agreed methods, procedures and techniques of verification in the treaty. The
In concluding arms control treaties, States bind themselves to observe the law: compliance is not voluntary. As has been made clear, there is no general legal principle that forces States into concluding arms control agreements. The law of arms control therefore starts at a point where States are already prepared in principle to co-operate in limiting their freedom of behaviour with regard to their national armaments. While some States Parties to an arms control agreement may prefer one set of rules over another, the stability of any such co-operative agreement is assured as long as all States Parties believe that abiding by the agreement produces better results than independent action. But even then – as was already touched upon when the scope of institutional arms control law was discussed – arms control can only work if States somehow have confidence in collectively complying with the provisions of the arms control agreement they entered into. Although it must be acknowledged that the decisive factor for achieving measures of arms control resides in the political will of States, especially of powerful ones, to do so, a significant role is reserved for supervisory mechanisms. Generally speaking, supervisory mechanisms purport to build confidence between the States Parties to the arms control treaty, to deter behaviour that violates the treaty and to allow for the control of compliance with the terms of the treaty.  

Put more precisely, this latter purpose involves that the supervisory mechanisms allow for a legally controlled observance of the compliance of States with their obligations under arms control treaties. Supervision in general makes it possible for errors (either in the assessment of a situation or in taking action) which might jeopardise the stability and security of the international system to be rectified and as such helps to ensure international order. In the context of arms control law, supervision also fulfils this function.

The primary rationale of supervision over the observance of arms control law is thus to make a contribution to the realisation of the objectives of the treaties with respect to which supervision is exercised. The substantive obligations of the arms control treaties represent the treaty objectives, as translated into fundamental rules. The exercise of international supervision in itself provides an incentive for compliance with these rules, and will increase the possibility that the obligations are observed, not only by the threat of sanctions being imposed for non-compliance but also through the possibility that there will be some form of official recognition of violations. Through this and the other ‘rationales’ mentioned, supervision

principle of reciprocity may play an important role in regard to reactions in the event of established non-compliance as well.

291 See Kaasik (1933), p. 7. See also Merle (1959), p. 412: “(…) il s’agit donc d’une procédure destinée à assurer l’ordre (…) d’une société donnée”.
may also contribute to the realisation of more general and abstract objectives, such as the universal goal of general and complete disarmament under strict and effective international control in the context of the arms control process. Finally, the exercise of supervision enriches international law and at the same time may contribute to its progressive development by way of clarifying and specifying the existing norms for which respect is to be assured. This feature will be referred to as the *interpretative element* in supervision.

3. The process of international supervision

3.1 Different phases of the process of international supervision

There is no standardised and generally accepted terminology when it comes to identifying and analysing supervisory mechanisms in treaties. The approach towards studying supervision that is used here has been inspired by general work on the analysis of mechanisms of international supervision and by more specific work on legal approaches towards supervision in the context of arms control law. International supervision can be described as a process, consisting of separate, but highly interrelated phases. Each phase is characterised by a set of supervisory methods - or instruments - that are applied in a specific institutional setting for a particular purpose. A system of international supervision can be more or less comprehensive. At least, international supervision requires, first, information that is (made) available to the supervising body about the behaviour of the subject that is being supervised; second, interpretation by the supervisor of the rule that is applicable to the behaviour of the subject being supervised; third, appreciation by the supervisor of the conformity to the rule of the behaviour of the subject that is supervised. The first requirement, information, may be obtained either generally, i.e. continuously and without having been triggered by a suspicion, or specifically, i.e. triggered by a suspicion of deviant behaviour of the subject that is supervised. The phase of supervision that aims at the general gathering of information on an ongoing basis is termed *monitoring*. The specific gathering of information is exercised during the phase of...
verification, itself a process encompassing several stages. The second requirement of supervision, interpretation, takes place in the phase of verification (review stage of verification), in the phase of dispute settlement, and, generally in all cases where rules are ‘elaborated’ while being applied (interpretative element). The last requirement, appreciation, takes place in the final stage of the phase of verification in the form of an official assessment, or by way of a judgement in the phase of dispute settlement. It may be recalled that a system of supervision not only purports to detect violations of the law, but also to respond to the violations detected. Hence, provisions in arms control treaties which make it possible for obligations to be enforced in the event of non-compliance are considered to constitute a phase in the process of international supervision. This phase encompasses reactions that may consist of correction of wrongful behaviour or the enforcement of rightful behaviour (phase of correction/enforcement).

In short, a ‘complete’ supervisory mechanism consists of four separate, but highly interrelated phases, viz. monitoring, verification, dispute settlement and correction/enforcement. In addition, the interpretative element can be discerned as a characteristic element applicable to the performance of supervision in all phases. As will become clear, the process of international supervision in its most highly developed form is of a continuous and repetitive nature. A model of supervisory mechanisms should therefore be pictured as a circular rather than a linear process, with the phase of monitoring continuously operating in order to oversee compliance with the decisions or actions taken in the other phases [See annex figure 1]. In the present chapter, the phases of the supervisory process will be further elaborated on the basis of theoretical studies, with illustrations taken from arms control treaty texts where appropriate. Any conclusions that are drawn as a result of this exercise are factual rather than normative, in that this analysis cannot be directly linked to the question of effectiveness of international supervision.

3.1.1 Monitoring
Monitoring as a phase in the process of supervision can be described as efforts to detect, identify, and measure developments and activities of interest. As such, it is a continuous, and often technical, activity which aims at scrutinising the behaviour of States by means of collecting relevant data. Data may either be ‘collected’, e.g. by officials of bodies established

299 Cf. Lang (1995), p. 70. This type of activity largely corresponds to the ‘collection
by the arms control treaty, or may be provided by the States Parties upon request or of their own accord, depending on the wording of the monitoring provisions in the treaty. This type of general exchange of information may take place before a treaty is concluded between the Parties concerned, on a voluntary basis, in the course of negotiations or even before that, in order to determine and improve the effectiveness of the procedures and methods of collecting data. Monitoring as part of the supervision process should however be distinguished from the exchange of information on a purely voluntary basis. A purely voluntary exchange of information need not be based on a legal obligation and there will be no legal possibility to hold Parties that ‘failed’ to report significant events (that took place in their territory and that were related to the object of the treaty) responsible for such ‘failure’. Monitoring as part of the supervision process does have a legal basis and the information gathered serves as a source of information for fact-finding in the verification process; in most cases verification itself will be triggered by an event that has been reported by virtue of the monitoring provisions. Also outside the treaty-based supervisory mechanisms (in unilateral and diplomatic supervision), it is quite common for States to mutually monitor each other’s performance in carrying out duties and obligations arising from substantive treaty law, mainly based on reciprocity. Besides the collection of factual data monitoring also entails their ‘routine’ analysis in order to retrieve remarkable or interesting points that might warrant more in-depth investigation. It also stops there, in that as soon as points of interest have been discovered and additional fact-finding is going to be undertaken, the activities are systematically part of the fact-finding stage of verification.

It might be contended that monitoring is itself not part of the supervisory system, since States are merely invited to explain the way in which they apply this or that norm, without their explanations being subject to review or appreciation. Still, the phase of monitoring lays a foundation of general information and data upon which appreciation regarding behaviour may be based later on. As such, monitoring activities are indispensable for the prompt and effective functioning of the supervisory mechanism of an arms control treaty. Moreover, due to its continuous character the phase of monitoring may reveal potential threats to compliance. It is obvious that the behaviour of some States Parties remains more closely within the norms they have accepted than that of others, that States Parties follow some norms more closely than they follow others, and that States’ behaviour with respect to norms changes over time, so there is certainly a case for ongoing monitoring of compliance. The processing by the supervising body of the

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information that is gathered on past activities enables this body to determine whether the continuance of those activities is of such a nature that they might constitute a violation of provisions of the arms control treaty. The monitoring of a State's behaviour may therefore not only contribute to avoiding disputes about compliance due to the preventive effect of its ongoing application, but also serves to build confidence by way of demonstrating the continued compliance by that State with its obligations under the arms control treaty. The performance of monitoring activities is not related to the occurrence of suspicions or incidents; it is 'incident-independent'. As such, it is different from fact-finding in the process of verification, which is about controlling compliance in specific cases.

3.1.2 Verification

It has been correctly stated that in order to facilitate the conclusion and effective implementation of arms control agreements and to create confidence, States should accept appropriate provisions for verification in such agreements. Verification can be defined as the 'process in which data are collected, collated and analysed in order to make an informed judgement as to whether a Party is complying with its obligations'. It presupposes the existence of a treaty-based obligation, the observance of which must be verified; verification can therefore be described as a specific, treaty-related process. Verification as a phase in the supervisory process comprises several stages, each of which may be of some complexity. The final purpose of the verification process is to establish whether the States Parties are complying with their obligations under an agreement. The ability to establish this requires the gathering and review (evaluation) of data and an assessment as to whether the behaviour of the State Party (or Parties) reflected in the data gathered are consistent with the obligations assumed under the arms control treaty. The first aim of verification is therefore to increase the level of transparency in relation to certain relevant activities to a point where a determination regarding compliance can be

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303 See SSOD-I (1978), par. 91.


reliably made. Consequently, the process of verification starts by the gathering of information on suspect State behaviour relative to the fulfilment of obligation(s) pursuant to the arms control treaty. This gathering of specific data constitutes the fact-finding stage of the verification process.

Unlike the activities performed in the phase of monitoring, the gathering of data in the verification process is not primarily performed as a purpose in itself. Rather, the data collected serve to represent the established behaviour of a State that will be put to the test for its conformity with the treaty-rules. Apart from collecting 'new' data and additional information, carrying out the collection of data within the verification process may lead to an implicit or explicit assessment as to whether the information collected or provided within the phase of monitoring has been correct.\(^{307}\) In this respect it can be noted that in various arms control treaties, the information provided in declarations by the States Parties in the phase of monitoring is subject to verification through routine on-site inspection.

The process of verification clearly consists of more than a technical, fact-finding stage. After the gathering of data, next the established factual behaviour of the State is tested for its conformity with the rules that are set out in the arms control treaty. To this end, the information gathered is thoroughly analysed, interpreted and evaluated from a technical, juridical and political viewpoint.\(^{308}\) This is the review stage of the verification process, which is about the measuring of behaviour against norms and which can be considered a core activity of the verification process.\(^{309}\) The analysis in the review stage necessarily involves more than the provisional 'routine' analysis that also takes place in the monitoring phase of supervision. Review involves the political and legal qualification of the pre-established facts. As a result of the analysis of the information collected as tested against the rules, a determination is made as to whether the specific terms of the arms control agreement have been met. This is the stage of assessment, with which the process of verification comes to an end. The term 'assessment' is used here in the meaning 'to decide on or estimate the degree of compliance'. The legal consequence of any assessment of compliance is the determination of the licit or illicit character of the contested behaviour, i.e. the determination of its legal validity.\(^{310}\) It should be noted, that unless the treaty provides or implies otherwise, the qualification of established behaviour as a violation of the treaty remains the individual responsibility of each of the States Parties concerned. The stage of assessment may involve


an international dimension however, in particular through an *ad hoc* or special collective procedure depending on and determined by the institutional design of the supervisory mechanism of the arms control treaty. The States Parties to the treaty may have attributed the power to make a binding assessment to a political body established by that treaty; note, that it is not necessary that a judicial body be established for this purpose. With regard to its outcome, i.e. the assessment, the process of verification can be characterised as relative: at best, it can be assessed that the established conduct of the other States Parties is not incompatible with the obligations assumed under the treaty; an automatic or absolute guarantee of the complete absence of any violation cannot be provided.\textsuperscript{311}

The activities in the separate stages of the verification process (collection of information, review of information combined with the rules and assessment regarding compliance) will most of the time be performed simultaneously. Strictly separating these phases will hardly ever be possible, even though a trend towards increasing autonomy of the different stages of the verification process can be identified. In particular, fact-finding within the verification process has evolved into a rather autonomous stage in recent arms control treaties. The assumption can be made that the existence and use of the fact-finding procedures will be sufficient, in a considerable number of cases, to assure a satisfactory degree of compliance. Still, it should be noted that the results of fact-finding methods are restricted to factual findings. The only ‘appreciation’ made in the stage of fact-finding is on the degree and nature of access (inspections) and co-operation granted in general by the State Party whose behaviour has been subjected to verification.

After having used the procedures to ascertain the facts of State behaviour it may still be difficult to decide whether that behaviour should be ascribed the quality of a ‘violation’ of the treaty provision(s) concerned. It can be upheld that in international relations the procedure of norm-creation calls for so many compromises that it is frequently not clear whether a specific norm does apply for a particular situation, and, if so, what this norm amounts to and what its implications are. A difference of opinion as to precisely what the obligations of the treaty entail, may lead a State Party into contending that it is fulfilling its obligations. For that matter, it may defend its own interpretation in good faith, or it may adopt such a narrow interpretation of the obligation that consequently alleged violations fall outside its scope.\textsuperscript{312}

Hence, the rules often need clarification and further specification by way of interpretation in order to enable proper review. This activity has already been introduced as the interpretative element of the supervisory mechanism.

\textsuperscript{311} See Blix (2000), p. 128-130; Sur (1991), p. 13, 15-16. Remarkably, according to Sur the verification of an all-embracing (positive) rule of result, such as the complete elimination of chemical weapons, proves compliance with this rule instead of merely providing a presumption of compliance as verification commonly does.

The interpretative element in fact increases the degree of determinacy of the rule concerned, so as to enable more stringent supervision. The interpretative element as such is inherent in every phase of the supervisory process. It is most apparent in the context of review within the process of verification. The stage of review taken together with these interpretative acts constitutes the technical interpretation of the data gathered, or, in other words, their translation from raw data into operational conclusions. These operational conclusions may amount to an assessment containing an official recognition of a violation of the treaty. The assessment made at the end of the verification process will therefore not only be based on the facts, but also on the interpretation of the obligations involved. In arms control treaties having an international organisation as supervising body, it is a political body that will make this decision (sometimes by official assessment) concerning a violation by a State Party of treaty provisions or of legal acts of the supervising organisation. A judicial organ will only get involved in the interpretation of the treaty or the legal acts of the organisation in case States Parties decide to refer a dispute to such organ, or in case the political organ has been granted the power to request an advisory opinion of the ICJ and it decides to make use of that power. 313

3.1.3 Dispute settlement

A ‘dispute’ can be defined as a ‘disagreement on a point of law or fact, or a conflict of legal views or interests between two persons’. 314 Disputes may remain at an abstract level, as where one person alleges that he has a particular right and the other person disputes this. In most instances however, a dispute assumes a practical form, as where one person causes damage to another by some act and that other person asserts a violation of his rights and makes a claim for compensation. Disputes between Parties to an arms control treaty that fall within the phase of dispute settlement will primarily relate to questions of implementation and application of the rules of the supervisory mechanism. Not each and every difference of opinion constitutes a ‘dispute’; in many cases arms control treaties contain procedures that are specifically meant to prevent differences from developing into (full-blown) disputes. 315 Furthermore, differences of opinion arising in the course of the routine application of the law by the supervising body can frequently be settled by informal discussion and consultation, and therefore do not require final interpretation and do not constitute

313 E.g., organs of the OPCW, the international organisation charged with supervising compliance with the CWC have this power (subject to authorisation from the UNGA) according to Art. XIV(5) of the CWC.

314 See the definition of the PCIJ in the Mavrommatis Case (1924), as repeated by the ICJ in the East Timor Case (East Timor (Portugal v. Australia), ICJ Rep. 1995, p. 99.

controversies in the sense that disputes dealt with in the phase of dispute settlement do.

Since some of the dispute settlement methods (such as consultation and enquiry) are likewise used in other phases of supervision, primarily verification, it is often difficult to draw a clear distinction between verification and the phase of dispute settlement. In general, it can be said that when use is made of dispute settlement techniques and procedures with the primary aim of solving an existing dispute, the phase of ‘dispute settlement’ has been entered. Entering the phase of ‘dispute settlement’ in the process of international supervision usually presupposes an already existing disagreement or conflict of views between the Parties, which emerged as a result of the performance of earlier stages of the supervisory mechanism. Especially after an official assessment has been made in the process of verification, States may identify their disagreements on points of fact or law. But also without any official assessment, unilateral or collective verification activities that result in a single State’s assessing another’s conduct as improper and contrary to the obligations under the treaty indicate the presence of a dispute between the perpetrator of that conduct and the ‘verifier’. All dispute settlement must take place by peaceful means; the pacific settlement of disputes, whatever their nature, can be considered a general, underlying principle of the international legal system as a whole. Above and beyond this obligation States are traditionally left with the freedom to choose the means and mechanisms by which to settle disputes over the interpretation and application of rules. This discretion in choice of means and mechanisms is only subordinated by the requirement that all means shall ‘be appropriate to the circumstances and nature of the dispute’.

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316 Cf. Trimble (1989), who postulates that any dispute regarding compliance ‘beyond verification’ is part of international dispute settlement.

317 Cf. Sur (1988), p. 22. In case an international organisation has been established as supervising body, one might contend that as soon as the organisation initiates the process of verification, a ‘dispute’ has arisen between the organisation and the State whose behaviour is being verified. This ‘dispute’ however is about compliance or non-compliance and the organisation has the final say in the matter. This phase is fundamentally different from procedures relating to disagreements on points of law or fact between the (legally equal) States Parties.

