

*International Environmental Law-making  
and Diplomacy Review*

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# **International Environmental Law-making and Diplomacy Review 2016**

Melissa Lewis, Tuula Honkonen and Seita Romppanen (editors)

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# CONTENTS

Foreword.....	v
Editorial preface .....	vii

## **Part I**

### **Introduction to the Effectiveness of MEAs**

The Effectiveness of Multilateral Environmental Agreements: Theory and Practice .....	1
<i>Peter Sand</i>	
Effectiveness of Multilateral Environmental Agreements: Introduction to General Aspects .....	27
<i>Sylvia Bankobeza</i>	

## **Part II**

### **General Aspects of MEA Compliance Regimes**

Legal Character of Compliance Mechanisms .....	47
<i>Malgosia Fitzmaurice</i>	
Comparative Review of Compliance Regimes in Multilateral Environmental Agreements.....	57
<i>Elizabeth Maruma Mrema and Tomkeen Onyambu Mobegi</i>	

## **Part III**

### **Effectiveness of and Compliance with Specific MEAs**

Effectiveness of CITES: Analysis in Relation to National Implementing Legislation .....	121
<i>Fazeela Ahmed Shaheem</i>	
Compliance under Biodiversity-related Conventions: The Case of the Convention on Biological Diversity .....	133
<i>Elisa Morgera</i>	
Compliance under the Basel, Rotterdam and Stockholm Conventions ...	147
<i>Juliette Voinov Kohler</i>	

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**Part IV**

**Interactive Negotiation Skills in the Area of MEA Effectiveness**

The Joensuu Negotiations – A Multilateral Simulation Exercise:  
The Minamata Convention .....159  
*Anne Daniel and Tuula Honkonen*

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# FOREWORD

The compilation of papers in the present *Review* is based on lectures presented during the thirteenth University of Eastern Finland – United Nations Environment Programme (UN Environment) Course on Multilateral Environmental Agreements (MEAs), held from 21 November to 1 December 2016 in Joensuu, Finland.

The publication is aimed at equipping present and future negotiators of MEAs with information and experiences of others in the area of international environmental law-making in order to improve the impact and implementation of these key treaties. The ultimate aim is to strengthen and build environmental negotiation capacity and governance worldwide.

For the past thirteen years, the University of Eastern Finland (previously, the University of Joensuu) has partnered with the UN Environment (previously, UNEP) to conduct a training course on MEAs annually, with each Course focusing on a specific theme. From each Course, selected papers written by lecturers, and participants, have, after a rigorous editing process, been published in the Course *Review* (2004–2015), for the benefit of both Course participants and a wider audience, who are able to access these publications through the internet.<sup>1</sup>

Since each MEA Course has a distinct thematic focus, the *Reviews* address a range of specific environmental issues, in addition to providing more general observations regarding international environmental law-making and diplomacy. The focus of the 2016 course was ‘Effectiveness of Multilateral Environmental Agreements’, and the current *Review* builds upon the existing body of knowledge in this area.

The material presented in this *Review* is intended to expose readers to a variety of issues regarding the effectiveness of and compliance with MEAs. This compilation informs negotiators of options available to them when aiming at making the agreements more effective. These considerations in turn inform policy choices that can enhance bilateral and multilateral cooperation in addressing this issue.

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<sup>1</sup> For an electronic version of this volume, and of the 2004–2015 *Reviews*, please see the University of Eastern Finland – UN Environment Course on Multilateral Environmental Agreements website, <<http://www.uef.fi/unep>>.

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We are grateful to all the contributors for the successful outcome of the thirteenth Course, including the lecturers and authors who transcribed their presentations to compile the *Review*. We would also like to thank Melissa Lewis, Tuula Honkonen and Seita Romppanen for their skillful and dedicated editing of the *Review*, as well as the members of the Editorial Board for providing guidance and oversight throughout this process.

**Professor Jukka Mönkkönen**

Rector of the University of Eastern Finland

**Elizabeth Maruma Mrema**

Director, Law Division,  
United Nations Environment Programme

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# EDITORIAL PREFACE

## 1.1 General introduction

The lectures presented on the thirteenth annual University of Eastern Finland<sup>2</sup> – UN Environment Course on Multilateral Environmental Agreements, from which most of the papers in the present *Review* originate, were delivered by experienced diplomats, members of government and senior academics.<sup>3</sup> One of the Course's principal objectives is to educate participants by imparting the practical experiences of experts involved in international environmental law-making and diplomacy – both to benefit the participants on each Course and to make a wider contribution to knowledge and research through publication in the present *Review*. The papers in this *Review* and the different approaches taken by the authors therefore reflect the professional backgrounds of the lecturers, resource persons and participants (some of whom are already experienced diplomats). The papers in the previous *Reviews*, although usually having particular thematic focuses, present various aspects of the increasingly complicated field of international environmental law-making and diplomacy.

It is intended that the current *Review* will provide practical guidance, professional perspective and historical background for decision-makers, diplomats, negotiators, practitioners, researchers, role-players, stakeholders, students and teachers who work with international environmental law-making and diplomacy. The *Review* encompasses different approaches, doctrines, techniques and theories in this field, including international environmental governance, international environmental law-making, environmental empowerment, and the enhancement of sustainable development generally. The papers in the *Review* are thoroughly edited.

The first and second Courses were hosted by the University of Eastern Finland, in Joensuu, Finland where the landscape is dominated by forests, lakes and rivers. The special themes of the first two Courses were, respectively, 'Water' and 'Forests'. An aim of the organizers of the Course is to move the Course occasionally to different parts of the world. In South Africa, the coastal province of KwaZulu-Natal is an extremely biodiversity-rich area, both in natural and cultural terms, and the chosen special themes for the 2006 and 2008 Courses were therefore 'Biodiversity' and

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<sup>2</sup> The University of Joensuu merged with the University of Kuopio on 1 January 2010 to constitute the University of Eastern Finland. Consequently, the University of Joensuu – UNEP Course was renamed the University of Eastern Finland – UNEP Course. The Course activities are concentrated on the Joensuu campus of the university.

<sup>3</sup> General information on the University of Eastern Finland – UNEP Course on International Environmental Law-making and Diplomacy is available at <<http://www.uef.fi/unesp>>.



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'Oceans'. These two Courses were hosted by the University of KwaZulu-Natal, on its Pietermaritzburg campus. The fourth Course, held in Finland, had 'Chemicals' as its special theme – Finland having played an important role in the creation of international governance structures for chemicals management. The sixth Course was hosted by UNEP in Kenya in 2009, in Nairobi and at Lake Naivasha, with the special theme being 'Environmental Governance'. The theme for the seventh Course, which returned to Finland in 2010, was 'Climate Change'. The eighth Course was held in Bangkok, Thailand in 2011 with the theme being 'Synergies Among the Biodiversity-Related Conventions'. The ninth Course was held in 2012 on the island of Grenada, near the capital St George's, with the special theme being 'Ocean Governance'. The tenth Course, which in 2013 returned to its original venue in Joensuu, Finland, had 'Natural Resources' as its special theme. The eleventh Course was again held in Joensuu with a special theme of 'Environmental Security'. The twelfth Course was hosted by Fudan University in Shanghai, China, with the recurring special theme 'Climate Change'. The thirteenth Course was again hosted by the UEF in Joensuu, with the special theme 'Effectiveness of Multilateral Environmental Agreements' – and this is therefore the special theme of the present volume of the *Review*.

The Course organizers, the Editorial Board and the editors of this *Review* believe that the ultimate value of the *Review* lies in the contribution which it can make, and hopefully is making, to knowledge, learning and understanding in the field of international environmental negotiation and diplomacy. Although only limited numbers of diplomats and scholars are able to participate in the Courses themselves, it is hoped that through the *Review* many more are reached. The papers contained in the *Review* are generally based on lectures or presentations given during the Course, but have enhanced value as their authors explore their ideas, and provide further evidence for their contentions.

All involved with the *Review* have been particularly grateful to receive contributions through the various editions both from new writers in every volume, and by writers who have written multiple papers on an ongoing basis and who have thereby been able to develop coherent bodies of work. Many of the people who have contributed papers have been involved in some of the most important environmental negotiations the world has seen. Publication of these contributions means that their experiences, insights and reflections are recorded and disseminated, where they might not otherwise have been committed to print. The value of these contributions cannot be overstated. To complement this, an ongoing feature has been the publication of papers by Course participants who have brought many fresh ideas to the *Review*.

Before publication in the *Review*, all papers undergo a rigorous editorial process. Each paper is read and commented on several times by each of the editors, is returned to the authors for rewriting and the addressing of queries, and is only included in the *Review* after consideration by, and approval of, the Editorial Board. As is alluded to above, the papers published in the *Review* vary in nature. Some are

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based on rigorous academic research; others have a more practical focus, presenting valuable reflections and advice from those involved in the real-world functioning of international environmental law; and still others are a combination of both. Since the 2012 volume, papers have undergone an anonymous peer-review process<sup>4</sup> where this process is requested by their author(s).

## 1.2 The effectiveness of MEAs

The special theme of the 2016 Course (and hence the current volume of the *Review*) was the effectiveness of multilateral environmental agreements (MEAs). This is an apt theme, given that the trend since the turn of the millennium has generally been to avoid the negotiation of new MEAs, and to instead focus on improving the implementation and effectiveness of existing agreements. When new regulatory subjects have emerged, the preferred option has often been to include these under an existing multilateral environmental regime rather than to create an entirely new agreement with its own institutions and mechanisms. In those instances in which new treaties have been negotiated, the need to establish compliance mechanisms with the aim of improving treaty implementation has tended to receive explicit recognition in these instruments' legal texts. Examples of this, relatively recent, phenomenon are seen in the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Resulting from their Utilization<sup>5</sup> (Nagoya Protocol) and the 2013 Minamata Convention on Mercury<sup>6</sup> – both of which are examined in this volume of the *Review*.