318 See Cottereau (1991), p. 82.

319 See Art. 2(3) of the UN Charter, which is supplementary to the principle of the prohibition of the use of force by States in their international relations (Art. 2(4) Charter). See also the ‘Declaration of General Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’ (UNGA Res. 2625 (XXV), 24 Oct. 1970, and Declaration on Principles of the Final Act of Helsinki (1986).

320 As mentioned in UNGA Res. 2625 (XXV), 1970; see Wellens (1994), p. 23. Those States that are Parties to the 1928 Geneva General Act or the 1949 Revised General Act on the Pacific Settlement of International Disputes, are required to first try to reach a settlement by
Dispute settlement can be performed either in a non-judicial or in a judicial form. Judicial dispute settlement generally consists of three stages that are highly interwoven, viz. gathering of specific information, review of the information gathered and, finally, an assessment producing a legally binding judgement or award by applying legal rules. Judicial dispute settlement is performed by an international court or arbitral tribunal. The acceptance of jurisdiction of international judicial bodies is voluntary and based on reciprocity. The assessment of a judicial organ in general only has binding force in the particular case brought before it and only produces effects between the Parties to the dispute. Non-judicial dispute settlement refers to all other peaceful means of settlement according to international law. In non-judicial dispute settlement, it all depends on the methods and procedures used whether or not different stages in the process can be identified. Still, the ‘assessments’ that result from non-judicial dispute settlement procedures are not legally binding and most often bear the character of advice or recommendation on how to solve the dispute (rather than being an estimate of the degree of compliance).

Dispute settlement in arms control law is primarily of a non-judicial nature and only very rarely, if at all, judicial. It can be assumed that the law of arms control in most cases does not lend itself to be subjected to judicial dispute settlement because of the close relationship of this branch of law with the security of States. In judicial dispute settlement political (and other, e.g., economical) factors can be taken into account, but of themselves cannot affect the outcome based on international law. All legal disputes in arms control law will unavoidably have political dimensions, and this overwhelming political concern with arms control law renders the settlement of contentious cases by a judicial organ difficult and perhaps even

way of conciliation, and only resort to judicial dispute settlement (first, the ICJ and in the second instance, an Arbitral Tribunal) in case no agreement has been reached by way of conciliation.

See e.g. Revised General Act for the Pacific settlement of International Disputes (UNGA Res. 268(III), 28 April 1949), Chapter II, ‘Judicial Settlement’, Art. 17: “All disputes with regard to which the Parties are in a conflict as to their respective rights shall, (...) be submitted for decision by the ICJ, unless the Parties agree (...) to have resort to an arbitral tribunal”. Chapter III of the Revised General Act offers a ‘model’ for the constitution of an Arbitral Tribunal; naturally, the Parties are at complete liberty to draw up their own constitution by way of special agreement (See Art. 18 of the Revised General Act). Special features that may further distinguish judicial dispute settlement from the non-judicial variant are the institutionalised nature of the judicial proceedings and the fact that the authority of an independent law-applying judicial organ may be more weighty due to its composition and behaviour. See Chowdhury (1986), p. 237-238.

See Chowdhury (1986), p. 14, 38-41. The means of accepting jurisdiction may include reference of the dispute to a third party (e.g. by way of Art. 36 of the Statute of the ICJ), the establishment of ad hoc jurisdiction of a court or tribunal or the inclusion of jurisdictional clauses in treaties. See Brus (1995), p. 179.

See e.g. Art. 59 of the Statute of the ICJ.
undesirable. Furthermore, also in arms control law the fact that no Party to a dispute can be certain in advance of the outcome of an arbitration or adjudication, which is, after all, binding upon it, promotes a reliance on negotiations and other voluntary settlement to the detriment of initiating judicial dispute settlement procedures.\textsuperscript{324} States prefer all kinds of non-judicial dispute settlement procedures, leaving room to pursue by all available political means their aim of safeguarding their national interests. In addition, contrary to the finality of judicial settlement, political decisions can be re-adjusted at any moment. Finally, in judicial dispute settlement, the judgements - in themselves a material source of international law - may exclude the possibility of (future) unilateral interpretation by a State of its rights and obligations under a specific treaty.

3.1.4 Correction/enforcement
The phase of correction/enforcement encompasses the procedures for the appropriate reactions to the established violation of an obligation. The possibility of imposing corrective or enforcement measures is important to persuade States to adapt their behaviour and again render it consistent with what is required by the treaty provisions. In case the State Party chooses to ignore the assessment made, the continued non-compliance of this State may be revealed, e.g. by ongoing monitoring activities. The phase of correction/enforcement may also be entered in reaction to these ongoing violations.\textsuperscript{325}

The term ‘enforcement actions’ or ‘enforcement measures’ refers to any (prospect of) action which is held out by a State Party, by the supervising organisation or some other organisation (e.g. the UN) as a negative consequence following non-compliance.\textsuperscript{326} The term ‘correction’ refers to the purpose under the arms control treaty of those actions, viz. any measures taken to correct deviant behaviour of the target State and to stimulate compliance. The threat of correction or enforcement resembles a deterrence strategy designed to maintain co-operation between the States Parties by preventing non-compliance from taking place. The actual response to a

\textsuperscript{324} This generally holds true for any field of law, see Chowdhury (1986), p. 326-328. See also Gotlieb (1965), p. 152. To illustrate this with regard to the law of arms control, it can be put forward that of the over a hundred cases that have been decided by the ICJ, the only real arms control-related affair ever treated by the ICJ concerned the French nuclear tests in the Nuclear Test Cases (1974).

\textsuperscript{325} There is of course a legal obligation for the State Party that has been acting in breach of a treaty to again bring itself in full compliance with the treaty. The need for ‘correction’ and ‘enforcement action’ presupposes an unwillingness on the part of the State to bring itself into compliance with the treaty.

\textsuperscript{326} It should be noted that enforcement action by the UNSC is designed to maintain or restore international peace and security; this does not necessarily involve enforcement of the law. See Henkin (1995), p. 45-47. However, it will be clear that both ‘triggers’ may easily merge in practice.
violation is only one part of that strategy.\textsuperscript{327} It can be upheld that States are normally induced, rather than coerced to comply with the law, albeit that the decision recognising (in an official assessment) that obligations have been violated by a State Party may in itself already be perceived as a kind of sanction, even if it has no further legal consequences within the supervising organisation. Still it is important that in case a situation has been qualified as illegal, measures to correct it be taken. If this were otherwise, a State Party whose conduct has been qualified as illegal, could consider itself to be free to continue acting in disregard of such illegality.\textsuperscript{328}

It is undisputed that the phase of correction/enforcement, although it appears to be a logical consequence of the verification exercise, is itself not an integral part of the verification process.\textsuperscript{329} Correction/enforcement differs from all other phases of the supervisory process in that it is designed to react to previously established violations; if earlier activities such as those in the phases of monitoring, verification and dispute settlement, indicate or establish non-compliance on the part of a State Party, correction and enforcement actions may be taken in order to establish or restore the conformity of norms and behaviour. Only when the established non-compliance does not originate from the ill-will of the State Party concerned but from its lack of capacities, assistance and support appear to be more appropriate responses to non-compliance than correction or enforcement.\textsuperscript{330}

However, only in exceptional circumstances will this kind of defence be raised by the State in the phase of correction/enforcement. If appropriate, it will have been dealt with earlier, viz. during the consultations in the phases of verification or dispute settlement.

It may be recalled that in international law there is limited opportunity for enforcement activities. This is no different in case a specialised international organisation has been established as the supervising body of the arms control treaty. While States Parties are willing to allow an exterior organ indicating to them how to conform with their obligations, they will not easily support that they be forced to do so.\textsuperscript{331} Regarding the implementation of their decisions, supervisory organisations eventually have to rely on the goodwill of (the majority of) the States Parties, that themselves retain the most essential means of action, legal as well as factual. This explains the


\textsuperscript{329} See, e.g., Sur (1991), p. 14; Sur (1992), p. 1. See also Lang (1995), p. 10: “Verification (…) does not yet envisage the consequences of failure to comply”. Some authors seem to deny even that correction/enforcement is part of the supervisory process (French: contrôle); e.g. Charpentier (1984), p. 153 maintains that: “(…) le schéma retenu de l’opération de contrôle exclut les mesures permettant de donner effet à la constatation du manquement”.


importance of the whole process of international supervision as a means to further the objectives of the arms control treaties.

3.1.5 *The interpretative element*

The interpretative element has already been touched upon in the discussion of the process of verification. The activity of specifying and clarifying norms is performed in all phases of the supervisory process, since in every phase rules are being applied and whoever applies a rule must first also interpret it, which requires ascertaining its meaning. The element of interpretation comes to the surface most clearly in the review stages of both verification and dispute settlement.

It is not to be expected that the exercise of unilateral or diplomatic supervision will contribute much to the elaboration of norms of arms control law, since for that effect to occur a supervisor having a certain degree of impartiality and general acceptability is needed. In many arms control treaties the interpretation of treaty obligations takes place by a body in the performance of its supervisory tasks. If the supervising body did not have this power of interpretation, it would not be able to succeed in officially assessing whether obligations have been violated by the State Party whose behaviour it has reviewed. The interpretation of an obligation favoured by the supervising body therefore necessarily overrules the interpretation given to the same obligation by the State Party itself. This holds true not only with regard to bodies of judicial supervision (Courts, tribunals), but also with regard to political organs of an international organisation, such as an executive body with supervisory tasks. Therefore as a rule, the body ('judicial' or 'political') that has the power to decide whether there is a violation of an obligation, must have the power to interpret the meaning of this obligation authoritatively. Thus, potential misperceptions on cases of non-compliance that are actually differences of opinion on the interpretation of a rule will be avoided as much as possible. The interpretative element of supervision may help to ensure at least some flexibility of rules and thus compensates for the core interest displayed in (the review stage of) verification, viz. 'to strengthen the rules and to attach greater importance to their application than to their flexibility' 332

3.2 *Treaty-specific and treaty non-specific arms control supervision*

As the above analysis has tried to show, some phases of supervision are positioned within the arms control treaty and therefore directly based upon the treaty, whereas other phases are positioned outside the arms control treaty proper. The first-mentioned category of phases shall be termed treaty-specific supervision, the second category treaty non-specific supervision. Within the process of international supervision, both monitoring and

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verification are typically treaty-specific phases. The procedural obligations of the States Parties to the arms control treaty in the phases of monitoring and verification, such as the obligation to submit annual reports or the obligation to allow the presence of an inspection team on their territory, result directly from the treaty-specific supervisory mechanism.333 The information to be obtained with the methods of verification (especially inspections) of a given arms control treaty has to be related to the purposes of verification of that specific treaty. Furthermore, the powers, procedures, and decision-making capacity of the verifying body are laid down in the arms control treaty, whether this verifying body has only limited powers, such as a Standing Consultative Committee, or is a specialised international organisation such as the OPCW. Therefore, not only the methods but also the institutional design of verification in most cases is treaty-specific.

In general, it is thought best to have a direct link between the arms control treaty and the methods and institutional design of the mechanism for the supervision of States Parties' compliance with the treaty.334 Obviously, this does not exclude the possibility that certain stages in the process of verification be performed by bodies from outside the arms control treaty. Such has been the case with fact-finding missions by the UNS-G when verifying compliance with arms control treaties that contain no verification mechanism of their own.335 Occasionally, the UNS-G has even been asked to conduct an impartial investigation regarding allegations of non-compliance with a treaty that does contain a supervisory mechanism (e.g. "Yellow-Rain" affair under the BWC).336 Furthermore, many arms control treaties allow the States Parties the choice of addressing compliance-concerns at an early stage through the appropriate procedures within the framework of the UN and in accordance with its Charter.337

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333 Only in very exceptional circumstances this may be different, viz. when a mechanism for the general exchange of information is set up on the basis of a broad interpretation of widely and generally formulated provisions on co-operation in the field covered by the arms control treaty. This happened during Review Conferences of the BWC through the involvement of the UN. This specific case remains exceptional, since the BWC is as yet the only arms control treaty of which the supervisory mechanism rests entirely on the UN.

334 See Sur (1988), p. 28: “The dominant view is that (...) there has to be a link between a treaty and verification measures”. See also Goldblat (1992), p. 35: “(...) it is the Organisation of the Parties, rather than an external international body, that should perform the function of compliance evaluation”.

335 This happened for example with regard to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. See UNS-G Report (1995), par. 40.


337 This is inter alia the case with the Sea-Bed Treaty, the BWC, the ENMOD Convention, and the Moon Agreement. See infra, Chapter [5].
Non-judicial dispute settlement as a phase in the supervisory process has characteristics of both treaty-specific and treaty non-specific supervision. It is of course treaty-specific insofar as the arms control treaty contains methods and an institutional design that relate to the settling of disputes by non-judicial means within the supervisory mechanism of the treaty. Many of the consultative bodies that have been established pursuant to arms control treaties, for example, as part of their task serve as a forum for the settlement of disputes by way of non-judicial means. These are treaty-specific fora for the functioning of which treaty-specific procedures may be provided. On the other hand, an institutionalised system of non-judicial dispute settlement with the general purpose of preventing disputes from reaching the threshold of military confrontation is provided by Chapter VI of the UN Charter. The Charter system is more than a system of collective enforcement of peace: in Chapter VI it establishes an extensive collective approach to preventing military conflict by way of a credible institution-based process for investigating disputes (Art. 34) as well as for making recommendations to settle them (Art. 37). Furthermore, UN Members have a general right to bring disputes to the attention of either the UNSC or the UNGA (Art. 35(1)). This system is primarily the domain of the UNSC, although the Council may recommend to the Parties that the dispute be referred to the ICJ (Art. 36(3)), or to other ‘methods of adjustment’ (Art. 36(1)).

Judicial dispute settlement is an essentially treaty non-specific phase of the process of international supervision. Judicial dispute settlement can only then become treaty-specific, when a tribunal is established pursuant to a treaty as the highest legal authority within that treaty regime. This has e.g. happened in the law of the sea with the Tribunal for the Law of the Sea, which was established pursuant to the 1982 Law of the Sea Convention. In the law of arms control, no such specific legal body has been established. Instead, the very few cases relating to issues of arms control that have been dealt with by the judiciary were decided by the ICJ, which has a general competence as the principal judicial organ of the UN (Art. 92 UN Charter). Only part of the phase of correction/enforcement operates within the supervisory mechanisms of arms control treaties. The most common actions of a ‘corrective’ nature that are treaty-specific are corrective actions under internal institutional law, such as the loss of voting rights as a result of failure to pay one’s dues. This is a general and well-known practice of ‘procedural sanctions’ that can be found in the constitutive treaty of almost any international body. Less common are treaty-specific prospects of suspension or loss of privileges and rights in certain areas, such as economic and technological development, held out in the event of non-compliance. As regards treaty-non-specific correction and enforcement, it can be observed

that enforcement measures, especially those involving the use of force, are severely limited by the law of the UN Charter and applicable rules of customary international law. The UNSC may carry out its own investigations and make its own assessments, independent of whether arms control treaties assign a role to it in the supervisory process, and has the power to order non-military and military measures pursuant to Chapter VII of the UN Charter.

4. Supervisory mechanisms in arms control law: methods of supervision

4.1 The institutional design of methods of supervision

In the process of supervising compliance, arms control treaties allow for the use of certain methods in all phases of the supervisory process. For example, the gathering and processing of information, which takes place in the verification process and in dispute settlement, is performed using methods such as reports, declarations, complaints, observations, and on-site inspections. The use of these methods of supervision is in most cases circumscribed, in that the arms control treaty institutionalises specific procedures in this respect. So, frequently, the treaty provisions indicate under what circumstances, for what purposes, by whom and according to what procedures of decision-making, specific methods may be used.

The whole complex of provisions that regulates the application of a specific method is referred to as the ‘institutional design’ of that particular method. The institutional design of supervisory mechanisms concerns both the institutional design of the separate phases of the supervisory process and the institutional design of the methods of supervision. Although supervisory mechanisms have developed specifically, in accordance with the functions of the treaties concerned, some general observations can be made. To make a distinction between the designation of a particular method and the contents of that method as reflected in its particular institutional design is particularly useful for the purpose of illustrating the diversity in the supervisory mechanisms of arms control treaties. The institutional design of the method of ‘on-site inspection’ for example, has been comprehensively elaborated in recent arms control treaties, such as the CWC and the CTBT, as compared to arms control treaties of an earlier date, such as the Antarctic Treaty and the Sea-Bed Treaty. So, even though both ‘old’ and ‘new’ arms control treaties may at first sight contain similar methods (designated as ‘on-site inspections’), the institutional design of the method may differ considerably per treaty. This difference depends on the extent to which the institutional design of the method is characterised by ‘unilateral’ or more ‘co-operative’ features.\footnote{Cf. Sur (1988), p. 14; Sur (1991), p. 17-18.}
The difference in institutional design of similarly named methods of supervision is not without importance: the more the method is institutionalised and the more its application is co-operatively organised, planned and executed, the more authority will derive from the information that results from its use. This may have important legal consequences: e.g., a report that is the result of fact-finding by way of on-site inspections executed by an international inspectorate and signed by both the inspectors and the inspected State in accordance with the applicable procedures, represents the factual behaviour of the inspected State Party as established by the supervising body. The contents of such inspection reports must therefore be considered binding on the States Parties. In contrast, should a government decide to ‘inspect’ its own territory unilaterally and draw up a report wherein it describes the allegedly established behaviour of the State, the contents of this report would have little authority and could certainly not bind other States. Another example may be found in the stage of assessment. The positions taken by the States Parties will in many cases be peculiar to them alone and will not, at least not in advance, bind the other States Parties. Only those assessments may be binding on the whole body of States Parties that have been made by a supervising body in the course of an institutionalised, co-operative procedure.\textsuperscript{340}

There is another important, factual distinction in institutional design of methods of supervision. The employment of fact-finding methods, especially declarations and reports, may be based on very general clauses (such as ‘the States Parties shall report on the progress made in the field of...’), or may be based on specific provisions that clearly and precisely prescribe the kind of information required.\textsuperscript{341} In the first case (general clauses), supervision is very general and leaves considerable discretion to States Parties, in the second case (specific clauses) the scope of the supervision has been defined in advance, with many details which indicate that only few facts can escape the international bodies’ notice. Of course, the legally relevant consequence of this difference in specification of reporting and other fact-finding obligations is that the more specific the provision of the treaty, the better it can be determined by the supervising body whether or not the State Party has lived up to those reporting- and other fact-finding obligations.

In the next sub-paragraphs, an overview will be provided of the methods of supervision as they are found in the different phases of the supervisory mechanisms of arms control treaties. Whereas only a few methods are confined to (or characteristic to) one particular phase, most methods are


\textsuperscript{341} See e.g. the detailed provisions of Art. III of the CWC, which prescribe the contents of the declarations that the States Parties to the treaty shall submit (Art. III(1)(a(ii)): “specify the precise location, aggregate quantity and detailed inventory of chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, (…)”).
used in more than one phase, depending on their specific institutional design.

4.2 Monitoring methods

National Technical Means. Historically, monitoring of arms control treaty-compliance has relied upon the unilateral methods of National Technical Means (NTMs).\textsuperscript{342} NTMs consist of technically diverse machinery that is directly, openly, and legally employed by the States concerned under their own responsibility.\textsuperscript{343} NTMs encompass methods of remote sensing, covering a wide range of imaging-, signal intercept-, early warning-, and other satellites as well as seismographs and related ground-based systems, aircraft equipped with imaging or electronic interception equipment and ships and ground stations with radio/radar interception equipment. Given the extremely high resolution of the basic monitoring systems in the field of arms control - like for instance those based on the image technique - it is generally assumed that these NTMs are adequate to provide detailed descriptions of major treaty-related items.\textsuperscript{344} NTMs are methods in the possession of individual States that may be used continuously to observe the military situation and capabilities of other States (be they potential adversaries or not) which may have a deterrent effect. For example, in 1977 Soviet and US satellites observed preparations for a nuclear test explosion in the Kalahari Desert (South Africa), which compelled the South-African government to dismantle the suspicious installations.\textsuperscript{345} Also, it is reported that India refrained from conducting nuclear test explosions in 1995 after preparations for testing were discovered by American satellites.\textsuperscript{346} Remarkably, the same monitoring satellites apparently failed to discover preparations for the series of Indian nuclear test explosions of 1998. Finally, the use of NTMs may of course also be connected to prior suspicions. For example, the well-known ‘threat’ of the North-Korean arms industry to develop weapons of mass destruction has prompted the Japanese government to develop and deploy intelligence satellites above the DPRK on a permanent basis.\textsuperscript{347}

\textsuperscript{342} See Davis (1990), p. 403. See also UNS-G Report (1995), par. 66.
\textsuperscript{344} See Kislyak (1992a), p. 52.
\textsuperscript{347} See Latter (1998), p. 6. Another example relates to the alleged South African nuclear test preparations of 1977 mentioned above. Two years after these preparations, a US satellite observed a flash in the southern hemisphere, which could have been produced by a low yield atmospheric nuclear explosion, but American experts could not agree on the nature of the event. It was only because it happened in the vicinity of South Africa, which was known to possess the capability of producing weapons usable material, and had not yet formally renounced the acquisition of nuclear weapons, that the South African government was accused of having conducted a nuclear test.
NTMs can also today be considered the most important monitoring method. Besides, many arms control treaties have integrated NTMs into the treaty structure by explicitly allowing the collection of data by way of NTMs and facilitating their use by prohibiting any interference with, and deliberate concealment from, this activity by other States. Especially in bilateral arms control treaties (almost all of which have been concluded between the USA and Russia), reliance is almost exclusively on NTMs, with the mutual prohibition of interference providing another clear illustration of the importance of reciprocity in arms control supervision.\textsuperscript{348} In addition, many arms control treaties require that the NTMs are used in a manner consistent with generally recognised principles of international law (including that of respect for the sovereignty of States). This requirement may serve to preclude the allegation that the use of NTMs would be tantamount to ‘legalised espionage’.\textsuperscript{349} The misuse of treaty-integrated NTMs for purposes of espionage clearly has not been legalised since that would infringe upon the general legal principle of good faith that is to be taken into account in the interpretation and execution of treaties.\textsuperscript{350} Still, the proper use of NTMs cannot always be confirmed since allegations by States of violations, especially in a bilateral context, are not always supported by clear NTM-based evidence out of fear of revealing intelligence capabilities. The success of NTMs may be explained by the fact that they do not entail physical intrusion into the State territory and thus respect territorial sovereignty, while still being suitable and making use of technological advances.\textsuperscript{351} This technical aspect also has a drawback; only few States can afford these highly sophisticated technical means, rendering the use of these methods somewhat ‘undemocratic’.\textsuperscript{352} While generally satisfactory for the purposes of a bilateral agreement, NTMs may therefore not be adequate or acceptable in each and every multilateral treaty. 

\textit{Exchange of information.} It has been stated that monitoring is about efforts to detect developments and activities of interest (general fact-finding). All instances where members of the international community themselves supervise the application of international rules by other members by way of

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\item \textsuperscript{349} This typification was used by Soviet-leader Chroetsjoj in the context of discussions surrounding the possibility of on-site inspections in a Comprehensive Nuclear Test Ban Treaty in the early 1960s. See Dean (1966), p. 91.
\item \textsuperscript{350} See Art. 26 and 32(2) of the Vienna Convention on the Law of Treaties.
\item \textsuperscript{352} Lang (1995), p. 78. See also van der Graaf (1991), p. 317, who refers to this issue in describing the negotiations on the 1986 Stockholm Document. This ‘undemocratic’ situation is, legally speaking, perfectly reconcilable with the principle of reciprocity in arms control law, for all States have the right to use NTMs mutually. The problem lies in the inability (technically, financially) of many States to develop sophisticated NTMs.
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the exchange of information concerning their intentions, formulated policies or the execution thereof could in theory be considered monitoring methods, even if they are not institutionalised. The rather ‘subjective’ form of non-institutionalised exchange of information, earlier referred to in the context of diplomatic supervision, is still widespread in international society and exists alongside more developed supervisory procedures within international organisations. This exchange of information is voluntary and takes place on the initiative of a State; strictly speaking it cannot even be considered part of a supervisory mechanism, since it is left completely to the States Parties whether or not to take part in it. The strictly voluntary exchange of information will most of the time be random and not authoritative and therefore inadequate and unsuitable in the absence of other, organised methods.\textsuperscript{353} The general exchange of information may however also take place in an institutionalised manner, through a supervising organisation. In that case, the treaty may provide that the States Parties communicate information, e.g. their national laws and regulations on a particular subject, to the supervising organisation, which in turn will transmit the information to the other States Parties. Sometimes, States Parties are required to set up a national focal point, usually named ‘National Authority’, for purposes of liaison (including the exchange of information) with the international organisation and with the other States Parties for the subject of the treaty.\textsuperscript{354} 

\textit{Notification.} The method of notification lies in between institutionalised exchange of information and reporting. Notification is a formal procedure by which one subject of law brings a point of fact or law to the knowledge of another subject of law.\textsuperscript{355} States Parties may e.g. be required to notify the supervising organisation or the other States Parties whenever they have concluded an agreement with other States relating to the subject of the treaty. Other examples are in the pre-notification of weapons tests to facilitate monitoring and in notification to account for numbers of weapons systems (for example when they are in transit).\textsuperscript{356} The method of notification may also be used to help focus the operation of NTMs. With regard to seismic monitoring of a prohibition of underground nuclear test explosions, for example, States could be requested to notify in advance any non-nuclear explosion with a yield exceeding a specific number of tons TNT equivalent in order to avoid unwarranted suspicions of breach.\textsuperscript{357} As such, notification may also be important in order to prevent disputes form arising.

\textsuperscript{354} See e.g. Art. III(4) CTBT; Art. VII(4) CWC.
\textsuperscript{355} Cf. Merle (1959), p. 425. The method of notification is also used in the follow-up after a verification procedure, to monitor compliance with the assessment made in the verification process, see infra.
\textsuperscript{357} As was proposed in a 1991 Swedish draft for a Nuclear Weapons Convention. See Goldblatt (1992), p. 30. The CTBT actually contains such a notification-procedure, albeit on a
Reporting. The obligation for States to draw up regular reports on the general implementation of the provisions of an arms control treaty can - taken from the point of view of other States - be seen as an effort to detect developments and activities of interest and therefore as a method of monitoring. The same goes for ‘declarations’, which are official pronouncements on the state of affairs with regard to the subject of the arms control treaty that the States Parties have to submit to the supervising body. The mere duty of States to send in reports or to submit declarations on their own conduct however does not, by itself, provide a sufficient degree of supervision. Therefore, in comprehensive supervisory mechanisms, the correctness of the contents of reports and declarations is commonly verified by way of (‘initial’) on-site inspections.\textsuperscript{358}

It goes without saying that the method of reporting can only be found in those (multilateral) arms control treaties that establish some kind of supervisory body, designed and designated to collect and study the reports (or declarations) of the States Parties. It is clear that an assessment regarding compliance in subsequent phases of the supervisory process will not (and should not) be based solely on State reports. It should on the other hand be noted that the reports drawn up by the States Parties at the request of the supervising body are usually subject to certain rules of presentation, rendering this method of supervision more efficient.\textsuperscript{359} First of all, reporting at regular intervals makes it possible to compare the various reports of one State Party and to monitor developments in its implementation activities with regard to the treaty obligations. Most arms control treaties therefore require submission of annual or semi-annual reports. Secondly, careful study and comparison of reports can be facilitated by harmonising their lay-out. In the CTBT, for example, a ‘list of characterisation Parameters for International Data Centre Standard Event Screening’ is annexed to the Protocol to that treaty, in order to harmonise the processing of data from all the monitoring technologies available under the treaty. Third, the coordination of national reports is indispensable for a timely and effective review of the information in search of ‘activities of interest’. Therefore, a limited number of national reports should be examined per period by the supervising body (in case of a specialised international organisation this is usually the secretariat), \textit{inter alia} charged with making summaries and surveys of the national reports. Finally, the reports should be discussed in a plenary organ (or in an executive organ or even in an organ specially designed for the study of the reports of the States Parties). If the gathering of information by way of reports is to make any sense, these reports have to be debated or discussed so as to retrieve ‘activities of interest’. The

\textsuperscript{358} As is the case with the procedures of the IAEA and the OPCW. See \textit{infra}, chapter [6].

‘discussion’ of the information gathered may still be considered part of the monitoring activities, belonging to the ‘routine analysis’ of data. In this respect there is again only a thin line dividing the phase of monitoring from the stage of fact-finding in the process of verification.

It is clear that supervision by way of timely and thorough examination at regular intervals of governmental reports requires a highly developed institutional design of the treaty-based supervisory mechanism. Especially when it is considered necessary to have the national reports examined by a secretariat or similar body before discussing them in a plenary body, a fully-fledged international organisation will be indispensable as supervising body. Indeed, in practice only those arms control treaties that are characterised by a highly developed institutional structure make provision of a comprehensive reporting system for monitoring purposes of the kind described. On the other hand, precisely in arms control treaties with (far) less developed supervisory mechanisms, monitoring provisions usually provide the sole methods of supervising compliance. In those treaties, the reporting duty is limited and may be less effective, since the system will lack active encouragement for systematic reporting to an international body.

**Routine on-site inspections.** On-site inspections that are to be executed ‘routinely’, on a regular basis (without being related to the occurrence of an incident) may be carried out for the general purpose of collecting information and may thus be used as methods of monitoring, even though their primary importance lies in the process of verification. When regularly and incident-independently executed, on-site inspections are primarily used as measures of confidence-building.

**Permanent monitoring methods.** In exceptional cases, provision has been made in arms control treaties for the permanent monitoring of a State’s behaviour by way of methods operating twenty-four hours a day, such as sealed cameras on strategic places or seismographic measuring methods.

This kind of method in combination with an almost permanent presence of agents of the supervising organisation on the State’s territory, enable truly permanent monitoring of the State’s behaviour by the supervising body and

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360 The (theoretical) distinction that can be made is that analysis of data in the phase of monitoring is performed with the general purpose of retrieving remarkable or interesting information that would warrant further investigation, whereas fact-finding in the process of verification is performed with the purpose of finding specific facts that are to be subjected to (legal-political) review in order to make an assessment of compliance with respect to the undertakings entered into.

361 See e.g. Art. III and Part IV(A) and V of the Verification Annex of the CWC.


363 E.g., pursuant to S/Res/687 (1991) strategic measuring methods, such as cameras, were introduced in Iraq, enabling UNSCOM to continuously collect information on Iraq’s behaviour. The CTBT, once it has entered into force, will be the first treaty to establish a worldwide International Monitoring System, consisting of seismological, radionuclide, hydroacoustic and infrasound monitoring methods; see infra, chapter [6].
must be deemed to be among the most effective methods available. A specific example of permanent monitoring can be found in the INF Treaty, where so-called ‘permanent perimeter-portal monitoring systems’ are used in production monitoring of the Intermediate Range Nuclear Forces. The continuous use of satellites and observation flights by aircraft may also come close to permanent monitoring. Monitoring activities are directed at ‘general fact-finding’ and stimulate States to correctly execute their obligations. As such, monitoring activities may either indicate a positive demonstration of compliance by the State whose behaviour is monitored, or - in case any potential inconsistency has been discovered - they may give impulses to the use of methods from the other phases in the supervisory process (verification, dispute settlement and correction/enforcement). Monitoring activities generally lead to the availability of adequate information; it is on the basis of this information that the subsequent phases of the supervisory process may be entered. In the future, monitoring activities will probably play an increasingly important and autonomous role in international supervision.

4.3 Verification methods

4.3.1 Methods of stage 1 of the verification process (fact-finding)
National Technical Means. The process of verification was, like monitoring, originally performed solely on the basis of NTMs. The use of unilaterally operated methods was a typical feature of verification under the conditions of distrust prevailing in the Cold War period. In order to get a clear and stable picture of the compliance behaviour of the other contracting Parties NTMs are widely employed as monitoring methods, but also in the process of verification NTMs in connection with other methods may be used. For example, pursuant to the START-I Treaty, the Parties are obliged to openly display, at the request of the other side, mobile ICBMs and aircraft. These weapons are to be displayed without any means of concealment, to allow their observation with the help of satellites.
Reporting. As in the phase of monitoring, the method of reporting is widely used for the purpose of specific fact-finding in the process of verification. Several supervisory organisations require from their members reports on the

366 Cf. Murray (1993), p. 146-148 (discussing ‘data-management’). Monitoring activities will probably not be referred to as such, but may be labelled ‘Confidence-Building Measures’, ‘Measures for increased transparency (of sensitive activities)’, or whatever other terms may come into fashion.
measures which they have taken to fulfil their obligations to the organisation. The obligation to send in reports as a rule derives from an explicit treaty provision, which may specify to a greater or smaller degree of detail the information that is to be provided by the States Parties. Although the types of reports under the different supervisory mechanisms differ widely and must all be recorded and analysed in their own way, they share as a common aim, like all other methods of verification, the collection of specific information that is being reviewed in order to eventually render an assessment regarding compliance possible. Sometimes, organs of international organisations with verification tasks are empowered to collect information on the way in which States fulfil their obligations from sources other than official reporting by the States Parties themselves. Such sources may e.g. be national legislation, official and unofficial reports or information provided by other international organisations. For example, the UN and some regional arrangements, such as NATO, have set up databases, which contain generally available information that is relevant to arms control efforts. Such provisions diminish the dependence of the international organisation on the data provided by the individual States Parties, albeit only to a small extent. Given the organised secrecy and confidentiality in the field of arms control, which is fully justified for security reasons, little ‘spontaneous’ information will flow from reliable sources in the absence of organised information-gathering machinery. It should be noted that in supervisory mechanisms it has never been envisaged, let alone proposed, to allow inadequacy of governmental information provided by one State to be compensated for by communications made by other States. Should this ever happen, it would almost immediately involve the supervising bodies in inter-State clashes.

Clarification. In connection with the power to collect information by way of declarations, reports, etc., the treaty may provide that requests for clarification be made by the supervising body, usually on behalf of a State Party. Clarification requests will normally be organised like requests for additional information if earlier specific or general fact-finding has raised suspicions as to possible problems of non-compliance. Clarification of anomalous or ambiguous events may also be facilitated by voluntary actions to demonstrate compliance that go beyond the strict terms of States Parties’ obligations. Such actions can enhance transparency and may reduce the need for application of more intrusive verification methods.