The effectiveness of MEAs can be understood and measured in a variety of ways.<sup>7</sup> In general, one can distinguish between legal, political and problem-solving or environmental effectiveness. Legal effectiveness naturally refers to legal compliance with the obligations introduced by an MEA, and is coupled with behavioral effectiveness in meeting these obligations. The political effectiveness of MEAs is measured by state acceptance of, and participation in, the legal arrangements. However, political effectiveness is mainly concerned with the breadth of the international environmental cooperation among states, not the depth of that cooperation. The concept of environmental effectiveness seeks, in part, to respond to the latter by focusing on the strin-

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<sup>4</sup> Per generally accepted academic practice, the peer-review process followed involves the sending of the first version of the paper, with the identity of the author/s concealed, to at least two experts (selected for their experience and expertise) to consider and comment on. The editors then relay the comments of the reviewers, whose identities are not disclosed unless with their consent, to the authors. Where a paper is specifically so peer-reviewed, successfully, this is indicated in the first footnote of that paper. A paper may be sent to a third reviewer in appropriate circumstances. As part of the peer-review process, the editors work with the authors to ensure that any concerns raised or suggestions made by the reviewers are addressed.

<sup>5</sup> Nagoya, 29 October 2010, in force 16 October 2014, <<http://www.cbd.int/abs/>>.

<sup>6</sup> Geneva, 19 January 2013, in force 16 August 2017, <<http://www.mercuryconvention.org/>>.

<sup>7</sup> For relevant literature, see the references included in the papers by Peter H. Sand and Fazeela Ahmed Shaheem in this *Review*.

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gency of state commitments and their ability to mitigate the environmental problem in question. This aspect is then coupled with the levels of state participation in and compliance with the relevant MEAs. It is to be noted that there are also more nuanced approaches to understanding the effectiveness of international environmental law, and MEAs more specifically. Such approaches focus, *inter alia*, on the nature of the problems that the international legal arrangements address, on the role of exogenous factors (such as power politics) in determining their effectiveness, or on the impacts of the infrastructure of the regulatory environment within this context.

Compliance is a recurring theme within discussions concerning MEA effectiveness. Professor Louis Henkin's (1917–2010) famous comment that '[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'<sup>8</sup> remains highly relevant today. While it can generally be assumed that states attempt in good faith to comply with their international commitments, there are always reasons for states not to comply with particular obligations. In response, there are two basic legal approaches to improving compliance with international (environmental) law: those that are facilitative/managerial and those that are more punitive/enforcement-based in nature. The former regards non-compliance as resulting primarily from capacity constraints on the part of states, whereas the latter views compliance problems as resulting from a cost-benefit analysis where the costs of compliance have outweighed the benefits thereof. Consequently, the facilitative approach focuses on encouraging and facilitating cooperation by removing barriers to effective cooperation through assistance and compliance management plans. In contrast, the enforcement approach emphasizes legal obligations, binding dispute resolution and (the threat of) sanctions. In practice, both approaches are relied upon by many multilateral environmental regimes. Whether the approach to (non-)compliance is more political or legal in nature, facilitative or adversarial, depends on the Parties, on the legal and institutional framework for states' cooperation, and on the specific compliance mechanisms that have been established under a treaty regime. Examples of both approaches, and their contribution to treaty effectiveness, are discussed in several papers in this volume of the *Review*.

### 1.3 The papers in the 2016 Review

The present *Review* is divided into four Parts. Part I introduces readers to the concept of effectiveness and the types of measures and mechanisms that can contribute to the enhanced effectiveness of MEAs. In the first paper, Peter Sand begins by examining several of the theoretical explanations for treaty effectiveness. The author divides attempts to define MEA effectiveness into questions of legal effectiveness, behavioural effectiveness and ecological effectiveness, but cautions that these approaches 'are not mutually exclusive, and that they will frequently overlap in any evaluation of a treaty's

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<sup>8</sup> Louis Henkin, 'How Nations Behave' (2nd ed., Columbia University Press, 1979) 47.

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effectiveness over time'. He proceeds to offer practical insight into treaty effectiveness by drawing examples from his personal experiences of assessing the effects of MEAs 'on the ground'. The MEAs discussed in these examples include UNEP's regional seas agreements, the Convention on International Trade on Endangered Species of Fauna and Flora (CITES),<sup>9</sup> and the Convention on Long-Range Transboundary Air Pollution<sup>10</sup> and its protocols. Finally, in an epilogue to the paper, the author examines the interface between effectiveness and legitimacy, using an example concerning Japan's persistent non-compliance with certain aspects of its CITES commitments and the apparent inconsistency between the CITES regime's response in this instance and its response to the non-compliance of states carrying less diplomatic clout.

In the second paper of Part I, Sylvia Bankobeza defines the effectiveness of an MEA as 'the degree or extent to which an environmental treaty is successful in meeting its objectives by delivery of desired results'. The author briefly outlines some of the methods that are used to assess the effectiveness of global MEAs. She focuses in particular on regular reviews of performance at Conferences and Meetings of the Parties (COPs and MOPs), the manner in which these are supported by the work of subsidiary bodies and treaty secretariats, and the role of commissioned studies. In the remainder of the paper, the author introduces a variety of factors that can contribute to an MEA's effectiveness. These include the national legislation, policies, and administrative actions through which MEA provisions are implemented; regular meetings of the contracting Parties; application of the principle of common but differentiated responsibility; and the establishment of expert bodies, national reporting mechanisms, financial mechanisms, mechanisms that support technology transfer, non-compliance mechanisms and procedures, and dispute settlement mechanisms.

Part II contains two papers, which address general aspects of MEA compliance regimes. First, Malgosia Fitzmaurice examines the law-making character of MEA COP decisions – such decisions being the route through which MEAs generally establish compliance mechanisms. The author explains the variation that can occur in the legally binding force of COP decisions, depending on the provisions of the primary instrument. She further stresses that the legal character of MEA compliance mechanisms has to be investigated on a case-by-case basis, and highlights the particular difficulties that arise in characterizing the practice of treaty bodies in instances in which the primary treaty contains no enabling clause. The paper further provides an introduction to MEA compliance mechanisms by distinguishing these from dispute settlement mechanisms and highlighting several of the features that tend to be common to such mechanisms, despite variation being seen from one treaty regime to the next.

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<sup>9</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org>>.

<sup>10</sup> Convention on Long-Range Transboundary Air Pollution, Geneva, November 13 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, <<http://www.unece.org/env/lrtap/>>.

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The paper by Elizabeth Maruma Mrema and Tomkeen Onyambu Mobegi endeavours to provide a comprehensive review and comparison of existing and emerging mechanisms for ensuring MEA compliance. The paper begins by describing the need for, and approaches to developing, MEA compliance mechanisms. It then discusses the compliance mechanisms of various MEAs, and the application and effectiveness thereof. In the course of this discussion, the authors emphasize the importance of linkages – both between MEAs and to the 2030 Agenda for Sustainable Development and the Sustainable Development Goals.<sup>11</sup> They further identify various challenges that states face in complying with their international commitments, and suggest solutions and opportunities for overcoming these.

Part III of the *Review* focuses on effectiveness and compliance in relation to specific MEAs or MEA clusters. In the opening paper of Part III, Fazeela Ahmed Shaheem examines the effectiveness of CITES in relation to national implementing legislation. After providing an overview of the Convention and Parties' commitment to introduce national legislation for the implementation thereof, the author outlines the mechanisms that have been developed to assist Parties in fulfilling this commitment, as well as the more coercive measures that are available in the form of trade suspensions. The author concludes by highlighting the role that CITES' experiences play in offering lessons for other treaty regimes.

The paper by Elisa Morgera addresses compliance with the Convention on Biological Diversity<sup>12</sup> (CBD) and one of its daughter treaties, the Nagoya Protocol. The author explains that, although it is principally mandated to keep the Convention's implementation under review, the CBD COP has 'mainly evolved into a prolific norm-creating body', while the Secretariat and the Subsidiary Body on Scientific, Technical, and Technological Advice have historically engaged in little analysis of national implementation legislation. She proceeds to discuss Parties' recognition, in 2010, of the need to consider the possible development of additional mechanisms to facilitate compliance with the Convention, and the resultant establishment of a new Subsidiary Body on Implementation (SBI). The initial activities of the SBI are briefly considered. The author then examines the approach that has been taken to compliance under the Nagoya Protocol, which – unlike its parent Convention – makes explicit provision for the creation of a compliance mechanism. As a result of the Protocol's provisions on traditional knowledge and genetic resources held by indigenous peoples and local communities, the procedures for its Compliance Committee included a number of innovative provisions on the participation of, and feedback from, these groups. The author highlights the potential of these provisions to act as a precedent for other MEA compliance mechanisms. She concludes her

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<sup>11</sup> 'Transforming our world: The 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015. See also 'Delivering on the 2030 Agenda for Sustainable Development', United Nations Environment Assembly of the UNEP Res. 2/5 (2016) at 2.

<sup>12</sup> Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>.

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paper by identifying several other international processes which could potentially be used to ensure compliance with the CBD's provisions on indigenous peoples.