Complaints. Complaints, which are really methods of diplomatic supervision, may be institutionalised as methods of the verification process,

372 See e.g. the procedures of Art. IX CWC and Art. IV CTBT.
granting a State the right to lodge a complaint with the supervising body to the effect that another State is not fulfilling its obligations. The purpose of a complaint is to draw the attention of the supervisor to the possible non-fulfilment by a State Party of its obligations and to start the process of verification. Complaints, like the results of monitoring activities, may thus ‘trigger’ the verification process. However, unlike monitoring activities, complaints easily take the form of accusations, creating a risk of international tension and political disputes, rendering this method potentially ineffective. Besides, complaints, like unauthoritative information, tend to nurture suspicions rather than confidence, and thus may prove to be counter-productive as to the attainment of certain objectives of international supervision in arms control law. Hence, it is important that the treaty-based supervisory framework allows for the verification process to be initiated by the supervising body.

On-site inspections. Arms control treaties may provide for the generally highly effective fact-finding method of on-site inspection. And, even if under certain circumstances on-site inspection cannot be considered a highly effective method,\(^{373}\) it remains important both as a confidence-building method and to fulfil the demand of reciprocity inherent in the law of arms control. Inspections on site are among the most comprehensively institutionalised supervisory methods and are generally available in arms control treaties with equally comprehensive supervisory mechanisms.\(^{374}\)

\(^{373}\) For example when used for the purpose of checking compliance with a comprehensive nuclear test ban, for reasons of the expense, time and effort involved when proof is sought that a nuclear explosion has taken place. See Goldblat & Cox (1988), p. 21; Goldblat (1992), p. 29. In the CTBT, no provision is made for routine OSI, but there is a procedure for challenge-like inspections, see infra, chapter [6].

\(^{374}\) In bilateral arms control law, the concept of OSI was introduced by the PNET (1976) and applied in practice in supervising the INF treaty (1987). On-site inspections have since become the most important method of verification in arms control treaties. The bilateral INF treaty, which required the elimination of all American and Russian intermediate-range ground-launched ballistic and cruise missiles and their launchers within three years of the treaty’s entry into force (in 1988), provides for inspections at INF-sites to confirm data exchanged and to help monitor the elimination of the weapons. It also provides for short-notice on-site inspections at INF-related sites during the three-year reduction period and the next ten years and permanent on-site inspectors at a key missile production facility in each State. “Mock” inspections (unilateral trial inspections) played an important role in the implementation of the treaty in a wide variety of areas, including the testing of plans, concepts, procedures and equipment, and the training of inspection and escort personnel. Later, in the START-I Treaty (1991), various even more detailed types of OSI were introduced which cover every major phase of the ‘life cycle’ of strategic nuclear arms. In multilateral arms control law, fully developed systems of (routine and challenge) inspections can be found with the IAEA (infra Chapter [6]). Since 1973, the even more detailed inspection system of Euratom has been integrated in the IAEA system after Euratom and seven of its members concluded a mixed agreement with the IAEA integrating the Euratom controls into the IAEA system. Furthermore, a detailed system of both routine and challenge inspections is included in the CFE-Treaty, the CWC and the CTBT; see Art. XIV of the 1990 CFE Treaty and its Protocol on Inspection; Arts. IV, V, IX(8-25) and Parts IV(A) sub D,
OSI as a method in arms control treaties can be defined as 'investigation or observation exercised on the spot by persons invested with international supervisory powers with a view to verifying the conformity of certain acts, a situation or the exercise of competencies, with a rule or engagement originating from the arms control treaty'.

OSI offers the most direct method of collecting information. It corresponds with the notion of 'enquiry', of which method it makes use. The mechanism of enquiry, which originated in the field of pacific dispute settlement, has been applied in the institutionalised form of on-site inspection retaining the main characteristics of 'investigation', 'on the spot', and 'facts'. Since inspections require the admittance of inspectors sent in to collect on the spot information to State territory, this method of (fact-finding in) the verification process is circumscribed and narrowly secured, which finds expression in its extensive institutional design. Even though on-site inspections are co-operative methods, States Parties may grant one-another a right of inspection without setting up a special body for this purpose or going through an existing international organisation. However, as a rule, the method of on-site inspections will be extensively organised and institutionalised. Only sophisticated and developed supervisory mechanisms are characterised by treaty-specific inspection regimes, requiring active involvement of the supervising body. Since the number of States that can afford to participate in on-site inspections is larger than the number of States that can afford to develop highly sophisticated NTMs, using the method of on-site inspection may be considered relatively 'democratic' as compared to the use of NTMs in fact-finding for purposes of verification.

Two general types of on-site inspection can be distinguished: (1) routine inspections and (2) challenge inspections. Routine inspections involve on-site inspections for the purpose of establishing facts and reporting thereon. Routine inspections are not incident-related. They may however be considered methods of monitoring as much as verification methods, depending on their primary purpose, viz. either the collection of information in general as the sole objective (monitoring) or the establishment of facts in

V(D), VII(B), VIII(B), IX(B), X, and XI of the Verification Annex of the CWC; and Art. IV(D) and Part II of the Protocol to the CTBT.

375 Cf. the general definitions by van Hoof & de Vey Mestdagh (1984), p. 23, and Chowdhury (1986), p. 200. According to Hanski (1998), p. 39 there is a difference between 'observation' and 'inspection', viz. the first entails 'looking at' whereas the second entails 'looking into', inspection thus being more active than observation.

376 See Charpentier (1984), p. 211. Enquiry is also among the methods of peaceful dispute settlement mentioned in Art. 33 of the UN Charter.


order to render a review and assessment regarding compliance (fact-finding stage within the process of verification) possible. Challenge inspections are retrospective inspections for the purpose of verifying accounts of past events the details of which are being doubted or have been disputed. Challenge inspections are incident-related; suspicions incurred by a particular event in the course of continuous monitoring (or by a routine inspection for verification purposes) may give rise to a challenge inspection in order to establish the facts of this event. Whereas a certain number of routine inspections may be directly provided for on the basis of the arms control treaty, challenge inspections imply that a special decision be taken. And, whereas routine inspections have a strong confidence-building function, challenge inspections are meant to discourage non-compliance and in effect to act as a deterrent. Finally, challenge inspections are mandatory; the inspected State Party has no right of refusal (albeit that these inspections are often carried out after consultation with the inspected State Party).

Depending on the institutional design of the method of on-site inspection, the initiative for an inspection is left to the States Parties (on their demand or request) or to the supervising body. In cases where the initiative of requesting a challenge inspection lies with the States Parties, (an organ of) the supervisory organisation usually determines whether the required inspection can take place. The right of inspection has as its corollary an obligation to allow for physical intrusion by inspectors and to provide for a guarantee of transparency so as to enable the collection of facts and the establishment of situations. The co-operation in on-site inspection is therefore not confined to acceptance of verification by way of this method; it implies the active participation of the inspected State as well, regardless of whether the inspectors are nationals of the State or international. On-site inspection may be more or less institutionalised according to whether the inspection takes place under national responsibility or relies on inspection teams provided by the supervising organisation; in the latter case, the inspectors will enjoy functional privileges and immunities and, in addition, respect for the independent position of the inspectors may be explicitly requested from the States Parties to the treaty.

It should be noted that the right of inspection is not unlimited; most arms control treaties of recent date strictly regulate the powers of the inspectors, primarily with regard to accessibility and time (prior notice, minimum delay between notice and action in order to avoid attempts at concealment).

370 See Sur (1988), p. 16. Fact-finding by way of challenge inspections belongs to the competencies of the supervising body, that may take decisions thereon. See e.g. Art. IX(8-25) and Part X of the Verification Annex of the CWC, and Art. IV of the CTBT.


381 See, e.g., Art. VIII, par. 46, 47, 49, 51 of the CWC.

382 Rules on accessibility can inter alia be found in the Outer Space Treaty, the ABM Treaty, the INF Treaty and the Antarctic Treaty. Moreover, the CWC and the CTBT provide for
Also, inspected States Parties have commonly been granted the right to have a State representative accompany the inspection team during inspection. Moreover, contrary to some of the older treaties that lay down a right of inspection without restrictions and without a right of refusal, recent arms control treaties regulate the conduct of inspections by imposing restrictions as far as frequency, location, activity or equipment are concerned. Usually there are also procedures to prevent abuse of the right to request an inspection. These regulations are laid down primarily with a view to enabling the inspected State to protect its national security and sovereignty. Primarily in bilateral nuclear arms control treaties, additional arrangements have been made which are meant to ensure the effectiveness of OSI. Most important in that respect are so-called counting rules, that are meant to facilitate verification of treaty limitations. For example, counting rules may distinguish between deployed systems and those under construction, assign the official number of MIRVs on a missile as the highest number flight-tested for that system, or contain methods for Re-entry Vehicle counting and tagging. Given the strong effects on State security of the implementation of arms control inspection regimes, it can be upheld that in practice there will always be a trade-off in on-site inspections between over-intrusiveness on the one hand and sufficient access and additional arrangements to demonstrate the absence of non-compliance on the other, whether or not this has been encapsulated in treaty language.

Also outside the framework of specific arms control treaties, on-site inspections (mainly for purposes of independent fact-finding) have been carried out. On-site fact-finding missions, both of a ‘routine’ and of a ‘challenge’ character, have been established by the UN on various occasions. The UNGA for example, has adopted resolutions on investigations, to be carried out by the UNS-G, in cases of alleged use of chemical weapons, and more recently the UNSC in Res. 687 (1991) established UNSCOM, an auxiliary organ with the task of conducting inspections in Iraq for purposes of verifying compliance by Iraq with the (nuclear, chemical and biological) arms control paragraphs of that resolution. More than sixty Member States have provided this auxiliary organ with qualified experts in chemical and biological fields, constituting a first corps of professional verifiers with work experience within multinational teams available to the UN and other international bodies.

extensive ‘Managed Access Regimes’, see infra, Chapter [6].


384 See e.g. Res. 37/98D of 13 December 1982 (‘Provisional measures to uphold the authority of the 1925 Geneva Protocol’) and Res. 42/37C of 30 November 1987 (‘Measures to uphold the authority of the 1925 Geneva protocol and to support the conclusion of a Chemical Weapons Convention’). These UNGA Resolutions are (naturally) not legally binding and legally distinct from the 1925 Protocol. See Sur (1991), p. 27.

The UNS-G has also conducted fact-finding missions on his own authority, on the basis of Art. 98 and 99 of the Charter, inter alia on the use of chemical weapons by Iraq against Iran in 1983 and in 1988. The experience gained and the methods used in arms control by the UN may provide valuable lessons for the supervising bodies of current and future arms control agreements.

**4.3.2 Methods of stage 2 of the verification process (review)**

At the point of completion of the fact-finding, the process of verification has reached its second stage. In this second stage, the information received and collected is reviewed against the norms contained in the treaty. In case of doubtful or ambiguous activities, the review will involve a strategic and political judgement concerning the nature and extent of a possible breach, so as to initiate appropriate reactions, such as a request for clarification, for consultations, etc. Consultations between governments take place in all kinds of situations, whether on the basis of a treaty provision or otherwise. In case no body for the purpose of verification has been established, States Parties will make use of the method of consultation to officially discuss a challenged breach on the basis of all materials gathered at that stage. In the absence of institutionalised procedures, these ‘consultations’ resemble ‘negotiation’ as a method of dispute settlement; if no independent ‘third’ party has been entrusted with the power to interpret the treaty authoritatively and to make an official assessment regarding compliance, the review stage of verification bears many characteristics of the review stage in the phase of dispute settlement. However, if available, a political organ making use of methods such as discussion and consultations will be involved in the stage of review within the process of verification.

During the stage of review it will become clear whether the supervisor will arrive at the conclusion that there has been a violation of the treaty. The reactions that may follow an established violation are obviously of a political nature; the stage of legal review will therefore be accompanied by a political evaluation.386 Depending on the objectives he wishes to attain, the supervisor may sometimes first try to persuade the State Party to change its behaviour during informal discussions. In case an international organisation has been established and charged with supervising the treaty, there is no reason why the organs of that organisation should not make use of their general powers of recommendation to induce the defaulting State into orienting its behaviour towards an application that is more satisfying vis-à-vis its obligations.387 It is also possible that political discussions be held in a

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plenary organ wherein the shortcomings of the State are debated and criticised by all States Parties. No doubt, the criticism raised will not be manifested by way of injunctions addressed to the defaulting State, but it may at least give rise to recommendations that contribute to redressing, through the moral and political pressure they exercise, the behaviour of States in a way so as to conform to the views of the organisation. In this stage of the process, the State Party involved cannot challenge the interpretation of its obligations as made by the supervising body, since the nature of supervision necessarily implies that in the end the interpretation of obligations made by the supervising body prevails over those made by the individual State Party. If informal discussions with the State Party involved prove unsuccessful, the supervising body still has at its disposal the power to submit a reasoned conclusion in an official assessment, implicitly (or, occasionally, explicitly) pronouncing that the State Party has violated its obligations.

4.3.3 Methods of stage 3 of the verification process (assessment)
When the political organ that has been entrusted with the verification tasks has reviewed the information received as tested against the rules, it will still have to arrive at a final conclusion, viz. whether or not the State has lived up to its obligations. The process of verification then enters its final stage with the assessment of compliance. An explicit assessment made by a supervising body on the basis of organised co-operative procedures acknowledging that the treaty has been violated is still a rare phenomenon. Relatively few arms control treaties provide for the possibility of having the supervisory organisation produce an explicit assessment regarding compliance as a result of the process of verification. Even regarding the bodies that must be deemed to possess that kind of assessing power, viz. the IAEA, OPCW and the bodies established by the various NWFZ treaties, the respective treaties that established them do not always make explicit that they have that kind of power.\(^\text{388}\) In most instances, supervisory bodies may make recommendations to the State Party concerned to change its behaviour, thereby only implicitly establishing that a violation has occurred. Even though the practical influence of such recommendations should not be underestimated, in those instances final decisions regarding violation of the treaty are left in the

\(^{388}\) From the text of the CWC it appears that the executive organ of the OPCW, the EC, may explicitly recognise a violation of the Convention, see Art. IX(22, 23) CWC. The Board of Governors of the IAEA may assess non-compliance with the NPT-safeguards system in that the Board can determine that the IAEA cannot fulfil its responsibilities, see par. 19 of INF/CRC/153. Furthermore, the Consultative Committee of the Rarotonga Treaty is explicitly allowed to make a decision regarding compliance, see Annex 4(8) of the Rarotonga Treaty, and the same goes for the Commission of the Pelindaba Treaty, see Annex IV(4(e)) of the African NWFZ Treaty. The Southeast Asia NWFZ Treaty also points in this direction, see its Annex (8(a)), and the General Conference of OPANAL still has some part in making assessments, see Art. 21(1) Treaty of Tlatelolco.
hands of the individual States Parties, in that each of them is allowed to
draw its own conclusions from the fact-finding and review in the process of
verification. In this respect, it must be kept in mind that verification can at
best establish whether the conduct in question was in fact allowed under the
treaty. It may be recalled that the outcome of the verification process is
relative: the assessment that no violation has been found means the absence
of proof (negative demonstration) of the (continued) existence of a
violation, and does not entail an absolute guarantee of compliance.\textsuperscript{389}

As the number of Parties that have participated in the review is larger and
the publicity given to the official assessment is more widespread, the
'mobilisation of shame' which can harm the international reputation of the
State will be greater and so will the deterrent effect of the process of
verification. It should be noted that in the process of verification efforts are
made to convince a defaulting State to redress its wrongful behaviour itself;
the official recognition by the verifying body that the State Party violated its
obligations must therefore be considered as an incitement to change its
behaviour, rather than as a condemnation. Since non-compliance, if it
occurs, may be the result of honest mistakes or misdirected actions, rather
than a deliberate intention to be non-compliant, such appeal (or warning)
may very well suffice to convince a State Party to alter its behaviour. Only
in case of complete failure of these attempts supervision will result in
coercive action, substituting persuasion by pressure.

After the assessment in the verification process has been made, the phase of
monitoring is again of (ongoing) importance. For except in case a defaulting
State openly refuses to change its behaviour altogether, the follow-up to the
assessment, i.e. the compliance with the recommendation or decision in
which the assessment of compliance has been laid down, in principle can
and will be monitored by all monitoring methods available. Apart from
unilateral methods (NTMs) and repetitive reporting, the method of
notification may be useful; the State concerned may be required to notify the
supervising organisation of all measures and activities it has (under)taken to
implement the decision or recommendation by which the assessment of
compliance was made. This ongoing monitoring may indicate a positive
change of behaviour, towards compliance, or instead may reveal ongoing or
even worsening non-compliant behaviour.