The final paper of Part III, by Juliette Voinov Kohler, examines compliance within the context of three global conventions aimed at protecting human health and the environment from hazardous chemicals and wastes: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal<sup>13</sup> (Basel Convention), Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade<sup>14</sup> (Rotterdam Convention), and Stockholm Convention on Persistent Organic Pollutants<sup>15</sup> (Stockholm Convention). Noting that 'compliance regimes are treaty-specific and are therefore, to some extent, tailored to the characteristics of each Convention', the author begins by providing a brief overview of each of the three conventions, focusing in particular on the elements that are most relevant from a compliance perspective. The only compliance regime to thus far have been established within this cluster of instruments is the Basel Convention Implementation and Compliance Committee. The author describes the design of this mechanism and the manner in which it has been used since its creation. She then presents an overview of the status of development of compliance regimes under the Rotterdam and Stockholm Conventions.

Part IV of the *Review* reflects the interactive nature of the Course – and the fact that education and dissemination of knowledge are at the core of the Course and of the publishing of this *Review*. During the Course, international negotiation simulation exercises were organized to introduce participants to the real-life challenges facing negotiators of international environmental agreements. Participants were given individual instructions and a hypothetical, country-specific, negotiating mandate and were guided by international environmental negotiators. Excerpts from, explanations of, and consideration of the pedagogical value of, one of the exercises are included in a paper in Part IV. This paper describes a negotiation exercise that, based on experiences from exercises run in previous years of the Course, was devised and run by Anne Daniel, who was assisted by Tuula Honkonen in preparing the exercise. The scenario for the negotiation simulation focused on the Minamata Convention on Mercury. The simulation was hypothetical but drew upon issues at play in actual ongoing negotiations. The scenario was set at the first meeting of the COP to the Minamata Convention, and focused on substantive, institutional and procedural issues. Negotiations took place within four informal contact groups, whose establish-

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<sup>13</sup> Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <<http://www.basel.int>>.

<sup>14</sup> Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <<http://www.pic.int>>.

<sup>15</sup> Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <<http://chm.pops.int/>>.

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ment was proposed by the COP President, and subsequently within the high-level segment of the COP plenary. The contact groups dealt with four key issues under the Convention that had been identified as requiring further negotiation, namely: the reporting format; the monitoring aspects of the effectiveness evaluation arrangements; the specific international programme of the financial mechanism; and the rules of procedure of the Implementation and Compliance Committee. In addition to requiring participants to explore a number of substantive and procedural issues, the simulation was intended to expose participants to the experience of legal drafting and encourage them to develop their negotiation skills in a realistic setting.

While the majority of the papers in the present *Review* deal with aspects of specific multilateral environmental agreements, and thereby provide a written memorial for the future; the negotiation exercises provide, in a sense, the core of each Course. This is because each Course is structured around the practical negotiation exercises which the participants undertake; and it is suggested that the papers explaining the exercises provide insights into the international law-making process. The inclusion of the simulation exercises has been a feature of every *Review* published to date, and the Editorial Board, editors and Course organizers believe that the collection of these exercises has significant potential value as a teaching tool for the reader or student seeking to understand international environmental negotiation. It does need to be understood, of course, that not all of the material used in each negotiation exercise is distributed in the *Review*. This is indeed a downside, but the material is often so large in volume that it cannot be reproduced in the Course publication.

It is the hope of the editors that the various papers in the present *Review* will not be considered in isolation. Rather, it is suggested that the reader should make use of all of the *Reviews* (currently spanning the years 2004 to 2015), all of which are easily accessible online through a website provided by the University of Eastern Finland,<sup>16</sup> to gain a broad understanding of international environmental law-making and diplomacy.

*Melissa Lewis,<sup>17</sup> Tuula Honkonen<sup>18</sup> and Seita Romppanen<sup>19</sup>*

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<sup>16</sup> See <<http://www.uef.fi/en/unep/publications-and-materials>>.

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# PART I

## INTRODUCTION TO THE EFFECTIVENESS OF MEAs





# THE EFFECTIVENESS OF MULTILATERAL ENVIRONMENTAL AGREEMENTS: THEORY AND PRACTICE

*Peter H. Sand*<sup>1</sup>

## 1 Introduction

‘Effectiveness is an elusive concept.’ That is the cautionary opening statement from a seminal study edited by Oran Young,<sup>2</sup> one of the eminent scholars who have struggled with the concept for many years – in protracted debates between ecologists, political scientists, lawyers, economists and sociologists on the one hand, and their counterparts among national and international decision-makers, politicians and diplomats on the other.

What, then, makes international environmental law effective? And if sometimes it is and sometimes it is not, which types of legal strategies can make it more so? This paper, based on my introduction to the 2016 UEF – UNEP Course on Multilateral Environmental Agreements (MEAs), provides an overview of MEA effectiveness from two perspectives: an academic one, with a view to identifying some of the salient theoretical explanations of treaty effectiveness; and a more down-to-earth one, based on my practical experience working with several global and regional environmental treaty secretariats over more than thirty years. The three empirical

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<sup>1</sup> Lecturer in International Environmental Law, University of Munich; former Associate Professor of Law, McGill University, Montreal; Senior Legal Officer, FAO; Secretary-General, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); Chief, UNEP Environmental Law Unit; Senior Environmental Affairs Officer, UNECE; Legal Adviser for Environmental Affairs, World Bank; e-mail: peterhsand@t-online.de. Comments on an earlier draft of this contribution – by Helmut Breitmeier, Peter Haas, Ronald Mitchell, Kal Raustiala, Arild Underdal, David Victor and Oran Young – are gratefully acknowledged. NOTE: This paper underwent a formal peer review process, through two anonymous reviewers.

<sup>2</sup> Oran R. Young, Marc A. Levy and Gail Osherenko, ‘The Effectiveness of International Environmental Regimes’ in Oran R. Young (ed.), *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioral Mechanisms* (MIT Press, 1999) 1-32 at 3.

examples selected for this purpose (the multilateral regimes for regional seas, endangered species, and transboundary air pollution) all date back to the beginnings of international environmental law-making in the 1970s; but as you could find from the other topical themes and case studies on the agenda in the Course, some of the lessons learned have indeed influenced the practice and design of subsequent legal instruments – be it as potential models to be followed, or by highlighting potential pitfalls to be avoided. Finally, by way of a cautionary epilogue, a prominent current case will illustrate the vexing problem of the interface of effectiveness and legitimacy of a global treaty regime.

## 2 Theory

### 2.1 Introduction

Agenda 21, the action plan of the 1992 Rio Conference on Environment and Development (UNCED), lists among its specific objectives in Chapter 39 (International Legal Instruments and Mechanisms) ‘to improve the *effectiveness* of institutions, mechanisms and procedures for the administration of agreements and instruments’.<sup>3</sup> That goal, which originated from a preparatory report issued in January 1992,<sup>4</sup> also re-appears in the activities proposed in Chapter 39: ‘While ensuring the effective participation of all countries concerned, [States] Parties should at periodic intervals review and assess both the past performance and *effectiveness* of existing international agreements or instruments as well as the priorities for future law making on sustainable development.’<sup>5</sup>

As Young and his fellow regime-theorists point out, the ‘effectiveness’ of MEAs can mean a number of different things. Indeed, the intergovernmental legal working group of the UNCED Preparatory Committee came up with no less than 32 ‘criteria for evaluating the effectiveness of existing agreements and instruments’, dealing with a wide range of issues including: treaty objectives and achievement; participation; implementation; information; operation, review and adjustment; and codification programming.<sup>6</sup> In light of these and other criteria formulated in the vast literature

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<sup>3</sup> Agenda 21, UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc. A/CONF.151/26/Rev.1 (1992), available at <<https://sustainabledevelopment.un.org/agenda21/>>, para. 39.3(f) (emphasis added).

<sup>4</sup> ‘Survey of Existing Agreements and Instruments and Its Follow-Up: Report of the Secretary-General of the Conference’, UN Doc. A/CONF.151/PC/103 (1992) 16, para. 40(d).

<sup>5</sup> Agenda 21, para. 39.5.

<sup>6</sup> UNCED Preparatory Committee, 3rd Session (Geneva, August-September 1991), Decision 3/25, UN Doc. A/46/48, vol. II (1991); reprinted in Peter H. Sand (ed.), *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments* (Grotius Publications, 1992) 4-7.

on the topic,<sup>7</sup> – and at the risk of over-simplifying matters – we can boil down the various attempts at defining an MEA's 'effectiveness' (in other words, the question how well a treaty 'works'),<sup>8</sup> to three basic questions:<sup>9</sup>

- (1) *legal effectiveness*: how and to what extent do states actually meet their international commitments under an environmental treaty to which they have become Parties?
- (2) *behavioral effectiveness*: which are the measurable positive changes in the environmental policies and practices of states that are attributable to their participation in a treaty?
- (3) *ecological effectiveness*: how successfully have the environmental problems targeted by a treaty been solved or mitigated as a result of cooperative action by the contracting states?

While the first of these questions invokes the classic *pacta sunt servanda* maxim from the general law of treaties, the two latter ones correspond to the basic distinction between 'obligations of means' (conduct, behavior) and 'obligations of result' (ful-

<sup>7</sup> For instance, see Claude Imperiali (ed.), *L'effectivité du droit international de l'environnement: contrôle de la mise en oeuvre des conventions internationales* (Economica, 1998); Gabriela Kütting, *Environment, Society and International Relations: Towards More Effective International Environmental Agreements* (Routledge, 2000); Michael J. Bowman, 'The Effectiveness of International Nature Conservation Agreements', in Helle T. Anker and Ellen M. Basse (eds), *Land Use and Nature Protection: Emerging Legal Aspects* (DJOF Publishing, 2000) 105-151; Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve Journal of International Law* (2000) 387-440; Michael A. Mehling, 'Betwixt Scylla and Charybdis: The Concept of Effectiveness in International Environmental Law', 13 *Finnish Yearbook of International Law* (2002) 129-182; Edward L. Miles *et al*, *Environmental Regime Effectiveness: Confronting Theory with Evidence* (MIT Press, 2002); Jon Hovi, Delef F. Sprinz and Arild Underdal, 'The Oslo-Potsdam Solution to Measuring Regime Effectiveness: Critique, Response, and the Road Ahead', 3 *Global Environmental Politics* (2003) 74-96; W. Bradnee Chambers, 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties', 16 *Georgetown International Environmental Law Review* (2004) 501-532; Ivana Zovko, 'International Law-Making for the Environment: A Question of Effectiveness', 2 *International Environmental Law-Making and Diplomacy Review* (2005) 109-128; Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge University Press, 2006); Tullio Treves *et al* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (T.M.C. Asser Press, 2009); Tobias Böhmelt and Ulrich H. Pilster, 'International Environmental Regimes: Legalisation, Flexibility and Effectiveness', 45 *Australian Journal of Political Science* (2010) 245-260; Helmut Breitmeier, Arild Underdal and Oran R. Young, 'The Effectiveness of International Environmental Regimes: Comparing and Contrasting Findings from Quantitative Research', 13 *International Studies Review* (2011) 579-605; Karin Baakman, *Testing Times: The Effectiveness of Five International Biodiversity-Related Conventions* (Wolf Legal Publishers, 2011); Chenaz B. Sealarbokus, 'International Environmental Agreements (IEAs): An Integrated Perspective on the Concept of Effectiveness', 2 *International Journal of Environmental Protection and Policy* (2014) 76-95; Wendy Jackson and Ton Bührs, 'International Environmental Regimes: Understanding Institutional and Ecological Effectiveness', 18 *Journal of International Wildlife Law and Policy* (2015) 63-83.

<sup>8</sup> See P. J. Simmons and Chantal de Jonge Oudraat (eds), *Managing Global Issues: Lessons Learned* (Carnegie Endowment for International Peace, 2001) 14; Durwood Zaelke, Donald Kaniaru and Eva Kružíková (eds), *Making Law Work: Environmental Compliance and Sustainable Development* (Cameron May, 2005); Geir Ulfstein (ed.), *Making Treaties Work* (Cambridge University Press, 2010).

<sup>9</sup> See also Dan Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2010) 253.

filment, performance) from general contract law.<sup>10</sup> The three approaches are not mutually exclusive, and they will frequently overlap in any evaluation of a treaty's effectiveness over time.

## 2.2 Legal effectiveness (output)

Concern for the effectiveness of legal instruments has facetiously been described as the 'holy grail of modern international lawyers'.<sup>11</sup> In purely formal terms, to begin with, a treaty becomes 'effective' once it enters into force, usually after the stipulated minimum number of ratifications by signatory states has been reached, whereupon it is considered legally binding between the contracting Parties. With the treaty membership gradually expanding, in the course of subsequent accessions by other states, one simple way of measuring the *territorial* legal effectiveness of an MEA could be its current geographical range.<sup>12</sup> For some agreements, that range may be expanded by appropriate treaty design; for example, a prohibition of trade with non-member states will reduce the incentive for 'free-riding' by outsiders and in fact can be shown to have contributed to effective near-universal participation in some MEAs.<sup>13</sup> Yet, geographical coverage alone does not tell us anything about the application of an MEA in state practice and about actual compliance by contracting Parties with their treaty obligations. Some databases have therefore begun also to record and analyze other indicators for measuring and comparing the performance of member states in applying a treaty.<sup>14</sup>

Most multilateral agreements specify the measures to be taken by the contracting Parties at the domestic level, with a view to implementing a treaty's objectives. Fre-

<sup>10</sup> Dinah Shelton, *Techniques and Procedures in International Environmental Law*, UNITAR/UNEP/IUCN Programme of Training for the Application of Environmental Law, Course 3 (2nd ed., United Nations Institute for Training and Research, 2006) 2.

<sup>11</sup> Thomas W. Wälde, 'Non-Conventional Views on "Effectiveness": The Holy Grail of Modern International Lawyers? The New Paradigm? A Chimera? Or a Brave New World in the Global Economy?', 4 *Austrian Review of International and Comparative Law* (1999) 164-203.

<sup>12</sup> For instance, see the UN Treaties Database, available at <[https://treaties.un.org/Pages/Treaties.aspx?id=27&subid=A&clang=\\_en](https://treaties.un.org/Pages/Treaties.aspx?id=27&subid=A&clang=_en)> and the FAO/IUCN/UNEP *Ecolex* Database <<http://www.ecolex.org/result/?type=treaty>> (both visited 1 February 2017).

<sup>13</sup> For instance, Art. 4 of the Montreal Protocol (Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <<http://ozone.unep.org/>>); see Winfried Lang, 'Trade Restrictions as a Means of Enforcing Compliance with International Environmental Law', in Rüdiger Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Springer, 1996) 265-283. Similarly, the imposition of 'comparable' documentation requirements for trade with non-Party states under Art. X of CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org/>>) (*infra* section 3.2) ultimately induced most 'hold-out' countries to join, thus turning free-riders into 'forced-riders', in the terms of Charles S. Pearson, *Economics and the Global Environment* (Cambridge University Press, 2000) 280.

<sup>14</sup> For instance, see Helmut Breitmeier, Oran R. Young and Michael Zürn, *Analyzing International Environmental Regimes: From Case Study to Database* (MIT Press, 2006); Ronald B. Mitchell, *International Environmental Agreements (IEA) Database: Performance Indicator Data*, available at <<http://iea.uoregon.edu/>>.

quently, those measures are further defined and elaborated in subsequent interpretative resolutions and decisions by the treaty's governing body (such as a Conference of the Parties).<sup>15</sup> Moreover, as postulated by Agenda 21,<sup>16</sup> a number of agreements now provide for periodic reviews of the performance of states in meeting their treaty commitments, on the basis of regular national reports and in some cases on the basis of independent expert assessments.<sup>17</sup> The historical role model for this approach was the system introduced in the 1920s by the International Labour Organization (ILO)<sup>18</sup> to supervise the national application of its conventions and standards,<sup>19</sup> several of which deal with occupational safety and health in the working environment.<sup>20</sup> The mechanisms and 'systems of implementation review' (SIRs) so established in the field of the environment serve as a feedback loop to ensure the continuing effectiveness of the treaties concerned.<sup>21</sup> Along with a range of innovative procedures for identifying, exposing and in some cases sanctioning non-compliance,<sup>22</sup> they are said to contribute to the development of a 'culture of compliance in the international environmental regime'.<sup>23</sup>

Yet, as pointed out by critics of a purely legal approach to compliance with the mere letter of treaty obligations, 'international environmental law is filled with examples

<sup>15</sup> See Annecoos Wiersema, 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements', 31 *Michigan Journal of International Law* (2009) 231-287; Michael J. Bowman, 'Beyond the "Keystone" COPs: The Ecology of Institutional Governance in Conservation Regimes', 15 *International Community Law Review* (2013) 5-43; Tim Staal, 'Exercising or Evading International Public Authority? The Many Faces of Environmental Post-Treaty Instruments', 7 *Goettingen Journal of International Law* (2016) 9-48.

<sup>16</sup> *Supra* note 3.

<sup>17</sup> See David G. Victor, Kal Raustiala and Eugene B. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments* (MIT Press, 1998); and Kal Raustiala, *Reporting and Review Institutions in 10 Multilateral Environmental Agreements* (UNEP, 2001).

<sup>18</sup> See <<http://www.ilo.org>>.

<sup>19</sup> Ernest A. Landy, *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience* (Stevens & Sons, 1966).

<sup>20</sup> See Virginia A. Leary, 'Working Environment' in Sand, *The Effectiveness of International*, *supra* note 6, 362-391; and the most recent Report of the Committee of Experts on the Application of Conventions and Recommendations, ILO Conference, 105th Session 2016: *Application of International Labour Standards* (ILO, 2016), available at <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_448720.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_448720.pdf)> (visited 10 February 2017).

<sup>21</sup> Jessica T. Mathews, 'Redefining Security', 68 *Foreign Affairs* (1989) 162-177 at 176.

<sup>22</sup> Patrick Szell, 'Supervising the Observance of MEAs', 37 *Environmental Policy and Law* 37 (2007) 79-83; Treves *et al*, *Non-Compliance Procedures*, *supra* note 7. See also the Guidelines on Compliance and Enforcement of Multilateral Environmental Agreements adopted by the UNEP Governing Council in February 2002 (UN Doc. UNEP/GCSS.VII/4/Add.2), as presented by Elizabeth Maruma Mrema, 'Implementation, Compliance and Enforcement of MEAs: UNEP's Role' in Marko Berglund (ed.), *International Environmental Law-Making and Diplomacy Review* 2004, University of Joensuu – UNEP Course Series 1 (University of Joensuu, 2005) 125-149; and most recently, the 'Implementation and Compliance Mechanism' established by Article 15 of the 2015 Paris Agreement under the UN Framework Convention on Climate Change, UN Doc. FCCC/CP/2015/L.9 (2015).