4.4 Methods of non-judicial dispute settlement
Provisions of non-judicial dispute settlement appear in almost all arms
control treaties, although a treaty-specific procedure is only seldom offered;
instead, usually there is little more provided than the general observation

\textsuperscript{389} See Sur (1988), p. 9. The case of Iraq, where the IAEA had never found nuclear material
that later on appeared to be present on Iraqi territory after all (see infra, chapter [6]) should in
particular be appraised against this background of relative verification capabilities.
that if States decide to settle their differences, they should do so peacefully and by the methods of their own choice. These methods include consultation, negotiation, good offices, mediation and conciliation, depending on whether a third party is requested to play a more or less active role in the process of settlement. It is remarkable that even when States are willing to allow intrusive verification procedures they remain very reluctant towards accepting mandatory procedures of dispute settlement, allegedly because they adhere to the mistaken opinion that mandatory dispute settlement would severely impinge upon their sovereignty (even if that is already the case with regard to verification).³⁹⁰

Non-judicial dispute settlement consists of the stages of (specific) fact-finding, review and assessment. However, not all stages are necessarily performed with regard to a dispute, given that States Parties are left with almost complete freedom of action in dispute settlement and given that dispute settlement not necessarily purports to produce an assessment of compliance. In case a dispute exists that is based on different views of the facts, the States concerned may agree that an enquiry be carried out with a view to elucidating the controversial points of fact. In ascertaining underlying circumstances and facts, fact-finding by way of enquiry may resolve disputes without questioning in advance the information furnished by a State. Enquiry is different from on-site inspection in that it is not institutionalised in the supervisory mechanism of the treaty. Missions of enquiry will therefore be carried out by teams created on an ad hoc basis; this kind of method has been well-tested (either by itself or as an auxiliary means in conciliation or arbitration procedures) on numerous occasions. In case an inspection on the territory of a Party to the dispute has already been carried out at an earlier stage, the States are in principle not barred from referring to that information in the course of the dispute settlement.³⁹¹

Whether or not specific fact-finding has been carried out, the States concerned will have to officially discuss their (remaining) disagreement or conflict of views (which may involve a challenged suspicion of non-compliance); this discussion is what constitutes the review phase of non-judicial dispute settlement. Since no mandatory means and procedures of dispute settlement are prescribed, the States concerned may choose to keep the issue ‘in their own hands’ as much as possible. They could e.g. decide to make use of direct consultation, ‘diplomacy’³⁹² or negotiation as the means to settle their difference. States Parties may however choose to introduce a third party into the phase of non-judicial dispute settlement, viz. by deciding

³⁹⁰ See Myjer (1990), p. 112.
³⁹¹ ‘In principle’, since the inspected Party to the dispute could always raise a defence by stating that the facts established at that time are out-dated or no longer correct.
to make use of mediation, 'good offices' or conciliation, either immediately after the dispute arises or in case consultations or negotiations seem to be leading nowhere. The introduction of a third party may provide States with at least a minimum degree of confidence that they have recourse to a procedure in which all Parties have equal means at their disposal, and furthermore that the decision that follows will be backed by the international community.

The 'assessment' made in non-judicial dispute settlement is by its nature not binding; the States Parties are free to either accept or reject the recommendation of a mediator or conciliation commission or other third party involved in the procedure at the request of the disputing States Parties. In case the States Parties have decided to keep the matter 'into their own hands', a diplomatic, bilaterally 'bargained' solution will be the best attainable outcome. In such cases, States retain the freedom to make their own 'assessment' of what their rights and obligations towards each other entail. It might be argued that there are too many interests of the other States Parties to the treaty (and the supervising body, or even the world community as a whole) at stake to allow for a bilaterally composed appreciation of behaviour that would solely take into account the interests of the disputing States Parties. Still, inherent risks such as these have to be accepted, since the political dimension of arms control calls for such discretion and so far has not allowed for the introduction of mandatory judicial dispute settlement.

The existing arms control treaty-specific provisions on dispute settlement primarily relate to disputes about the application or interpretation of the treaty between States Parties. What about disputes between the supervising body and one or more States Parties? Some treaties explicitly include differences between one or more States Parties and the supervising organisation in their provisions on dispute settlement. In that case, all

393 On conciliation see the 'Revised General Act for the Pacific Settlement of International Disputes', Chapter I (Arts. 1-16). Disputes of every kind between two or more Parties to the General Act which it has not been possible to settle by diplomacy, shall (...) be submitted (...) to the procedure of conciliation (Art. 1). The States Parties to this Act furthermore agree to submit their disputes to a permanent or a special (ad hoc) Conciliation Commission (Art. 2-6), which - in the absence of agreement to the contrary between the Parties to the dispute - shall take their decisions by majority vote (Art. 12) and the task of which shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the Parties to the dispute to an agreement (Art. 15(1)), thereby concluding the proceedings within a period of six months unless the Parties to the dispute agree otherwise (Art. 15(3)).

394 States may notify the other States Parties in those cases where the consultations do not seem to be leading anywhere (either or not on an explicit treaty-basis). Myjer (1990), at p. 119, in this respect rightfully points at the possibility of viewing notification as a method for the purpose of inviting mediation or good offices by other States.

disputes are treated in the same manner, i.e. like inter-State disputes.\textsuperscript{396} Furthermore, the specific arrangements on dispute settlement are usually without prejudice to the treaty-based provisions on verification and those on measures of correction and enforcement;\textsuperscript{397} therefore, since most ‘disputes’ between the supervising body and a State Party will arise in the process of verification and the phase of correction/enforcement, not many will be left for consideration in the phase of non-judicial dispute settlement. What if no explicit provisions on the settlement of disputes between the States Parties and the supervising organisation have been made? It has been mentioned before that obligations towards the supervising organisation are at the same time obligations owed to the other States Parties. This observation is valid not only with regard to the substantive law of arms control treaties but also with regard to the institutional law. Therefore, in case a State Party does not fulfil a ‘procedural’ obligation, such as the timely submission of a report or the admittance of an inspection team on its territory, all States Parties together with the international organisation (of which they are members) have an interest in this one State changing its deviant behaviour. Efforts to alter this deviant behaviour would have to be made during consultation rounds, in which all States Parties have the right to participate. The supervising organisation usually provides for a forum for this purpose by way of (special) meetings of its plenary organ. During the political discussions in the consultation rounds, the individual State Party having committed the alleged violations may have to defend its position against all the other States Parties in their capacity of members of the organisation. The pressure exerted by the plenary meeting is likely to induce the State Party concerned to comply. Apart from the specific arrangements in the arms control treaties, Chapter VI of the UN Charter offers a general framework for the pacific settlement of disputes. Art. 33(1) of the UN Charter contains a general clause offering different means of peaceful dispute settlement, the substance of which has been reiterated in several arms control treaties. When it deems necessary, the UNSC shall call upon the Parties to settle their dispute by such means (Art. 33(2)). Art. 34 of the UN Charter establishes a power of investigation for the UNSC, which may investigate any dispute or situation which might lead to international friction. The Council’s power to investigate in no way diminishes the primary responsibility of the States to settle peacefully disputes that may endanger international peace and security.\textsuperscript{398} In general, the President of the UNSC shall call a meeting of the UNSC if a dispute or situation is brought to the attention of the UNSC under Art. 35 or under Art. 11(3) of the Charter, or if the UNGA makes recommendations or refers any

\textsuperscript{396} See e.g. Art. XIV(2) CWC; Art. VI(2) CTBT.

\textsuperscript{397} See e.g. Art. XIV(6) CWC; Art. VI(6) CTBT; Art. 10 APM Convention.

question to the UNSC under Art. 11(2), or if the UNS-G brings to the attention of the UNSC any matter under Art. 99. The UNSC may furthermore appoint the UNS-G as a reporter, or may appoint a commission or committee for a specified question. As such, the UNSC might be considered to act as a permanent conciliation commission for situations likely to endanger international peace and security. Furthermore, if Parties fail to settle their dispute in accordance with the means of Art. 33, they shall refer that dispute to the UNSC (Art. 37(1)). It should be noted that such referral is not merely discretionary but mandatory. The UNSC may thereupon decide whether to take action under Art. 36 or to recommend such terms of settlement as it may consider appropriate, if it deems the continuance of the dispute to be in fact likely to endanger the maintenance of international peace and security (Art. 37(2)). It is clear that these general provisions of the UN Charter do not relate to specific issues of (arms control) treaty compliance and therefore do not constitute part of the treaty-specific supervisory mechanisms. Certainly, issues of non-compliance may give rise to serious disputes between States Parties to the arms control treaty, which, by the nature of its objectives, may very well lead to international friction. But even then, it is the international friction rather than the problem of non-compliance with international law per se that may give rise to action by the appropriate organs of the UN.

4.5 Methods of judicial dispute settlement
In regard to the phase of judicial dispute settlement, it may be recalled that a third party performing the settlement would have to be ‘borrowed’ from outside the arms control treaty, given that no arms control agreement establishes a judicial body for the purpose of settling disputes relating to the treaty. Besides, most questions that may come up under an arms control treaty are of such a character that they may not be susceptible at all to judicial settlement. With regard to the legal force of ‘official recognitions’ of violations, either made by an international court or by an arbitration tribunal in the assessment stage of the phase of judicial dispute settlement, it has already been mentioned that such recognitions are legally binding. The authority deriving from the legal force of the judgements obliges States as if they were rules of enacted law. This is not necessarily the same with regard to assessments made in the process of verification and non-judicial dispute settlement since their legal force depends on the nature of the relevant

402 True, the IAEA Safeguards system offers the possibility of establishing an ad hoc tribunal at the request of either Party to the dispute (par. 22 of INFCIRC/153), but this provision has never been used in practice.
provisions of the constituent treaty. Moreover, if a Court (or a tribunal) establishes that there has been a breach, it can lay down the consequent procedure - in the first place, the obligation to compensate for damage done, and secondly, should the law-breaking State refuse redress or decline to submit to the ruling of the Court (or, depending on the terms of the arbitral agreement, the tribunal), thereby adding yet another breach to the original one, the executory measures that may be applied to the law-breaking State.\footnote{Not all Courts will readily do so. In the \textit{Haya de la Torre - Case} (1951 ICJ Rep. 79), the ICJ observed that its judgement entails the obligation of compliance therewith (cf. Art. 94(1) Charter), but that it is not part of the Court's judicial function to make a choice amongst the various courses by which the judgement may be executed.}

The legal force of the judgements delivered in the phase of judicial dispute settlement entails that disregarding a judgement shall have ready consequences; both the phase of non-judicial dispute settlement and that of correction/enforcement may be set in motion. A Court's judgement (or a tribunals' award) in practice does not rule out a bilaterally negotiated final settlement (which is a method of non-judicial dispute settlement) and, at least with regard to the ICJ, the UNSC may have a task in enforcing compliance with judgements made (phase of correction/enforcement).\footnote{Art. 94 Charter applies only to decisions of the ICJ, not to decisions of other tribunals to which the members of the UN are authorised to submit disputes. One example where non-judicial dispute settlement was preferred over enforcement methods was in the \textit{Corfu Channel Case} (1949), in which a sum awarded by the ICJ to the UK was not paid by Albania. The case was finally settled in 1992, by way of a bilaterally negotiated settlement between the UK and Albania. The UK chose not to have recourse to the UNSC (pursuant to Art. 94(2) of the UN Charter) in order to have the judgement enforced. As appears from the text of Art. 94(2) and the \textit{travaux préparatoires}, the UNSC has a discretionary power in this matter; it is not obliged to take action. See Ajibola (1996), p. 19-20, 33 and see Kelsen (1948), p. 790.}

Furthermore, non-compliance with judgements of international courts, like non-compliance with supervisory decisions in general, may very well lead to all kinds of diplomatic, political, social or economic pressures, which may be very effective but are not as such part of treaty-based supervisory mechanisms.

\section*{4.6 Methods of correction/enforcement}

The phase of correction/enforcement will normally be entered into after an assessment in which a violation by a State Party has been established. Only in exceptional circumstances, such as in case it is established that there were only minor breaches, ambiguous activities or violations of secondary importance, the States Parties may decide to overlook those insignificant violations deliberately because, when brought to light, they might result in major disputes having more disadvantages than leaving the minor breaches unattended, or because in the light of these violations the other States Parties
consider themselves entitled to adopt a similar attitude.\textsuperscript{405} An official statement of non-compliance normally suggests that measures to correct the deviant behaviour should be taken. These measures, although they are as such part of the international supervisory process, do not depend on the power to supervise, but on the power to sanction. This sanctioning may be directed at enforcing the law, at seeking relief and correction for major violations of the treaty-provisions, or at both. In case no supervising body has been established, States are left with unilateral options to respond to the alleged non-compliance. In such cases emphasis will lie heavily on diplomatic procedures; there is no difference between disputes resulting from mere allegations of non-compliance and those resulting from unilaterally ‘assessed’ non-compliance, and both will be dealt with by way of diplomatic consultations and discussions.

In case an international organisation has been established as supervisor of the treaty, provision may have been made for sanctions that work solely within the context of that organisation. Such ‘organisational’ sanctions, e.g. the loss of voting rights or the restriction or suspension of a State Party from the exercise of its rights and privileges under the arms control treaty concerned, are usually reactions to violations of ‘internal’ obligations, such as the obligation to pay one’s financial contributions to the organisation. However, it cannot be presumed that an established violation of the treaty’s substantive obligations would never lead to the imposition of ‘organisational’ sanctions. In case the international supervisory organisation furnishes technical assistance and materials (such as the IAEA), the possibility that the provision of such assistance be put to an end because the organisation would denounce the violated agreement between itself and the defaulting State, may offer an effective deterrent or reaction to the violation of the treaty.\textsuperscript{406} As the ultimate sanction in this respect, the constituent treaty may provide that the defaulting State be expelled from the organisation. This however is a counterproductive sanction, since it would deprive the organisation of the exercise of its power of supervision towards the State that has been expelled (not to mention the damage that may be done to the degree of universality of the treaty and its nature as a permanent multilateral regime).\textsuperscript{407} In this respect reference can be made to the prohibition, common in recent arms control treaties, of terminating a State’s membership of the


\textsuperscript{406} E.g., the supervision exercised by the IAEA has the particular function of offering a kind of guarantee: assistance is only furnished to States that have accepted the supervision by the IAEA in a bilateral safeguards agreement; the IAEA could therefore decide to curtail or suspend its technical assistance to States that have tried to upgrade fissile material for use in nuclear weapons. See Wainhouse (1968), p. 154.


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supervising organisation as a sanction, by way of a general clause stipulating that a State Party ‘shall not be deprived of its membership’.

More related to their supervisory function than the application of sanctions is the power vested in supervising bodies to exhort States Parties to correct their deviant behaviour. This power derives from the general power of supervising bodies to influence, by way of recommendations, the behaviour of the States Parties relative to the objectives of the constituent treaty. However, in case an international organisation has been established for the purpose of supervising compliance, usually the organ that decides on the application of corrective- or enforcement-actions will be the same organ that has the power to establish (in an official assessment) whether violations have been committed. For that reason, the additional value or force of an exhortation by the supervisor may be fairly limited. Consequently, it is important that the power to exhort has also been vested in another organ besides the direct supervising body. This ‘other organ’ may be located within the arms control treaty or may, preferably, come from outside it. An example of the first is when the treaty provides that the ‘executive organ’ of the supervisory organisation may refer an urgent matter to the plenary organ of the same organisation (as is the case in the CWC and the CTBT). An example of the latter is when the treaty explicitly allows that the matter be brought to the attention of the UN, in particular the UNGA and the UNSC. Since serious violations of an arms control treaty will readily endanger international peace and security, almost all arms control treaties provide explicitly that specified organs of the international supervisory organisation may bring the issue to the attention of the UN. These provisions in the arms control treaties deal with the attitude of the States in the organs of the international organisation and have no direct bearing on the activities of the UN. The relevant organs of the UN, the UNGA and especially the UNSC, possess general powers in investigating matters that might endanger international peace and security; they do not need for this purpose any reference from a treaty’s supervisory organisation. As soon as reference to the UN takes place, the issue is ‘out of the hands’ of the treaty-based supervisory organs and it is up to the organs of the UN to decide on the application of methods of correction/enforcement.

The methods of correction/enforcement at the disposal of the UN relate in the first place to the sanctions that may be imposed by the UNSC under general international law, irrespective of whether treaty-specific supervisory mechanisms have been set up. The UNGA is in principle vested with recommendatory powers, which implies it cannot take measures, although it may adopt resolutions which make determinations or have operative design.408 The methods of correction/enforcement by the UNSC encompass

the non-military enforcement measures as well as the military enforcement measures of Chapter VII of the UN Charter, which measures are instituted by legally binding decisions (See Art. 25 Charter). They may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations (See Art. 41) as well as demonstrations, blockade, and other operations by air, sea, or land forces of Members of the UN (See Art. 42).

It can be observed that military enforcement measures are not necessarily effective, the modalities of their execution being highly dependent on the co-operation by the members of the UN. Economic sanctions are likewise not necessarily effective, also because the target States often accept high costs, including civilian suffering, to achieve their policy objectives, especially fundamental ones such as those pertaining to their national security. Still, the consistent enforcement by the UNSC is necessary in theory, if States are to rely upon those methods for their security instead of depending for that purpose exclusively on their own stockpiles of armaments.

Note that attempts to evade enforcement actions such as sanctions imposed pursuant to Art. 41 of the UN Charter, may be revealed by way of continuous monitoring activities (on a unilateral or treaty-basis). Like after an assessment in the process of verification, the phase of monitoring supplies the methods to oversee the follow-up by the State and to detect possible non-compliance with the decisions that were made earlier in the phase of correction/enforcement in order to bring the State into compliance. The monitoring of compliance with sanctions is increasingly relevant as it provides the general factual basis for the verification of compliance by the State Party with its obligations, both those arising from the arms control agreement proper and those emanating from the decision to impose enforcement measures. In many instances - all outside the context of arms control treaties - where sanctions not involving the use of armed force have been applied by the UNSC (pursuant to Art. 41 of the Charter), the UNSC has established Sanctions Committees to oversee implementation of the sanctions. Those Committees are usually asked to perform a series of tasks and to report on their work to the UNSC with their observations and recommendations. Although through the establishment of the Sanctions

410 Sanctions Committees have been established in respect of South Africa, Iraq, the former Yugoslavia, the Libyan Arab Jamahiriya, Somalia, Haiti, the National Union for the Total Independence of Angola (UNITA), Rwanda, and more recently the Taliban in Afghanistan, with the scope differing from case to case.
411 Tasks of the Sanctions Committees include development of guidelines for the implementation of measures imposed by the UNSC or to study ways and means by which such measures could be made more effective (See S/Res/421 (1977) - South Africa;
Committees, the UNSC builds a specific institutional framework for the implementation of sanctions, the Committees themselves have no operational verification mechanisms.\textsuperscript{412} Therefore, even if Sanctions Committees would be established one day in the context of enforcement of arms control treaty-law, the methods of ongoing monitoring would remain of crucial importance (inter alia to ‘trigger’ specific investigations).

Besides the UN Charter, the constitutions of certain regional arrangements, first and foremost the OAS and the European Union, also allow for the imposition of binding economic sanctions, and their practice has been to impose sanctions against their own members and, in the case of the European Union, even against non-members.\textsuperscript{413} There are of course many other sanctions not embodied in agreements or operating through public opinion that rest on tacitly established expectations regarding the consequences of non-compliance. Their relationship with the treaty-specific methods of correction/enforcement will be examined in chapter [7].

4.7 Methods of the interpretative element

Many of the methods of supervision that have been discussed derive their ‘contents’ from their specific institutional design as contained in the procedures of the arms control treaty. A strict division between the method itself and its institutional design in the treaty is in many cases difficult to make. This is especially true with regard to the methods of the interpretative element. Since interpretation of norms takes place in all phases of the supervisory process, especially in the review-stages of verification and dispute settlement, there is a close connection between the methods of the interpretative element and the methods used in the other phases. As methods of the interpretative element have been identified: investigation and discussion, and more specifically, interpretation and clarification, adaptation and filling of gaps.\textsuperscript{414} It can be questioned whether these should be called ‘methods’ or whether these notions in themselves merely indicate for what purposes they are being used. For example, a method such as ‘clarification’ is in principle always used during deliberations in all kinds of organs, from plenary organs to secretariats. Still, a special institutionalised procedure of

\textsuperscript{412} They have to rely on the efforts of individual Member States, acting singly or with others. See UNS-G Report (1995), par. 182.

\textsuperscript{413} See White (1994), p. 86-90.

\textsuperscript{414} See van Dijk (1987), p. 28, in referring to the ‘creative function’ of supervision.
‘consultation and clarification’ as part of the verification process may also be laid down in a treaty.\textsuperscript{415}

Generally described, ‘the’ method of the interpretative element is political discussion held in the plenary organs of international supervisory organisations.\textsuperscript{416} Of course, also the political discussions that are held in other organs can be considered methods of the interpretative element, albeit that the plenary organ, in which as a rule all States Parties are represented, is best suited for the purpose of authoritatively (by consensus) clarifying or specifying a norm. During the sessions of the plenary organ not only States’ reports and concerns about compliance or already established deviations will be discussed, but the causes of and the reasons for deviations, and the difficulties met by particular States will also be subject of debate. As such, those political discussions may play an important role in the phases of verification, dispute settlement and even correction/enforcement.

In addition to the regular sessions of the plenary organ, many arms control treaties arrange for the gathering of a Review Conference after five or ten years after entry into force of the treaty, for the purpose of reviewing the operation of the treaty.\textsuperscript{417} A Review Conference is different from an Amendment Conference; a Review Conference does not have the legal power to amend the provisions of the treaty. Thus, only pragmatic and limited solutions may be provided by the Review Conference, depending on the flexibility provided by the general formulation of the provisions of the treaty. Apart from reviewing the implementation of particular measures, also the adequacy of the supervisory mechanism itself will be assessed during the political debates in the Review Conference. Review of the operation of the treaty usually takes place on the basis of expert reports, supplemented by other sources of information, such as reports of States. During these Review Conferences, interpretation, clarification and specification of treaty obligations may take place, potentially limiting the presupposed behavioural discretion of the States Parties. With regard to several arms control treaties, notably the NPT and the BWC, the Review Conferences have not only served the purpose of reviewing the application and interpretation of the norms laid down in the treaty under review, but have provided an important indication of the legal developments in the entire field of arms control as well.\textsuperscript{418}

\textsuperscript{415} See in particular Art. IX CWC and Art. IV(C(29-33)) CTBT.
\textsuperscript{417} See e.g., Art. VIII(3) NPT; Art. XII BWC; Art. VIII(22) CWC; Art. VIII CTBT. Cf. Principle (8) of the Principles of verification affirmed by the Disarmament Commission (2-20 May 1988): ‘To assess the (…) effectiveness of the verification system, an arms limitation and disarmament agreement should provide for procedures and mechanisms for review and evaluation. Where possible time-frames for such revisions should be agreed in order to facilitate this assessment’.
\textsuperscript{418} E.g., the 1995 Review Conference, that extended the NPT indefinitely, agreed on decisions on principles and guidelines for future negotiations on nuclear arms control law and also
The interpretative element in the verification and the dispute settlement phases is essentially meant to maintain the effectiveness of the supervisory mechanism. The interpretative element links the rules to be applied with the policy objectives of the States Parties and the supervisory body and with common values and social reality.\footnote{Sometimes, this is attempted by limiting the freedom of interpretation; see e.g. Art. XIII CWC, which prescribes that nothing in the CWC shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the 1925 Geneva Protocol and under the BWC of 1972.} A Review Conference, by way of its focusing on improving the adequacy of the supervisory mechanism, serves the same purposes. Hence, Review Conferences can be considered a special institutional design of the methods of the interpretative element in all phases of the process of international supervision. Although the results of Review Conferences do not have the legal force of a treaty signed and ratified in due process, they cannot be ignored when interpreting the official text of the treaty. Especially the ‘Final Declarations’ in which the results of the Review Conferences are commonly adopted (by consensus) can be considered expressions of the ‘subsequent practice’ of the arms control treaty concerned, and hence should be taken into account in the interpretation of that treaty.\footnote{See Karkoszka (1991), p. 220. Pursuant to Art. 31 (3(b)) of the 1969 Vienna Convention on the Law of Treaties any ‘subsequent practice’ in the application of the treaty which establishes the agreement of the Parties regarding its interpretation shall be taken into account, together with the context, in the interpretation of the treaty.} It must be admitted, though, that so far no really far-reaching modifications of arms control treaties have resulted from Review Conferences.

5. Supervisory mechanisms in arms control law: supervising bodies

5.1 The ‘institutionalisation’ of supervisory mechanisms through the establishment of international bodies

Now that the different methods of supervision in arms control law have been discussed at length, the international supervising bodies of arms control treaties will be examined, with emphasis on the role of international organisations. The term ‘supervision’ in the context of international
supervising bodies refers to all institutionalised methods and procedures which help to realise the application of rules of substantive and institutional law contained in the constituent treaty (or other treaties) and, if applicable, the rules made by the supervising body (or the concert of the States). Ever since the end of WW I, States have increasingly delegated supervisory powers to international bodies. Some bodies have exercised supervision *ad hoc*, when called upon in contentious cases; they are occupied with judicial dispute settlement, like arbitration commissions and, later on, permanent tribunals, or with non-judicial dispute settlement, such as negotiating-commissions and conciliation commissions. Next to this category of bodies, other *ad hoc* bodies have been established with the special task of performing continuous, systematic supervisory activities. This latter kind of bodies has been established in many bilateral and multilateral arms control treaties usually for the general purpose of promoting co-operation between the States Parties and to provide a forum for consultations on questions *inter alia* relating to the performance of the treaty obligations.\(^{421}\) Those bodies, usually called ‘commissions’ or ‘committees’, in general have a (very) low level of institutionalisation. Mostly devised in the Cold War period and in an East-West context, they are characterised by a high degree of confidentiality (private deliberations) and flexibility (no designated or permanent staff or specified meeting times).\(^{422}\) In legal terms the *ad hoc* bodies cannot be regarded as international organisations bearing international legal personality.

It has already been observed that in its most developed form, international supervision takes place by specialised international organisations, that are legally distinct from the States Parties by virtue of their legal personality. The fact that the specialised international organisations possess international legal personality means that they are subjects of international law, capable of possessing international rights and duties, and having the capacity to maintain their rights by bringing international claims.\(^{423}\) The organs of the specialised international organisations are permanent, exercising their special supervisory tasks on a continuous basis. The objective of the ongoing or repetitive use of supervisory methods, viz. stimulating States into the appropriate application and execution of their obligations (compliance), is part of the general purposes of the specialised international organisations.

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The organisations perform their activities with the explicit consent of the Parties, and it is an expression of the sovereign right of States to enter into such arrangements.\textsuperscript{424}

The first instances wherein States attempted to institutionalise their cooperation in the field of arms control by granting supervisory powers to a specialised international organisation occurred before WW II. Those incentives reached their peak under the auspices of the League of Nations in the early 1930s, with a so-called Draft Disarmament Convention that was to be adopted by the World Disarmament Conference - or officially, the Conference for the Reduction and Limitation of Armaments.\textsuperscript{425} Part VI of the Draft Disarmament Convention (called 'Miscellaneous Provisions') contained the provisions on the supervisory mechanism envisaged. A 'Permanent Disarmament Commission' was to be established with the duty of following the execution of the Convention.\textsuperscript{426} On the basis of inter-State complaints, the Permanent Disarmament Commission was to have the ability to verify compliance with the Convention.\textsuperscript{427} If necessary, the Council of the League of Nations could act as the body in correction/enforcement, 'with a view to ensuring the observance of the Disarmament Convention and to safeguarding the peace of nations'. Several new drafts of the Convention, which went as far as to introduce mandatory inspection regimes (both of a 'routine' and of a 'challenge' nature) followed and took years of deliberation, but eventually at the beginning of 1936 the Council of the League of Nations decided to suspend the World Disarmament Conference which never reconvened afterwards.\textsuperscript{428}


\textsuperscript{425} This Conference convened for the first time in Geneva in 1932. Pursuant to Art. 1 of the Draft Disarmament Convention, the High Contracting Parties agreed to limit, and as far as possible, to reduce their respective armaments as provided in the (Draft) Convention. The Draft Convention dealt with personnel (average number of days' duty and period of service) as well as with material (land armaments, naval armaments and air armaments) and budgetary expenditure (total annual expenditure); see Arts. 2-29 of the Draft Convention. The text of the Draft Disarmament Convention, of December 9, 1930, is reproduced in Dupuy & Hammerman (1973), p. 170-186.

\textsuperscript{426} The Members of this Commission, although appointed by the Governments of the States Parties, were not to represent their Governments (Draft Art. 40). The Commission was to meet in annual sessions, and decisions were to be made by majority vote, each Member having one vote (Draft Art. 41-45).

\textsuperscript{427} The 'Procedure Regarding Complaints' provided that if a High Contracting Party was of the opinion that another Party to the Disarmament Convention was maintaining armaments in excess of the figures agreed upon or was in any way violating or endeavouring to violate the provisions of the Convention, such Party may lay the matter, through the Secretary-General of the League of Nations, before the Permanent Disarmament Commission (Draft Art. 52). Any Party could do so; the Draft Convention (and also the Covenant of the League of Nations) made clear that a violation of its provisions endangered the peace of all Parties, not just of the one(s) directly affected.

\textsuperscript{428} Although the World Disarmament Conference managed to reach agreement on a number
After WW II, attempts at institution-building in the field of arms control primarily served the purpose of denying certain States access to technologies for the production of specific weapons, especially weapons of mass destruction. Examples include the 1946 Baruch Plan, which proposed to establish an International Atomic Control Authority thereby denying the SU access to nuclear weapons, as well as the now defunct Arms Control Agency of the WEU (1956), which aimed at denying Germany the right to produce weapons of mass destruction and certain conventional weapons. In the late 1950s and the early 1960s, when the quest for general and complete disarmament was at its height, it was considered necessary to establish one central international organisation for purposes of (strict and effective) international arms control.\textsuperscript{429} The gradual shift from unqualified general and complete disarmament as the ultimate goal of the arms control process towards more limited higher goals has also brought about changes in the ideas about the type of international organisation that should accompany it. Instead of one central organisation, over the years several specialised international organisations have been established for purposes of supervision of compliance with more limited arms control goals, such as the prevention of the proliferation of nuclear weapons or the achievement of overall chemical disarmament.

In the regional context, the first specialised supervisory organisation in arms control law was established in Latin-America (NWFZ Treaty of Tlatelolco, 1967). In 1957 the IAEA was established, but this universal organisation only became strongly involved in supervision activities after the conclusion of the NPT in 1968. The IAEA has concluded and has supervised all bilateral safeguards agreements with the States Parties to the NPT ever since. The NPT thus provides for a formula wherein an international organisation outside the treaty framework has been entrusted with the supervisory task. The same holds true for the BWC of 1972, wherein the UN has the supervisory role.\textsuperscript{430} In the ENMOD Convention of 1977, in addition of issues, the definitive withdrawal of Germany from both the World Disarmament Conference and the Covenant of the League of Nations, as well as German rearmament in violation of the 1919 Treaty of Versailles, brought about a breakdown of attempts to transform the agreed points into a generally acceptable disarmament treaty. See Goldblat (1996), p. 243.

\textsuperscript{429} The USA and the SU considered in the 1960s that in order to implement control over and inspection of GCD, an international disarmament organisation including all parties to the organisation should be created within the framework of the UN. This International Disarmament Organisation (IDO) and its inspectors should be assured unrestricted access without veto to all places, as necessary for the purpose of effective verification. See McCloy/Zorin (1961), par. 6 and see Gotlieb (1965), p. 130-153.

\textsuperscript{430} Apart from the UNSC, the UNS-G has been involved in supervising the BWC and has been given a role in regular exchanges of information (monitoring), through which the verification mechanism of the treaty has been strengthened. See Karkoszka (1991).
to the UNSC an intermediate committee for supervisory purposes has been introduced, which may be convened on an ad hoc basis.

Regional conferences have also provided a valuable approach to dealing with security concerns specific to a particular region, including issues of arms control.\(^{431}\) In Europe, the OSCE, which started as a regional conference (CSCE), provides a clear example of the opportunities that regional conferences have as the organising mechanism for conducting negotiations in the field of arms control. Since participation in a regional conference has different implications than membership of a regional organisation, the conference mechanism may offer the possibility of drawing on wider regional support. It is however obvious that the conference mechanism would be too loose and informal so as to be appropriate to function as a formal arms control treaty-implementing structure; regional conferences are more apt as vehicles for gaining consensus on adopting confidence-building measures between States in the region.\(^{432}\)

The end of the Cold War at the beginning of the 1990s has broadened perspectives not only for the development of international law in ‘sensitive’ fields that had previously, during the days of bipolar opposition, been the exclusive domain of the US and SU, but also for closer co-operation in supervising compliance with those newly developed and developing rules of international law. For supervision is not only a legal matter. Rather, political factors play a decisive role, especially relations between States and the common desire for further co-operation.\(^{433}\) The organisation of supervision after the end of the Cold War is no longer aimed at reducing ‘bipolar’ suspicion, but rather at building ‘multilateral’ confidence.\(^{434}\) Within this context of ‘multilateralisation’ of the arms control process, the ‘institutionalisation’ of supervisory mechanisms takes place through the establishment of international organisations as supervisors. With the creation of the CWC and the CTBT in the 1990s, plans for the establishment of treaty-specific international supervisory organisations have eventually been put into practice. The CWC and CTBT serve as the constituent treaties of global organisations specially created for the purpose of supervising compliance, and are characterised by comprehensive supervisory mechanisms by which the States Parties have entrusted intrusive powers to

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\(^{431}\) In fact, the conference mechanism has laid the foundations, in the 19th and early 20th Century, for a new way of supervising the obligations incumbent upon States, including issues of (dictated) arms control. Cf. Chowdhury (1986), p. 172-174.


\(^{434}\) As the UNS-G Report (1995), par. 21, states: “As a culture of transparency and mutually beneficial interactions replaces one of secrecy and suspicion, the verification environment may change from one where an inspected State Party seeks to evade inspection to one where that Party is ‘passive’, seeking neither to hinder nor to help, to an atmosphere of active co-operation between inspected and inspecting Parties because both see a shared interest in demonstrating compliance”.

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the supervisory organisations. The activities of these organisations are not linked to the use of particular methods of supervision; rather, they can carry out supervisory tasks in all phases of the process of international supervision.

It can thus be upheld that the law of arms control is increasingly characterised by a tendency of elaborating the supervisory mechanisms within the arms control treaties and establishing permanent international organisations for the special purpose of supervising compliance. Along with this development, the authoritativeness increases of both the activities committed during, and the outcome of, the process of international supervision, since the international dimension of the procedures is enlarged. The development of the institutional law of arms control has received such an impetus that building comprehensive supervisory mechanisms seems to have become the (political) standard when adapting existing arms control treaties or concluding new ones, at least as far as those treaties capture the collective benefits that are available through strict co-operation in their field of application.