<sup>23</sup> Ruth Greenspan Bell, 'Developing a Culture of Compliance in the International Environmental Regime', 27 *Environmental Law Reporter* (1997) 10402-10416. See also Karen N. Scott, 'Non-Compliance Procedures and the Implementation of Commitments under Wildlife Treaties' in Michael J. Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar Publishing, 2016) 414-436.

of agreements that have had high compliance but limited influence on behavior'.<sup>24</sup> Conversely, treaties experiencing significant non-compliance can still be effective if they induce changes in behavior.<sup>25</sup> In a broader view of effectiveness, therefore, legal compliance with a treaty commitment should be distinguished from the extent to which the commitment has actually influenced the behavior of states so as to advance the goals that inspired the treaty.<sup>26</sup>

### 2.3 Behavioral effectiveness (outcome)

There have been a number of attempts at defining and measuring the effects of multilateral agreements in terms of changing the behavior of states at the level of domestic environmental policies and regulations.<sup>27</sup> The comparative 'effectiveness surveys' undertaken for that purpose – either at the request of a treaty's governing body, by intergovernmental or non-governmental organizations, or as independent *ad hoc* academic studies – cover a wide range of MEAs as applied in member countries worldwide.<sup>28</sup> Perhaps the longest-standing and most elaborate initiative of this kind is the National Legislation Project established by the Conference of the Parties (COP) to the Convention on International Trade in Endangered Species of Wild Fauna and Flora in 1992 and reviewed at each biennial meeting of the COP.<sup>29</sup> Under that system, the national laws of all member states are ranked by the Secretariat in one of three categories: 1 = legislation believed generally to meet the mandatory requirements for CITES implementation;<sup>30</sup> 2 = legislation believed to meet only some of those requirements; and 3 = legislation believed generally not to meet the requirements.<sup>31</sup> Pursuant to the CITES 'Compliance Procedures' codified by the

<sup>24</sup> Victor *et al*, *The Implementation and Effectiveness*, *supra* note 17 at 7.

<sup>25</sup> Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds), *Handbook of International Relations* (Sage Publications, 2002) 538-558 at 539.

<sup>26</sup> Kal Raustiala and David G. Victor, 'Conclusions', in Victor *et al*, *The Implementation and Effectiveness*, *supra* note 17, 659-707 at 661; see also W. Bradney Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements* (United Nations University Press, 2008) 129: 'When legal scholars do study effectiveness it is from the standpoint of compliance alone and they are not concerned with behavior of the actors the treaty is trying to change.'

<sup>27</sup> See Kenneth Hanf and Arild Underdal, 'Domesticating International Commitments: Linking National and International Decision-Making' in Arild Underdal (ed.), *The Politics of International Environmental Management* (Kluwer Academic Publications, 1998) 149-170; and Oran R. Young, 'The Behavioral Effects of Environmental Regimes: Collective-Action vs. Social-Practice Models', 1 *International Environmental Agreements: Politics, Law and Economics* (2001) 9-29.

<sup>28</sup> For instance, see the list of surveys carried out between 1992 and 1998, in Peter H. Sand, 'A Century of Green Lessons: The Contribution of Nature Conservation Regimes to Global Governance', 1 *International Environmental Agreements: Politics, Law and Economics* (2001) 33-72 at 38 (Box 2); see also *supra* note 17.

<sup>29</sup> 'National Laws for Implementation of the Convention', Res. Conf. 8.4 (Rev. CoP15 (1992/2010)).

<sup>30</sup> Specified as including: (a) designation of national CITES management and scientific authorities; (b) prohibition of trade in violation of the Convention; and (c) penalization of such trade; and (d) confiscation of specimens illegally traded or possessed. See Rüdiger Wolfrum, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law', 272 *Hague Academy of International Law: Recueil des Cours* (1998) 9-154 at 50.

<sup>31</sup> For background and subsequent practice, see Rosalind Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (Earthscan, 2002) 134-147.

COP in 2007,<sup>32</sup> states persistently found in category 3 may then become subject to trade sanctions (suspension of all trade in CITES-listed species) imposed by the Standing Committee.<sup>33</sup>

Since 1992, trade bans for inadequate domestic laws were thus imposed on at least 25 states; in 20 cases, the embargoes resulted in new or amended national regulation systems and were accordingly lifted by the Standing Committee; five of the embargoes (targeting Djibouti, Guinea-Bissau, Liberia, Somalia and Mauritania) continue in force.<sup>34</sup> The system of ‘collective retorsion’<sup>35</sup> for a state’s failure to comply with the Convention is therefore generally considered as highly effective;<sup>36</sup> in some cases, the mere threat of a ban was sufficient to bring about compliance. It must be kept in mind, however, that most of the countries concerned were developing countries, where the real causes of non-compliance are often related to a lack of administrative, technical and financial facilities.<sup>37</sup> The CITES Compliance Procedures therefore provide for a number of prior non-coercive measures (including information assistance, expert advice and capacity-building) to induce compliant behavior, before recommending default penalties (i.e., trade sanctions) as a last resort.

## 2.4 Ecological effectiveness (impact)

Ultimately, though, the success or failure of a treaty – its ‘problem-solving capacity’ or ‘functional effectiveness’<sup>38</sup> – will have to be ascertained by its impact not only on the subsequent behavior of member states, but on the physical or biological condi-

<sup>32</sup> ‘CITES compliance procedures’, Res. Conf. 14.3 (2007).

<sup>33</sup> Peter H. Sand, ‘Enforcing CITES: The Rise and Fall of Trade Sanctions’, 22 *Review of European, Comparative and International Environmental Law* (2013) 251-263, reprinted in Ludwig Krämer (ed.), *Enforcement of International Law* (Edward Elgar Publishing, 2016), chapter 18.

<sup>34</sup> According to the national legislation list presented at the most recent CITES Conference of the Parties (Johannesburg, 2016), 52.2 per cent of the contracting Parties are now in category 1; 24.7 per cent are in category 2; while 19.2 per cent remain in category 3. See CoP17 Doc. 22 (2016) para. 8, updated by SC67 Doc. 11 (26 August 2016) para 73. CITES trade embargoes have also been imposed for non-compliance with other obligations under the Convention, including inadequate reporting and inadequate ivory controls; for a complete list (1985–2016), see Peter H. Sand, ‘International Protection of Endangered Species: Whither Conservation Diplomacy?’ 20 *Asia Pacific Journal of Environmental Law* (2017) 5-18.

<sup>35</sup> See Thomas Giegerich, ‘Retorsion’ in Rüdiger Wolfrum (ed.), 8 *Max Planck Encyclopedia of Public International Law* (2012) 976-981.

<sup>36</sup> Duncan Brack, ‘Environmental Treaties and Trade: Multilateral Environmental Agreements and the Multilateral Trading System’ in Gary P. Sampson and W. Bradnee Chambers (eds), *Trade, Environment and the Millennium* (2nd ed., United Nations University Press, 2002) 321-340 at 334: ‘an almost 100 percent success rate’.

<sup>37</sup> Peter H. Sand, ‘Institution-Building to Assist Compliance with International Environmental Law: Perspectives’, 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law* (1996) 774-795.

<sup>38</sup> Thomas Bernauer, ‘The Effect of International Environmental Institutions: How We Might Learn More’, 49 *International Organization* (1995) 351-377; Martijn Hisschemöller and Joyeeta Gupta, ‘Problem-Solving through International Environmental Agreements: The Issue of Regime Effectiveness’, 20 *International Political Science Review* (1999) 151-174; Arild Underdal, ‘Conclusions: Patterns of Regime Effectiveness’ in Miles et al, *Environmental Regime Effectiveness*, supra note 7, 433-465 at 448; Baakman, *Testing Times*, supra note 7, at 46.



tions of the environment which the treaty was intended to protect or improve.<sup>39</sup> As pointed out by a comparative study of the implementation of five key MEAs in eight selected countries and the EU, ‘countries may be in compliance with a treaty, but the treaty may nevertheless be ineffective in attaining its objectives’.<sup>40</sup>

The task of evaluating actual environmental impacts necessarily requires scientific expertise. One difficulty here is that part of the assessment will have to be counterfactual; i.e., how much worse the situation of the environment would be without the international agreement.<sup>41</sup> The other major difficulty is the establishment of a clear causal connection between the agreement and the perceived impacts, which in most cases may also be potentially attributable to a multitude of extraneous causal factors,<sup>42</sup> or to subsequent intervening variables.<sup>43</sup>

An indispensable source of information for scientific assessment of a treaty’s environmental impacts are the continuous monitoring and reporting schemes introduced by many MEAs.<sup>44</sup> Much depends on the quality and comparability of the data submitted by states, usually on the basis of uniform standard criteria laid down by expert committees under the authority of the treaty’s governing body. Yet, the ‘self-reporting’ systems and monitoring networks so established also raise a problem of reliability, in light of the risk of political interference and outright cheating;<sup>45</sup> for example, the sulphur dioxide (SO<sub>2</sub>) emissions of Romania in the 1980s turned out to be five times higher than the data officially reported by the government at the time.<sup>46</sup> Ideally, therefore, monitoring and assessment (M&A) programmes should also be

<sup>39</sup> Oran R. Young, ‘Regime Effectiveness: Taking Stock’, in Young, *The Effectiveness*, *supra* note 2, 249-279 at 251; Louka, *International Environmental Law*, *supra* note 7, at 71; Jackson and Bührs, ‘International Environmental Regimes’, *supra* note 7.

<sup>40</sup> Harold K. Jacobson and Edith Brown Weiss, ‘A Framework for Analysis’ in Edith Brown Weiss and Harold K. Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, 1998) 1-18 at 5. See also Young *et al.*, ‘The Effectiveness’, *supra* note 2, at 4: ‘A regime can be effective in a legal sense without doing much to solve the problem that led to its creation.’

<sup>41</sup> Marc A. Levy, ‘European Acid Rain: The Power of Tote-Board Diplomacy’ in Peter M. Haas, Robert O. Keohane and Marc A. Levy (eds), *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press, 1993) 75-132 at 115 and 121-122; Carsten Helm and Detlef Sprinz, ‘Measuring the Effectiveness of International Environmental Regimes’, 14 *Journal of Conflict Resolution* (2000) 630-652; Sand, ‘A Century of Green Lessons’, *supra* note 28, at 37; Emilie M. Hafner-Burton, David G. Victor and Yonatan Lupu, ‘Political Science Research on International Law: The State of the Field’, 106 *American Journal of International Law* (2012) 47-97, at 90.

<sup>42</sup> Victor *et al.*, *The Implementation and Effectiveness*, *supra* note 17, at 47; Arild Underdal, ‘Methods of Analysis’, in Miles *et al.*, *Environmental Regime Effectiveness*, *supra* note 7 at, 47-59; Chambers, *Interlinkages and the Effectiveness*, *supra* note 26, at 119; Baakman, *Testing Times*, *supra* note 7, at 58.

<sup>43</sup> Young, ‘Regime Effectiveness’, *supra* note 39, at 251.

<sup>44</sup> Kamen Sachariew, ‘Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms’, 2 *Yearbook of International Environmental Law* (1991) 31-52; Wayne B. Gray and Jay P. Shimshack, ‘The Effectiveness of Environmental Monitoring and Enforcement: A Review of the Empirical Evidence’, 5 *Review of Environmental Economics and Policy* (2011) 3-24.

<sup>45</sup> Breitmeier *et al.*, *Analyzing International Environmental Regimes*, *supra* note 14, at 71.

<sup>46</sup> Lars Nordberg *et al.*, ‘The Role of the Secretariat: Building the Protocol Tree’ in Johan Sliggers and Willem Kakebeke (eds), *Clearing the Air: 25 Years of the Convention on Long-Range Transboundary Air Pollution* (United Nations Economic Commission for Europe, 2004) 97-117 at 104.

equipped or retrofitted with agreed mechanisms for independent verification.<sup>47</sup> For example, the United Nations Compensation Commission (UNCC) mandated by UN Security Council Resolution 687 (1991)<sup>48</sup> to deal with the reparation of pollution damages arising from the 1991 Gulf War proceeded with the help of independent expert scrutiny of all damage claims submitted by governments.<sup>49</sup> As a result, only USD 5.26 billion were awarded for environmental damages in 1999–2005, as compared to a total of approximately USD 85 billion claimed.<sup>50</sup>

### 3 Practice

This leads to the second part of the present paper: assessing the effects of multilateral environmental agreements on the ground. Here, the purpose is to illustrate some of the approaches used to assess effectiveness in practice. I will draw examples from my professional work with three international environmental treaty secretariats:

- UNEP’s regional seas agreements, starting with the Barcelona regime for the protection of the Mediterranean;
- the CITES regime regulating international trade in endangered species; and
- the UNECE/LRTAP regime regulating long-range transboundary air pollution.

#### 3.1 Regional seas

The 1996 Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution<sup>51</sup> was the forerunner of a string of UNEP-sponsored MEAs which now cover a dozen regional sea areas.<sup>52</sup> Historically, it goes back to a set of principles and guidelines drafted in 1973–74 by an intergovernmental working group under the

<sup>47</sup> See Jesse H. Ausubel and David G. Victor, ‘Verification of International Environmental Agreements’, 17 *Annual Review of Energy and Environment* (1992) 1-43.

<sup>48</sup> S/RES/687 of 3 April 1991.

<sup>49</sup> See Robert C. O’Brien, ‘The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission’, 31 *Cornell International Law Journal* (1998) 1-29; Michel T. Huguenin, *et al*, ‘Assessment and Valuation of Damage to the Environment’ in Cymie R. Payne and Peter H. Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press, 2011) 67-94.

<sup>50</sup> See Peter H. Sand, ‘Compensation for Environmental Damages from the 1991 Gulf War’, 35 *Environmental Policy and Law* (2005) 244-249 at 245; and Jean-Christophe Martin, ‘La pratique de la Commission d’indemnisation des Nations Unies pour l’Irak en matière de réclamations environnementales’ in Yann Kerbrat, Sandrine Maljean-Dubois and Rostane Mehdi (eds), *Le droit international face aux enjeux environnementaux* (Pedone, 2010) 257-274.

<sup>51</sup> Convention for the Protection of the Mediterranean Sea against Pollution, Barcelona, 16 February 1976, in force 12 February 1978, 15 *International Legal Materials* (1976) 290, amended to be the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, Barcelona, 10 June 1995, in force 9 July 2007, <<http://web.unep.org/uneppmap/>>.

<sup>52</sup> See UNEP, ‘Regional Seas Programmes’, available at <<http://drustage.unep.org/regionalseas/who-we-are/regional-seas-programmes>> (visited 10 February 2017). See Peter H. Sand, ‘The Rise of Regional Agreements for Marine Environment Protection’, 39 *International Digest of Health Legislation* (1988) 499-513.

auspices of the Food and Agriculture Organization of the United Nations (FAO)<sup>53</sup> General Fisheries Council for the Mediterranean (GFCM),<sup>54, 55</sup> which in turn had borrowed some key elements from other contemporaneous regional fisheries and marine environment agreements.<sup>56</sup> One of its most influential innovations was the ‘framework-convention-cum-protocols’ idea, initially proposed by Spain in 1974.<sup>57</sup> Instead of the classical model of a single *ad hoc* treaty instrument, it envisaged the combination of a common framework text,<sup>58</sup> accompanied or followed by separate specific protocols binding only those states willing and ready to take on further-reaching commitments. The framework/protocol approach has since become a characteristic element of numerous MEAs favouring a step-by-step codification process, sometimes described as ‘tote-board diplomacy’.<sup>59</sup>

A second original feature of the 1974 Mediterranean draft was its guideline 18, titled ‘compliance control’ (reading: ‘The framework convention and/or the protocols should provide that the contracting Parties shall agree to cooperate in the development of procedures for the *effective application* of the framework convention and/or the protocols ...’).<sup>60</sup> That guideline was to become Article 21 of the 1976 Barcelona Convention. It subsequently appeared, *verbatim* or with minor modifications, in the 1978 Kuwait Regional Seas Convention<sup>61</sup> (Article 24), the 1981 Abidjan Convention<sup>62</sup> (Article 23), the 1982 Jeddah Convention<sup>63</sup> (Article 23), and the 2003 Tehran Convention<sup>64</sup> (Article 19(3), calling for regular ‘assessments of the environmental conditions of the Caspian Sea and the *effectiveness* of measures taken

<sup>53</sup> See <<http://www.fao.org>>.

<sup>54</sup> See <<http://www.fao.org/gfcm/en/>>.

<sup>55</sup> ‘Principles suggested for inclusion in a Draft Convention for the Protection of Living Resources and Fisheries from Pollution in the Mediterranean’, FAO Doc. FID:PPM/73/6 (1973); and ‘Guidelines which could serve as a basis for the drafting of a Framework Convention on the Protection of the Marine Environment against Pollution in the Mediterranean’, *FAO Fisheries Reports* No. 148 (1974), Annex I. See Peter H. Sand, ‘Protection of the Marine Environment against Pollution in the Mediterranean’, 1 *Environmental Policy and Law* (1976) 154-159 at 155.

<sup>56</sup> Including the Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 22 March 1974, in force 3 May 1980, 13 *International Legal Materials* (1974) 546, <<http://www.helcom.fi>>; see Jean E. Carroz, ‘Institutional Aspects of Resources Management and Protection in the Mediterranean’, 3 *Ocean Management* (1978) 235-251.

<sup>57</sup> At the Third Diplomatic Conference of Mediterranean States on the Law of the Sea (Athens, March 1974); see José A. de Yturriaga Barberán, ‘Convenio de Barcelona de 1976 para la protección del mar mediterráneo contra la contaminación’, 2 *Revista de Instituciones Europeas* (1976) 63-96 at 66.

<sup>58</sup> *Convenio-marco*, binding all participating states to basic normative and institutional principles.

<sup>59</sup> Levy, ‘European Acid Rain’, *supra* note 41, at 77.

<sup>60</sup> Emphasis added. Precedents can again be found in the 1974 Helsinki Convention, Article 13 of which empowered the Commission ‘to keep the implementation of the treaty under continuous observation.’

<sup>61</sup> Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, Kuwait, 24 April 1978, in force 1 July 1979, 1140 *United Nations Treaty Series* 133.

<sup>62</sup> Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan, 23 March 1981, in force 5 August 1984, 20 *International Legal Materials* (1981) 746.

<sup>63</sup> Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, Jeddah, 14 February 1982, in force 20 August 1985, 22 *International Legal Materials* (1983) 219.

<sup>64</sup> Framework Convention for the Protection of the Marine Environment of the Caspian Sea, Tehran, 4 November 2003, in force 12 August 2006, 44 *International Legal Materials* (2005) 1 (emphasis added).

for the prevention, control and reduction of pollution of the marine environment of the Caspian Sea’).