The ‘institutionalisation’ of supervisory mechanisms through the establishment of international organisations for purposes of supervision can be considered an important development, for various reasons.\(^{435}\) First of all, the States Parties accept a certain legal order by becoming members of the international organisation. They define certain common goals and objectives and recognise the primacy of certain principles that are necessary for their realisation. The States may therefore be more eager than without such legal order to demonstrate that their behaviour is in conformity with those principles and that it contributes to the realisation of the common goals. Secondly, the permanence of the international organisation provides an incentive for compliance. Also when the organs of the organisation have not been equipped with constraining powers, they meet regularly and consequently are in a position to follow, from one meeting to another, the progress made by the States Parties in the realisation of their obligations. Finally, a tendency towards universality of membership of certain international organisations in the field of arms control can be discerned.\(^{436}\)


\(^{436}\) Especially with regard to the control of weapons of mass destruction the aim towards universality is perceptible in arms control law. For example, the BWC has 142 States Parties and the CWC has been signed and ratified by 141 States. Moreover, 187 States are Party to the NPT, thereby making it - after the UN Charter - one of the most generally ratified treaties. In Decision (2), ‘Principles and Objectives for Nuclear Non-Proliferation and Disarmament’ of the Final Document NPT (1995), it was stated: “Universal adherence to the Treaty on the Non-Proliferation of Nuclear Weapons is an urgent priority. All States not yet Party to the Treaty are called upon to accede to the Treaty at the earliest date, particularly those States that operate unsafeguarded nuclear facilities. Every effort should be made by all States Parties to achieve this objective”. Given the choice of wording, this ‘Decision’ appears to be directed first and foremost at India, Pakistan and Israel. In Final Document NPT (2000) the call for
This is a highly important factor in determining the effectiveness of supervision by the international organisation, since States will be more inclined to accept the restrictions on their freedom of behaviour that derive from the supervisory mechanism as other States - be it their adversaries or merely their competitors - are accordingly subjected to the same restrictions. The combination of the factors mentioned - the fact that an international organisation constitutes a permanently functioning legal order in which (a great) many States participate on an equal footing - may account for the success of international organisations in exercising supervisory tasks, in the law of arms control like in other fields of law.

5.2 A note on the powers and composition of supervising organisations

The performance of supervisory tasks is based on an autonomous power of the supervising body. The power of international supervision is not implicated in an obligation, nor is it an automatic corollary of an obligation. Supervisory powers cannot be presumed to automatically derive from, or be part of, substantive obligations. Instead, the extent to which supervision may be exercised by an international organisation is determined by the specific powers attributed to the organisation for the purpose of achieving its supervisory objectives. As the ICJ has observed, international organisations are subjects of international law that do not (unlike States) possess a general competence, but instead are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. In accordance with this principle, the powers conferred are normally the subject of an express statement in the constituent instrument of the international organisation and must be capable of justification by reference to it. And, as is the case with all their powers, the organs of the international organisation may exercise their supervisory powers to the full extent compatible with their functions and with a view to the fulfilment of the purposes of the organisation, in so far as their constituent instrument does not impose restrictions on them. The scope of the consent given by the States Parties to the international organisation regarding its supervisory powers is usually clearly defined, and is otherwise determined by the methods and the institutional design of the supervisory mechanism. The supervisory powers of the organisation may be limited by the circumscribed

universality is repeated and the very few States remaining outside the regime are explicitly identified (see comments on Art. 1, par. 8).


438 See ICJ 'Legality of the Use by a State of Nuclear Weapons in Armed Conflict', Advisory Opinion, 8 July 1996, par. 25. This principle was referred to earlier by the PCIJ in 'Jurisdiction of the European Commission of the Danube', Advisory Opinion, PCIJ, Series B, No. 14, p. 64. See on this issue Bothe (1999).
objective of the use of the methods of supervision. The States Parties to the NPT, for example, have granted the power to the IAEA to supervise the non-diversion of nuclear materials by way of checking whether there are any nuclear materials unaccounted for on declared sites and buildings; IAEA inspections therefore cannot be used to trace down potential clandestine nuclear weapons programmes.\footnote{439} The power of the organisation may also be limited by determined time-limits; unless explicitly stated otherwise, supervision is not retroactive so that facts that occurred before the acceptance of the obligations that are to be supervised cannot be taken into account in the supervisory process.

The role of international organisations in international supervision can be analysed according to a variety of characteristics, of which the composition and size of their organs and powers including the decision-making procedures (e.g. unanimity versus majority rule), are the most important and interrelated. International organisations in arms control law commonly have three organs: a plenary organ in which each State Party has a vote, an executive organ which usually is of a more limited composition, and a secretariat.\footnote{440} Whereas the plenary organ is composed of State-representatives, the executive organ and the secretariat are usually manned with independent experts. The composition of the organs, as far as it reflects their status as neutral and independent bodies, is of utmost importance for the process of confidence-building and for the weight that shall be attached to their decisions.\footnote{441} Decision-making by the plenary organs, as purely intergovernmental bodies, usually takes place by consensus, which means that only in the absence of any objection by any Party decisions can be taken and recommendations can be adopted. In contrast, the executive organ may have the power to make recommendations or take decisions by qualified majority. In general, States Parties will only seldom be prepared to consider decisions taken by the supervising body as obligatory; the force attached to decisions is usually that of a (non-binding) recommendation. The power to take binding decisions (outside judicial supervision procedures), if granted at all, is as a rule the prerogative of the highest political organ. But even if such powers have been granted, whenever possible, supervising bodies will

\footnote{439} This will be partly remedied by the new ‘Additional Protocol’, see infra Chapter [6].
\footnote{440} This ‘trinity’ of a plenary, executive and technical organ can be found in exactly the same manner with the IAEA, the OPCW and the CTBTO; see infra, chapter [6].
\footnote{441} For example, in the case of supervision of compliance with arms control in Iraq by UNSCOM (a case of ‘dictated’ arms control and therefore strictly speaking outside the scope of this chapter), the American domination in the composition of that Commission has from the outset given rise to compliance problems and Iraqi allegations of espionage. In January 1999, reports in the American media revealed that UNSCOM had probably been misused by the CIA for intelligence purposes. The ‘independent’ and ‘unbiased’ character of UNSCOM as a subsidiary organ of the UNSC could no longer be maintained and the Commission was replaced by a new one, viz. the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), established by S/Res/1284 (1999).
try to evade normative criticism and instead will confine their remarks to a
global appreciation of the State’s behaviour. Especially in the plenary organ
supervisory activities will much more resemble a diplomatic negotiation
All organs may be involved in exercising supervision and may have at their
disposal supervisory powers, depending on the terms of the treaty (and, to a
lesser extent, the practice of the organisation). Several supervisory activities,
such as interpreting ‘raw’ data or collecting required samples on-the-spot
during an inspection, require a specific technical expertise; therefore, many
supervisory mechanisms within international organisations show a
distinction between ‘technical’ and ‘political’ activities. In the fact-finding
stages, national experts who are under instructions of their governments, or
independent experts appointed by the international organisation, or a
combination of both, carry out ‘technical’ supervisory tasks. Within
supervisory organisations the secretariat, as the technical organ, is
commonly responsible for these tasks. Usually States Parties retain a
political surveillance over the supervision delegated to the technical organ
through the institution of the executive organ and, primarily, the plenary
organ consisting of representatives of all States Parties which are under
instruction from their respective governments. Decision-making by this kind
of ‘policy-making’ organs is often a bargaining process whereby, States
Parties try to realise as much as possible their specific, individual interests.
Only occasionally, depending on the supervisory powers granted and
exercised, international supervision can be said to take up more of a
‘constructive’ aspect, viz. if it is used by the supervising body not only to
bring about compliance with the treaty, but also to induce the States into
elaborating a common policy, which may be perceived as a means of
who notes that ‘the supervisory and the regulatory tasks of the international bodies merge’.}
The secretariat operates to safeguard the interests of the organisation and
may accordingly be less influenced by political factors than policy-making
organs, thereby rendering its supervision potentially more effective. On the
other hand, it appears from the text of arms control treaties that international
secretariats often fulfil the important, but limited role of ‘liaison office’.
They are competent to receive or to request information and may play an
important role in the phase of verification because of their processing of
technical information, but they are themselves not empowered to exercise
what supervision is really about: drawing conclusions from the information
gathered, assessing the correctness of the behaviour of the States Parties to
the treaty and responding to cases of non-compliance. These latter
responsibilities have been assigned (if at all) to the ‘higher’ level of the
political organs of the organisation. The ability to assess degrees of compliance and the responsibility to make an official assessment should not be equated. For although the secretariats of specialised supervisory organisations (such as the OPCW and the IAEA) will be able to assess whether a violation has occurred, the responsibility to make an official assessment (assuming that the power to do so has been invested in an organ in the first place) remains the exclusive prerogative of a political organ.\textsuperscript{444} Even though supervisory powers must be granted explicitly to the organs of the international organisation, those powers that have not but that are nevertheless essential to the exercise and effectuation of its supervisory functions must be considered part of the implied powers of the supervising organisation.\textsuperscript{445} In that respect, it can be noted that an organ that has the power to take binding decisions also has the power to interpret those decisions authoritatively. According to the general legal principle of \textit{eius est interpretare legem cuius condere} \textsuperscript{446} he who has the power to conduct the law, also has the power to interpret that law. Since the power to interpret its own legal acts is a power of the supervisory organ vested in it as such and not in the individual States Parties as members of the supervisory

\textsuperscript{444} This course of action can be illustrated with regard to the method of OSI (with co-operative institutional design): after the inspection teams have completed their work, they report to a central body, usually the head of the secretariat (often named ‘Director-General’), who in turn transmits the report to an appropriate organ, usually the ‘executive’ organ of the supervising organisation. This latter organ will draw its conclusions from the inspection report and, given that it has been invested with the power to pronounce an official assessment of compliance, may recommend a change of behaviour by the inspected State Party, thereby implicitly (or, occasionally, explicitly) acknowledging the violation of the treaty by that State Party. Of course, conclusions as to non-compliance with the terms of the treaty would probably already be implicit in the inspector’s reports, but the use of these reports as a direct basis for the establishment of non-compliance would make it difficult for inspectors on the spot to secure the necessary cooperation of the inspected State Party. Yet, consensus on the conclusions to be drawn from the report may not necessarily be achieved by the inspection team; the report may then only reflect the observations made by each of the participating inspectors. In that case, the supervising organ bound to make the assessment would have difficulty in drawing definite conclusions when basing itself solely on the inspection report. See Wainhouse (1968), p. 155 and see the procedures for OSI in the CWC, CTBT and the IAEA-NPT system, \textit{infra}, Chapter [6].

\textsuperscript{445} Cf. as the ICJ observed in ‘\textit{Reparations for Injuries suffered in the Service of the United Nations’}, Advisory Opinion, \textit{ICJ Rep.} 1949, 174, at p. 182-183: “Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties”. See also ICJ ‘\textit{Legality of the Use by a State of Nuclear Weapons in Armed Conflict}’, Advisory Opinion, 8 July 1996, par. 25: “(…) the necessities of international life may point to the need for organisations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic methods which govern their activities. It is generally accepted that international organisations can exercise such powers, known as “implied” powers.”

\textsuperscript{446} \textit{Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)}, Advisory Opinion of 6 December 1923, 1923 \textit{PCIJ (Ser. B)}, no. 8, at 37. See Degan (1997), p. 54.
organisation, as a counterpart to this power there is a shared responsibility of individual States Parties not to unilaterally deviate from the organ’s interpretation. A State Party therefore cannot rely on its own interpretation of a legal act of an organ of the supervisory organisation so as to justify the taking of a position which deviates from the original, collective interpretation of that legal act.\textsuperscript{447}

The activities of an international supervisory organisation are not necessarily restricted to supervising compliance with its own constituent treaty. International organisations may be requested to fulfil supervisory functions with regard to other legal instruments. In that case, it should be noted that not only the consent of the States Parties to those treaties is needed, but also the consent (either explicit or tacit) of the international organisation. This consent is necessary, because out of respect for its own ‘constitution’ the international organisation must refuse requests that would require it to exercise supervisory powers that fall outside the duties and tasks for which those powers were originally granted.\textsuperscript{448} This is a logical consequence of the fact that all powers of supervision of international organisations need a basis (explicit or implied) in the constituent treaty.

5.3. The relationship between the powers of supervising organisations and powers of unilateral supervision

The introduction of supervising bodies as additional actors in the supervisory mechanisms of arms control treaties implies a concurrence of supervisory powers in their field. International supervisory organisations are not the only international legal persons committed to the supervision of compliance; the States Parties that collectively frame the international organisation are each individually concerned with the application of the rules by the other States Parties. When expressing their consent to be bound by an arms control treaty, the States Parties undertake obligations vis-à-vis the other States Parties, whether or not they establish an international organisation for supervisory (and other) purposes. Obligations undertaken towards the international organisation are at the same time duties owed to the other States Parties; this gives each State Party the right to supervise observance of the rules by all the other States Parties. Hence, the question arises whether the presence or the exercise of powers of supervision by the international supervisory organisation excludes unilateral control by the


\textsuperscript{448} There may arise a particular situation when an already existing international organisation is requested to supervise compliance with a newly concluded treaty: the States Parties to that treaty must accept the supervisory powers of the organisation without having consented to the substantive obligations that may have been laid down in the constitutive treaty of the organisation. In that case, the (substantive) legal obligations that characterise the relationship between one State Party to the treaty and another are different from the (institutional) obligations that characterise the relationship between the organisation and the States Parties.
States Parties if there is no clear provision to that effect in the arms control treaty. This brings us first of all to the issue of what treaty-specific powers of the supervising body potentially concur with powers of unilateral supervision. The treaty-specific powers of supervision that exist next to one another (and that might lead to a collision) can be identified as the power to establish facts, the power to interpret rules, and the power to assess whether non-compliance has occurred. It may be recalled that in principle the position each of the States Parties takes regarding the factual behaviour of others is its own and is not binding on the other States without their consent. In case a supervising organisation has been established through the organs of which the States Parties can act, such as the OPCW, IAEA and CTBTO, their means of fact-finding, especially inspections, can be employed to determine authoritatively the factual behaviour of the (inspected) States Parties. Moreover, such comprehensive supervisory mechanisms often give States Parties the right to request clarification (and sometimes ‘further clarification’) as a ‘trigger’ that takes expected observational errors into consideration by increasing the amount of information that is required to prompt the assessment of (non-) compliance. The higher the degree of initial information-uncertainty, the higher the ‘trigger’ level and the more evidence is required before a violation can be established authoritatively. Inherent in the consent to be bound by the arms control treaty is that States Parties acknowledge the authority of the facts established by the supervising organisation. However, since no system of (monitoring and) verification is capable of providing a one hundred per cent guarantee that what it establishes is the complete and actual ‘state of affairs’, the use of additional unilateral methods may still be necessary.

A similar line of reasoning holds for the power to interpret the obligations resulting from the treaty. As a principle, States have the right to interpret their own obligations and if they refuse to submit a dispute on interpretation to judicial dispute settlement (which takes place outside the treaty-based supervisory mechanism), they will not succeed in arriving at a generally accepted, authoritative interpretation of a specific provision. This uncertainty may bring with it that it remains unclear whether a violation has

449 Obviously, if the treaty-text contained a provision in which the States Parties would expressly give up their right to make use of unilateral powers of supervision with regard to the subject matter of the treaty (in all circumstances or as soon as the supervising body decided to make use of its powers), their consent to be bound would lead to forfeiture of those rights (in the applicable circumstances).

450 On the issue of the potential concurrence of powers of enforcement, see infra, chapter [7].


452 For example, the extensive debates and policy manoeuvring surrounding the ABM Treaty of 1972 have been explained from a lack of complete mutual agreement between the sides (USA, Russia) as to what is banned and what is allowed by the treaty in terms of ABM systems. See Kislyak (1992b), p. 65.

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occurred. The difficulty is not only that a violation might thus go undetected, but also that there may be apparent violations that are not real because the established behaviour is in fact not covered by the provisions allegedly having been violated. As long as plenary organs (comprising representatives of all States Parties) take decisions by consensus or unanimity, the States Parties to a large extent retain their freedom of interpretation of their obligations. This is different in those instances where the plenary organ of the organisation has been granted the power to take majority decisions, or the executive organ of the organisation (which is of limited composition) can take decisions that are legally binding on all States Parties. In those instances the power to interpret obligations has been granted by necessary implication to the decision-making majority, alongside their power to take decisions binding on all States Parties alike.

Finally, and perhaps most importantly, States do not have the power to unilaterally decide by way of legally binding assessment whether another State has not complied with the treaty. In case an international organisation has been established, the power to make the final assessment regarding treaty-compliance can be vested in an organ of the organisation. To possess that kind of power means that when the organ determines that the State Party concerned is in breach of its obligations, all other States Parties shall consider this State to be in breach. But even if the organisation has the power to appreciate the State’s behaviour and make a binding assessment of compliance, such assessment may reflect various degrees of compliance and not a clear ‘black and white’ indication of non-compliance, thus leaving discretion to the States Parties how to respond to the situation.