The effectiveness of the Barcelona regime and its model status for other regional seas treaties has in part been due to the systematic mobilization of an ‘ecological epistemic community’ of its own, consisting mainly of an interdisciplinary network of marine scientists in the contracting states, who through their active participation in the implementation of the Convention and the protocols in turn gained access to governmental decision-making processes.<sup>65</sup>

### 3.2 Endangered species

Among the characteristic features of the 1973 Endangered Species Convention (CITES) also is an emphasis on verification of compliance. Under Article XIII of the Convention, the Secretariat is empowered to follow up on alleged infractions, and to draw them to public attention. From the beginning, it did so in close collaboration with non-governmental organizations (NGOs), especially with a small International Union for Conservation of Nature (IUCN)<sup>66</sup> Specialist Group called ‘Trade Records Analysis of Flora and Fauna in Commerce’ (TRAFFIC), which was set up in 1976 and has since evolved as a worldwide NGO network co-sponsored by IUCN and World Wildlife Fund (WWF).<sup>67,68</sup> As an independent ‘watchdog’, the network collects information on alleged infringements of the Convention, channeling the data to governmental CITES management authorities and eventually (via the international secretariat) to the Conference of the Parties. In the process, NGO members have carried out detailed investigations of illegal trade in wildlife and wildlife products, and exposed many suspicious commercial transactions, poaching and smuggling operations.

One of the most effective ways of verifying governmental compliance with CITES was the ‘cactus test’ – originally thought up by John A. Burton, one of the co-founders of TRAFFIC.<sup>69</sup> All wild cactus plants (*Cactaceae spp.*) are listed on Appendix II of CITES, and hence require an export permit to travel abroad, or suitable proof that they are exempt (for instance as artificially propagated specimens). So, we went into

<sup>65</sup> Peter M. Haas, ‘Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control’, 43 *International Organization* (1989) 377-403; Peter M. Haas, *Saving the Mediterranean: The Politics of International Environmental Cooperation* (Columbia University Press, 1990) xxii and 55-59; Peter H. Sand, ‘Crucial Cooperation’ in Nikki Meith (ed.), *Setting a Course for Regional Seas* (UNEP, 2014) 6.

<sup>66</sup> See <<http://www.iucn.org>>.

<sup>67</sup> See <<http://www.wwf.org>>.

<sup>68</sup> See <<http://www.traffic.org>>, with offices in 16 countries in Africa, America, East and Southeast Asia, Eastern and Western Europe. See Peter H. Sand, ‘Wither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment’, 8 *European Journal of International Law* (1997) 29-58 at 49-51; John Lanchbery, ‘Long-Term Trends in Systems for Implementation Review in International Agreements on Fauna and Flora’ in Victor *et al.*, *The Implementation and Effectiveness*, *supra* note 17, at 70-71; Reeve, *Policing International Trade*, *supra* note 31, at 68-69.

<sup>69</sup> The narrative which follows is based on Peter H. Sand, ‘CITES and the Migratory Cactus’, 29 *World Conservation* (1998) 23-24.

a department store in Morges, and for five Swiss francs acquired a pretty red-flowered cactus advertised as 'Little Red Riding Hood'. From then on, whenever a CITES staff member went on duty travel, he/she had to take the cactus along. Upon arrival at any destination airport in a CITES member country, he/she would proceed through the red entry gate – instead of the green 'nothing-to-declare' entrance – and innocently ask the customs officer whether and how this plant, purchased in Switzerland, should be declared for import.

The reactions at most airports were amazing, and often hilarious. In those days, very few customs inspectors had ever heard of CITES, let alone that their government had ratified the treaty and regularly reported that it was in full compliance with its terms. Their usual reaction was to consult the applicable code of the Customs Cooperation Council (now the World Customs Organisation),<sup>70</sup> define the cactus as 'non-commercial import of an ornamental plant', and wave the nosy passenger on. When the passenger insisted on a document, they would either grab some form and stamp it – this resulted in the building up of the most peculiar collection of so-called import documents – or come up with highly ingenuous authoritative explanations why no form was required in this particular case.

Others would proceed to a phytosanitary inspection, including the occasional fumigation – one customs officer at Copenhagen airport informed me that he was far more concerned about the earth in the flowerpot than about the cactus, and returned Little Red Riding Hood naked, without her pot. Once, when travelling to the 1978 IUCN General Assembly in Ashkhabad with other staff members and walking through the red gate at Moscow airport (even though the others had implored the author not to do it lest all the staff members end up in a gulag), I was kept in custody for an hour until the competent official showed up and allowed me, exceptionally, to move on with the cactus, in the interest of international ecological cooperation and in order not to miss the connecting flight.

In each case, the cactus-bearing staff member had to write a full report on his/her experience, for transmission and follow-up action to the national CITES authority concerned. As time went by, more and more customs services did become familiar with the Convention, and many international airports became cactus-proof or at least cactus-wise. Yet any customs officer who then proudly produced a copy of the treaty text, plus the appropriate form, still faced the problem of identifying the specimen at hand. He/she would study the plant intently, ask for her name, enter 'Little Red Riding Hood' in the column for species nomenclature, perhaps declare her exempt as a household item, and mumble something about the new green bureaucracy. One obvious risk was to hit upon the same embarrassed customs inspector twice in a row – as happened to the author at my hometown airport in Munich: What that Bavarian customs officer asked me to do with that cactus (in the native

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<sup>70</sup> See <<http://www.wcoomd.org/>>.

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Bavarian dialect) is unfit for print, and therefore could not be fully included in my report to the national CITES authority.

Those of course were the early days of CITES. The Convention has since evolved worldwide, to encompass a near-universal membership of 182 contracting states. Rather than duplicating existing bureaucracies, though, CITES implementation practice continues to make systematic use of available administrative structures such as national customs services. Under a 1996 Memorandum of Understanding with the World Customs Organization (WCO),<sup>71</sup> the WCO ‘harmonized system’ of standard tariff classifications for import/export has thus been aligned with CITES documentation requirements; joint training and capacity-building programmes – such as the WCO-INAMA project for Sub-Saharan Africa – now support national customs administrations in dealing with illegal wildlife trade. Similar arrangements for institutional ‘interplay’ and ‘interlinkages’<sup>72</sup> have been developed with other global and regional organizations.<sup>73</sup>

### 3.3 Transboundary air pollution

The 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP),<sup>74</sup> which covers most of Europe and North America, is often cited as a precedent for

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<sup>71</sup> See John Lanchbery, ‘The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): Responding to Calls for Action from Other Nature Conservation Regimes’ in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance* (MIT Press, 2006) 157-180 at 162-164.

<sup>72</sup> Olav Schram Stokke, *The Interplay of International Regimes: Putting Effectiveness Theory to Work*, FNI Report 14/2001 (Fridtjof Nansen Institute, 2001); Oran R. Young, *The Institutional Dimensions of Environmental Change: Fit, Interplay and Scale* (MIT Press, 2002); Chambers, *Interlinkages and the Effectiveness*, *supra* note 26, at 136-139.

<sup>73</sup> For instance, with the International Criminal Police Organization (INTERPOL, <<http://www.interpol.int>>) and the UN Office on Drugs and Crime (UNODC, <<https://www.unodc.org/>>), in the context of the ‘International Consortium on Combating Wildlife Crime’ (ICWC, <<https://cites.org/eng/prog/iccwc.php>>); see Jean-Luc Lemahieu and Angela Me (eds), *World Wildlife Crime Report: Trafficking in Protected Species* (UNODC, 2016).

<sup>74</sup> Convention on Long-Range Transboundary Air Pollution, Geneva, November 13 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, <<http://www.unec.org/env/lrtap/>>. See Sliggers and Kakebeeke, *Clearing the Air*, *supra* note 46; Gabriela Kütting, ‘A Critical Approach to Institutional and Environmental Effectiveness: Lessons from the Convention on Long-Range Transboundary Air Pollution’ in Dimitris Stevis and Valerie J. Assetto (eds), *The International Political Economy of the Environment: Critical Perspectives* (Lynne Rienner Publishers, 2001) 181-198; Jørgen Wettestad, ‘The Improving Effectiveness of CLRTAP: Due to a Clever Design?’ in Rolf Lidskog and Göran Sundqvist (eds), *Governing the Air: The Dynamics of Science, Policy and Citizen Interaction* (MIT Press, 2011) 39-60; Adam Byrne, ‘The 1979 Convention on Long-Range Transboundary Air Pollution: Assessing its Effectiveness as a Multilateral Environmental Regime after 35 Years’, 4 *Transnational Environmental Law* (2015) 37-67; Peter H. Sand, ‘Transboundary Air Pollution’ in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017) 962-986.

other regions.<sup>75</sup> One of its most distinctive – and arguably most successful – features is the comprehensive ‘Cooperative Programme for Monitoring and Evaluation of the Long-Term Transmission of Air Pollutants in Europe’ (EMEP), jointly financed under a 1984 protocol to the Convention.<sup>76</sup> Originally established by the Organisation for Economic Cooperation and Development (OECD)<sup>77</sup> to determine the contribution of sulphur emissions to acid rain in Western Europe,<sup>78</sup> the programme was expanded under the auspices of the UN Economic Commission for Europe (UNECE)<sup>79</sup> to the measurement and modelling of East-West air pollution flows,<sup>80</sup> and has since become the backbone of an elaborate reporting and monitoring system for the LRTAP Convention, with a network of 164 sampling stations in 36 countries.<sup>81</sup> The data so compiled also serve to verify compliance by the contracting states with their commitments under the Convention and its protocols,<sup>82</sup> in conjunction with the implementation review procedure introduced in 1997.<sup>83</sup>

Yet, what at first glance appeared to be a straight-forward instrument to measure the effectiveness of a multilateral environmental agreement (by simply comparing the reported and verified annual emissions of pollutants, for example in million tons of sulphur dioxide),<sup>84</sup> turned out to be a far more complex undertaking in practice.