There are many arguments to support the position that, unless the treaty concerned provides otherwise, agreeing to an institutionalised supervisory mechanism cannot and does not deprive a State Party of its unilateral supervisory powers, either de facto or de jure. As of right, contrary to supervising bodies, States do not need a specific grant of supervisory powers. State-Parties therefore can only be considered to have given up their right to exercise unilateral supervisory powers either expressively or by necessary implication. Since it is not hypothetical that in a concrete case the supervisory mechanisms would not function (properly), accepting a mutual exclusivity of powers would mean that the State concerned could, under certain circumstances, be deprived of any means of establishing violations and hence of reacting thereto. For these reasons, the question whether the mere existence of treaty-specific supervisory powers in the hands of international supervisory bodies would exclude unilateral control

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453 An example of a supervision-related power that may be given up ‘by necessary implication’ is the power to interpret treaty obligations, which goes hand in glove with the power to assess compliance with those treaty obligations.
by the States Parties to the arms control treaty if there are no clear provisions in the treaty to that effect, has to be answered in the negative. However, it would be inconceivable that the establishment of a supervising body would not make any difference whatsoever with regard to the freedom of behaviour of States Parties in exercising unilateral supervisory powers. The procedural obligations of which the supervisory mechanism is composed are part of the *pactum* that each State has agreed to observe upon becoming a Party to the arms control treaty, which brings with it an obligation to implement and thereby to uphold the treaty-based supervisory mechanisms. All States, as members of an international supervisory organisation, have an interest in its functioning and therefore should not disregard the relevant supervisory procedures available pursuant to the arms control treaty. Hence it will be clear that States Parties should not actually fulfil supervisory tasks when organs of the organisation are available for that purpose. It can thus be concluded that there is not so much exclusivity, but rather a *priority* of the institutionalised, treaty-based supervisory mechanism over unilateral supervisory powers. The existence of this priority however is deemed to be somehow connected to the actual use of the treaty-specific supervisory powers by the supervising body. If the treaty-specific supervisory powers are never made use of in practice, it will no longer be reasonable to withhold from States Parties the right to unilaterally observe the application of the rules and to notify possible violations. In sum, it can be upheld that the essential consequence of the establishment of a supervisory mechanism which includes a supervising body, is that in case of a concurrence of supervisory powers and provided that appropriate use is made of them, there is priority of the treaty-based specific powers of the supervising body over States' unilateral powers of supervision.

5.4 The objects of supervision as exercised by supervising organisations

When discussing the objects of supervision by international organisations, a distinction can be made between 'internal' supervision and 'external'

454 See Schermers & Blokker (1995), p. 869-870. The ICJ has delivered two judgements that touched upon the question of concurring powers when considering the mandatory system of the League of Nations in the *South West Africa Case*. In the second judgement, of 18 July 1966 (*ICJ Rep.* 1966, at 45), the ICJ observed that all questions regarding the mandatory system had been resolved in the Council of the League, and that no member of the League had attempted to settle directly with the mandatory any question that did not affect its own interests as a State or those of its nationals, and that no cases were referred to the PCIJ under the adjudication clause. From this, the ICJ concluded "that any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which lay between the mandatory and the competent organs of the League - not between the mandatory and individual members of the League". This latter statement suggests that individual members lose their right to supervise the observance of the rules of the organisation if the organisation itself fulfils this task (i.e. makes use of its treaty-based powers).
supervision.\textsuperscript{455} Whereas ‘external’ supervision is supervision of the States Parties, ‘internal’ supervision is supervision of the organisation. ‘Internal’ supervision can be defined as overseeing the compliance of an international organisation with its own acts. Such acts are to be supervised either by the organisation itself, or by the States Parties. ‘Internal’ supervision will not be dealt with here, and all references to (international) supervision consequently refer to ‘external’ supervision.

The objects of international supervision consist of the behaviour of the States Parties to the arms control treaty and the rules with which compliance must be supervised. Subject to this supervision is the behaviour of the State Party towards the international supervisory organisation and towards the other States Parties. Behaviour of the State organs, whether part of the legislative or executive branch or of the judiciary, whether centralised or decentralised, is the kind of behaviour that is generally attributable to the State. With regard to other actors in the national system, such as private companies and individuals, international supervision is necessarily limited. Still, international supervision may bring with it that the State is called to account for the way in which it is implementing its international obligations in its national system. Arms control treaties for this purpose often contain provisions on ‘national implementation measures’, usually connected to the obligation to inform or to report to the international organisation on the progress made with regard to the implementation of those measures.\textsuperscript{456} This activity forms part of the monitoring phase of the process of international supervision. The task of the supervising body in this respect is obviously not to officially assess whether the behaviour of a State Party is in conformity with its obligations, but to indicate any discrepancy that might separate the internal situation in the State Party concerned from the situation that corresponds with the correct application of the norms. The national implementation measures in arms control treaties normally require the adaptation of national legislation (translating the international obligations into domestic law) or actual performance of the national authorities (courts, administration) in relation to the treaty under consideration. The corresponding substantive law of the arms control treaty then requires that the States Parties prohibit natural and legal persons anywhere on their territory or in any other place under their jurisdiction from undertaking any activity prohibited to a State Party under the treaty.\textsuperscript{457}

Clearly, the States Parties are obliged to act in conformity with the objectives assigned to the organisation of which they are members and to accept the obligations that derive from the constituent treaty. Although this obligation can be considered self-evident, it has been expressly laid down in

\textsuperscript{456} See e.g. Art. III(3) CTBT; Art. VII CWC.
\textsuperscript{457} See e.g. Art. III(1(a)) CTBT; Art. 7 APM Convention.
various treaties. Furthermore, the treaty may refer to some kind of ‘treaty-making power’ of the supervising organisation; the organisation will in that case be allowed to supervise compliance by the States with the ‘legislation’ in the agreements that have been concluded under its auspices.\footnote{458} The duties of the State Party under supervision not only relate to the law made by the treaty, but also to the law made by the supervising organisation. In accepting the constitutive treaty of the international organisation, States not only consent to the substantive obligations of the treaty, but are also bound to observe the obligations that may derive from the ‘legal acts’ of the organs of the international organisation created in the course of their activities. The ‘legal acts’ of the supervising organs encompass the rules and binding decisions they have adopted, including assessments of compliance.\footnote{459} Since the powers of supervising bodies derive directly from the constituent treaty, it is no more than natural that the rules and binding decisions that result from the exercise of those powers should be complied with and that the rightful application of those rules and decisions by the States Parties can and should be supervised by the supervising organisation. Furthermore, also recommendations or resolutions that are adopted during debates and discussions by a supervising (plenary) body should be taken into account. Even though these acts are in general not legally binding, international supervision still tends to incorporate their contents in assessing the overall institutional legality of the behaviour of the State-Parties. However, the supervisory body does not automatically possess the means to supervise compliance with those recommendations and resolutions; consequently, this supervision cannot be performed directly, unless on the basis of an explicit provision in the constituent treaty which allows for the monitoring or verification of the ‘follow-up’ by the State of the recommendations made.\footnote{460}

\footnote{458}{The best example in this regard is provided by the IAEA, that is required to conclude bilateral safeguards agreements on the basis of the NPT. The IAEA is also required to verify compliance by the States with these bilateral agreements.}

\footnote{459}{Cf. Wessel (1999), p. 207: “[t]he formal determination of an infringement is a legal act”. On the nature of legal acts, see Kelsen (1971).}

\footnote{460}{This is e.g. the case when the constituent treaty provides for the obligation of the States Parties to furnish periodic reports on the measures they have taken as a result of recommendations made. Also in cases where the recommendations have to be approved in advance and individually by the States Parties to the treaty, supervision of compliance with those recommendations can be performed directly; in fact through the approval by the States Parties the ‘recommendations’ are turned into legally binding acts. But even then, those recommendations will only be legally binding on the States Parties that have actually approved them. The practice under the Antarctic Treaty provides an example of this. See infra, Chapter [5].}
6. Supervision and compliance

6.1 Potential motives for non-compliance with arms control treaties

Generally speaking, arms control treaties are the result of lengthy and carefully orchestrated negotiations and represent an equilibrium no State Party has incentives to violate. States that have freely decided to enter into an arms control treaty can be expected to have calculated the effects that the substantive arms control measures will have on their conceptions of national interest, including their security. The generally high level of compliance with arms control law may thus be the result of the fact that many arms control treaties require States to make only modest departures from what they would have done anyway in the absence of an agreement. Furthermore, treaties comprising comprehensive supervisory mechanisms (such as the CWC) can be expected to pick up broad, militarily significant non-compliance in good time, materialising the risk of detection. Most of the time, violations of arms control treaties will rather be the result of non-volitional factors, such as treaty ambiguity and State incapacity, than deliberate attempts to defy a legal standard.\footnote{Still, a State’s perceptions may change over the years and may induce it to seek a way out of the substantive obligations without the other States Parties’ notice. It is a valid assumption that in the field of arms control law, like in any field of law, a State Party will only deliberately violate a treaty because it expects that the advantages of violation will outweigh its costs. Several broad reasons can be discerned why States may be tempted to deliberately violate provisions of arms control treaties.\footnote{First, temporal opportunism may play a role. If the benefits of a treaty accumulate early to the benefit of a State or a group of States, this (group of) State(s) may be tempted to violate the treaty to avoid obligations that it must perform later. In the context of arms control law, one might point at the principle that the NWS pursuant to Art. VI of the NPT should negotiate a nuclear disarmament treaty.\footnote{Somewhat cynically, it can be argued that the NNWS under the NPT have performed first by giving up the nuclear option (the ‘benefit’ of non-proliferation from the point of view of the NWS). The NWS are now tempted to postpone any serious negotiations on getting rid of the weapons that, at least partly, secure their dominant position in world affairs.} Second, a State might threaten to breach in order to extract concession from other States. Here, the example of the DPRK is accurate. It is known that the DPRK poses a threat to the nuclear non-proliferation regime, but the

\footnote{Cf. Chayes & Chayes (1993), p. 187-197. See for a critical appraisal of this assumption Downs et al. (1996).\footnote{These reasons are, \textit{mutatis mutandis}, taken from Morrison (1994-95).\footnote{This example is perhaps not entirely accurate since Art. VI NPT cannot be said to contain a \textit{determined} behavioural standard that can be ‘violated’ as such.}}
seriousness and exact scope of its nuclear proliferation efforts are unknown. In reaction to criticism and serious suspicions of nuclear proliferation attempts, the DPRK threatened to leave the nuclear non-proliferation regime in 1992. This threat has induced the USA to help develop the (civilian) nuclear energy supply in the DPRK in exchange for the assurance by the government of the DPRK that the nuclear weapon programme would be frozen.

Third, the costs and benefits of adhering to a treaty may change during the course of performance, causing a State to breach even though *ex ante* that State would have adhered to the treaty. In the context of arms control, the best examples are those treaties that anticipate certain technical developments in weapon systems. Suppose, for example, that a fully operational ballistic missile shield in space were technically feasible, then the USA or Russia would be much more tempted to violate the 1972 ABM Treaty.\(^4\)\(^6\)\(^4\) The same applies in case successful environmental modification techniques for military purposes would be developed, which is currently prohibited by the 1977 ENMOD Convention.

In the context of arms control law, it is vital to realise that any benefits for a State Party resulting from its breaching an arms control treaty will almost automatically give a negative impact on the (security) interests of the other States Parties. Consequently, any gains resulting from breach of treaty provisions in the context of security relationships are relative rather than absolute. When States try to gain those relative advantages by acting in disregard of arms control law, the extent to which the violation of an arms control treaty provision threatens international security is an important factor in determining the seriousness of the violation, which will determine the severity of the measures of correction and enforcement to be taken in response (see *infra* chapter [7]).

### 6.2 A note on the question of effectiveness of supervisory mechanisms

Closely related to issues of alleged or established non-compliance is the question of the effectiveness of international supervision. A supervisory mechanism may be said to be more or less effective depending on whether those subjected to it obey the law at least partly because of the existence of that mechanism. The idea of effectiveness of supervision is therefore in general linked to the degree of compliance with the law that is being supervised. As indicated, the primary objective of international supervision is to control and to induce compliance by the States Parties with the engagements they entered into. The wording ‘to induce’ compliance is appropriate; supervision cannot ‘ensure’ that treaties are complied with in

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\(^{464}\) At present, even though the USA has shown interest in developing a National Missile Defence (NMD) program, also according to the USA the ABM Treaty as yet remains the cornerstone of strategic stability determining the parameters of the related military efforts of the USA and Russia. See Daalder et al. (2000), p. 18. See also Wilkening (2000).
all circumstances, given the fact that no supervisory mechanism is perfect and only part of supervisory mechanisms is designed to enforce compliance or to correct non-compliance. Only in the hypothetical case that the supervisory mechanism would be perfect and would also function perfectly, any covert violation of the law would be impossible. Measuring the effectiveness of supervision is an immense and quite delicate undertaking, especially when a supervising organisation is entrusted with supervising compliance with the treaty, given that the effectiveness of supervision will vary from one organisation to another as a function of the objectives it aspires to. Furthermore, since what constitutes ‘effectiveness’ is also linked to the objectives of the different phases of the supervisory mechanism, the determination of effectiveness necessarily differentiates along with those phases. The process of verification, for example, can only detect non-compliance but not all cases of non-compliance at that. The choice is generally considered satisfactory when verification makes non-compliance more costly in terms of the risk of discovery or of its human, financial or technological price.\footnote{See Sur (1991), p. 16; Hanski (1998), p. 42.} To what degree verification actually succeeds in attaining this objective can hardly be determined. Even though verification takes place \textit{ex post facto} and therefore cannot prevent non-compliance, its presence as well as the possibility that sanctions be imposed do seem to have a deterrent effect. The effectiveness of this deterrent effect however cannot be measured either, given the nearly complete absence of established cases of non-compliance in the practice of arms control law. Besides, supervisory mechanisms cannot be considered a necessary pre-condition for compliance: the history of arms control law provides examples of agreements lacking supervisory mechanisms that were nevertheless complied with. For these reasons, any ‘assessment’ of effectiveness is bound to remain a purely theoretical exercise. Still, without going into the ‘measurement’ of effectiveness of supervision, it can be upheld that a comprehensive supervisory mechanism that offers procedures and methods for continuous monitoring as well as for verification, dispute settlement and correction/enforcement will deter States Parties from trying to violate the arms control treaty and will contribute to the building of confidence among the States Parties to a much higher degree than a purely informal ‘supervisory mechanism’ could. But then, the existing comprehensive supervisory mechanism should be made use of in practice, for it is a plausible assertion that a lack of practice in itself may detract from the ‘preventive’ (as well as the ‘confidence-building’) effects of the existing procedures.

Whatever the legal force of an official recognition of a violation, the principal guarantee of its effectiveness probably lies in an action of publicity. Publicity results from automatic publication, such as in cases of
judgements in judicial dispute settlement procedures, or may result from the debates in the (plenary) political organs of the supervising organisation and the publicity given to the assessment comprising the results of the verification process. In the absence of treaty provisions to that effect, the States Parties are not required to make public the result of the verification. On the other hand, in the absence of provisions concerning secrecy of the information obtained the States Parties must be deemed free to publish it. Established violations of arms control law which are published can be expected to receive wide attention. This attention may lead to considerable pressure on the State involved to alter its behaviour and to discontinue the established violation. Besides that, a general knowledge that a violation has been committed by a certain State Party will render it more difficult for this State to commit such violation again in the future, given the increased alertness of other States Parties in monitoring the behaviour of this State. Also governmental reports, as part of the fact-finding machinery of the treaty, may eventually be published, thus enabling all kinds of interest groups to make critical comments on government policy as reflected in the reports. This could have a positive effect on improving compliance and effectuating deterrence of the supervisory procedure. However, as long as possible publication and dissemination of information continue to be at the discretion of the States Parties concerned (as generally is the case in arms control law), the effectiveness of supervision in that respect still depends to a large extent on the *ad hoc* co-operation of the States Parties concerned. Moreover, it should be noted that the effect of publicity at the national level to a large degree depends on the reaction of the general public to the information that is revealed. In the field of arms control, the reactions of the public to arms build-up by their governments have not always been negative, as the cases of Iraq, India, Pakistan, Israel and even France sufficiently demonstrate. Although it must be admitted that the effectiveness of a trustworthy ‘people’s voice’ largely depends on the presence of democratic structures in government; the idea that a government is making efforts to enhance the security of the State may seem convincing to a lot of people, pressing to the background the issue that these efforts may have been in breach of arms control obligations.

468 Here, reference is made to the domestic support that the Iraqi government receives in its struggle against the international weapon inspection regime; to the support that the governments of both India and Pakistan received from their respective peoples when they conducted their nuclear weapons tests; to the support that the Israeli government received when developing its nuclear weapons programme; and to the relatively weak protests in France against the French 1996 series of nuclear weapon tests at Mururoa atoll.
7. Concluding remarks

In this chapter, the international legal framework of supervision in arms control law has been extensively discussed. Originally, States solely exercised supervision unilaterally or through their diplomatic organs. As peace-time arms control treaties were concluded, the need was felt for new institutional structures which could provide fresh incentives ‘to help nurture the culture of compliance’. \(^{469}\) With the rise of international organisations after WW II, prospects for true international supervision widened. The process of international supervision can be divided into four separate, though highly interrelated phases, together serving the general purposes of controlling and inducing compliance with the substantive and institutional obligations of the treaty, as well as contributing to the co-operation and the building of confidence between the States Parties. Whereas the phases of monitoring and verification are treaty-specific, the phases of dispute settlement and correction/enforcement are largely regulated by rules of general international law, outside the arms control treaties proper (these phases are largely treaty non-specific). It is important to realise that international supervision cannot ‘ensure’ compliance in all circumstances. Rather, the supervisory mechanisms are meant to induce States into compliance by making detection of non-compliance as likely as possible. In that regard, the strengthening of the fact-finding capabilities of supervising bodies, which can be witnessed as a trend in recent arms control treaties, fulfils a priority purpose.

In the next two chapters (Part IIA) a survey will be made of the treaty-based supervisory mechanisms in multilateral arms control treaties, in order to examine what those mechanisms encompass and, perhaps just as important, what they leave unregulated.