<sup>75</sup> For instance, see Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd ed., Cambridge University Press, 2012) 247; Nilmini Silva-Send, *Preventing Regional Air Pollution in Asia: The Potential Role of the European Convention on Long-Range Transboundary Air Pollution in Asian Regions*, Doctoral thesis (University of Kiel, 2007); Lars Nordberg, *Air Pollution: Promoting Regional Cooperation* (United Nations Environment Programme, 2010) at 5; Alan Boyle, ‘Transboundary Air Pollution: A Tale of Two Paradigms’ in S. Jayakumar *et al* (eds), *Transboundary Pollution: Evolving Issues of International Law and Policy* (Edward Elgar Publishing, 2015) 233-259 at 258; Simon Marsden and Elizabeth Brandon, *Transboundary Environmental Governance in Asia: Practice and Prospects with the UNECE Agreements* (Edward Elgar Publishing, 2015).

<sup>76</sup> Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe (EMEP), Geneva, 28 September 1984, 1491 *United Nations Treaty Series* 67.

<sup>77</sup> See <<http://www.oecd.org>>.

<sup>78</sup> Anton Eliassen, ‘The OECD Study of Long-Range Transport of Air Pollutants: Long-Range Transport Modelling’, 12 *Atmospheric Environment* (1978) 479-487.

<sup>79</sup> See <<http://www.unece.org>>.

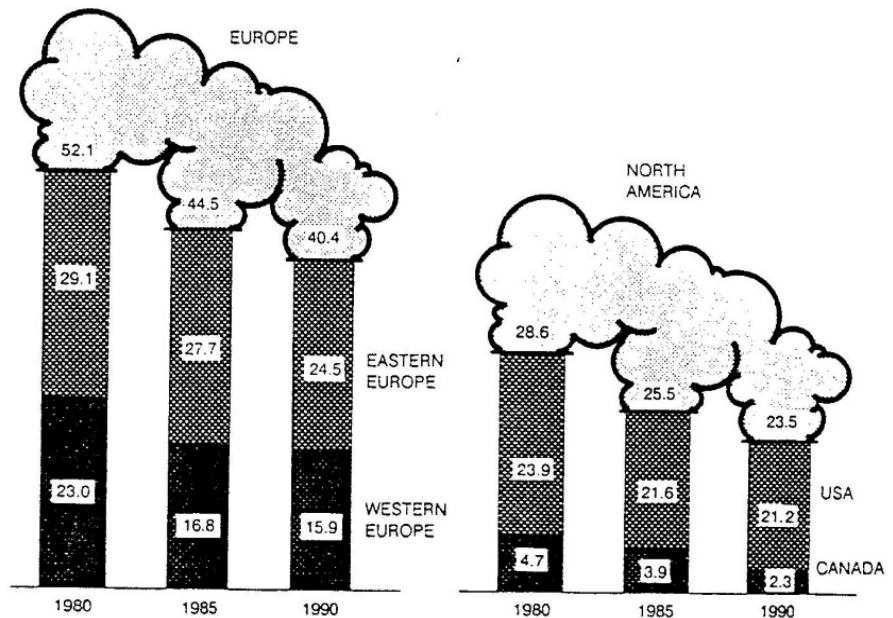
<sup>80</sup> Harald Dovland, ‘Monitoring European Transboundary Air Pollution’, 29 *Environment* (1987) 10-15, 27-28; Toni Schneider and Jürgen Schneider, ‘EMEP: Backbone of the Convention’, in Sliggers and Kakebeke, *Clearing the Air*, *supra* note 46, at 31-44.

<sup>81</sup> Tobias Böhnelt and Jürg Vollenweider, ‘Information Flows and Social Capital Through Linkages: The Effectiveness of the CLRTAP Network’, 15 *International Environmental Agreements: Politics, Law and Economics* (2015) 105-123. See the EMEP Status Report 1/2016: *Transboundary Particulate Matter, Photo-Oxidants, Acidifying and Eutrophying Components* (Norwegian Meteorological Institute, 2016), available at <[http://emep.int/publ/reports/2016/EMEP\\_Status\\_Report\\_1\\_2016.pdf](http://emep.int/publ/reports/2016/EMEP_Status_Report_1_2016.pdf)> (visited 5 February 2017).

<sup>82</sup> Juan C. di Primio, ‘Data Quality and Compliance Control in the European Air Pollution Regime’ in Victor *et al*, *The Implementation and Effectiveness*, *supra* note 17, at 283-304.

<sup>83</sup> See Tuomas Kuokkanen, ‘Practice of the Implementation Committee under the Convention on Long-Range Transboundary Air Pollution’ in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Nijhoff, 2006) 39-51.

<sup>84</sup> For instance, see for the first ten years of the LRTAP Convention, figure 7 (below) from Peter H. Sand, ‘Regional Approaches to Transboundary Air Pollution’ in John L. Helm (ed.), *Energy: Production, Consumption, and Consequences* (National Academy Press, 1990) 246-264 at 256.



To everyone's apparent surprise, the successful reduction of atmospheric sulphates in Europe and North America between 1980 and 2005 is now found to explain as much as about half of the warming observed in the Arctic during the same period,<sup>85</sup> – clearly an unintended environmental side-effect, which as a result of the contribution of melting glaciers and ice-caps to sea-level rise may in the long run have impacts well beyond the UNECE region.

Moreover, merely recording the reductions in overall pollution output does not necessarily tell us much about the actual impact of a treaty on environmental quality in the states directly concerned. This can be illustrated by two EMEP maps,<sup>86</sup> produced by reporting and modelling work in collaboration with the International Institute for Applied Systems Analysis (IIASA):<sup>87</sup>

<sup>85</sup> EMEP Status Report 1/2016, *supra* note 81, at vi. Steven T. Turnock *et al.*, 'The Impact of European Legislative and Technology Measures to Reduce Air Pollutants on Air Quality, Human Health and Climate', 11 *Environmental Research Letters* (12 February 2016) 1-10.

<sup>86</sup> Figures 1 and 5 from Sand, 'Regional Approaches to Transboundary', *supra* note 84, at 248 and 252.

<sup>87</sup> The IIASA 'Regional Acidification Information and Simulation' (RAINS) model, which played an important role in the negotiation of the more recent LRTAP Protocols, has since been expanded to a global 'Greenhouse Gas Air Pollution Interaction and Synergies' (GAINS) model; see Markus Amann, 'Air Pollutants and Greenhouse Gases: Options and Benefits' in Håkan Pleijel (ed.), *Air Pollution and Climate Change: Two Sides of the Same Coin?* (Swedish Environmental Protection Agency, 2009) 99-108.



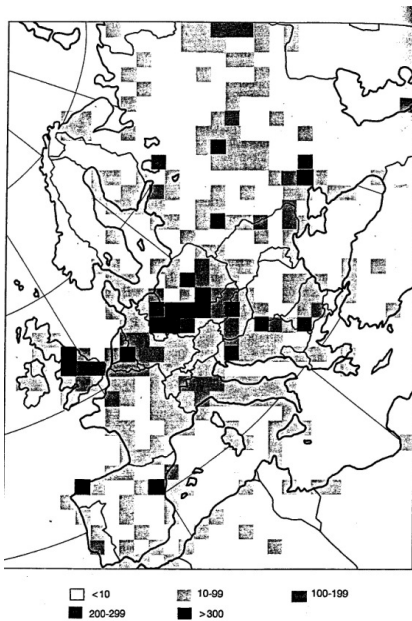


FIGURE 1 Emissions of sulfur dioxide in Europe, 1985 (in 1,000 metric tons of sulfur per year).

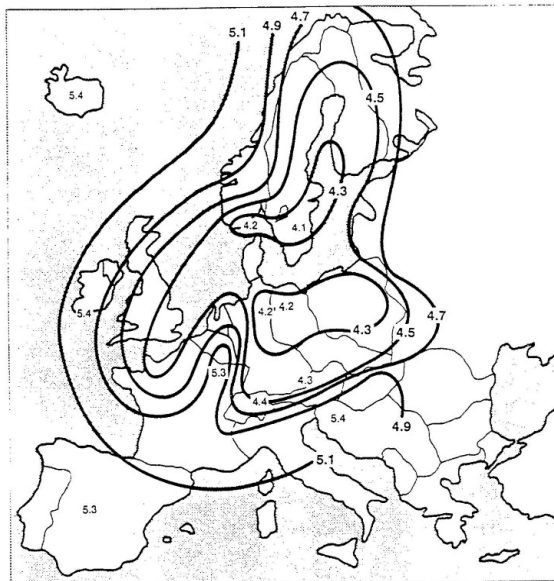


FIGURE 5 Mean annual precipitation acidity in Europe, 1985 (pH values).

The maps show a striking difference between the geographical distribution of  $\text{SO}_2$  emissions (mainly from industrialized areas) and their transboundary effects on ecosystems (through ‘acid rain’), with the highest acidity (lowest pH values) affecting some of the least industrialized areas such as Scandinavia. Partly in response to this discrepancy, the focus of the LRTAP follow-up negotiations shifted, from uniform flat-rate percentage reductions as in the first (1985)  $\text{SO}_2$  Protocol,<sup>88</sup> to a ‘critical loads’ approach.<sup>89</sup> According to it, emission reduction targets are tailored to the ecological vulnerability of different regions,<sup>90</sup> taking into account the multiple and combined effects of multiple air pollutants (in the most recent 1999 Gothenburg Protocol, as amended in 2012).<sup>91</sup> The change also reflects a new emphasis on the cost-efficiency of abatement strategies, which may be defined as their *economic effectiveness*.<sup>92</sup>

<sup>88</sup> Protocol on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at least 30 %, Helsinki, 8 July 1985, in force 2 September 1987, 1480 *United Nations Treaty Series* 215.

<sup>89</sup> See Keith R. Bull, ‘Critical Loads: Possibilities and Constraints’, 15 *Water, Air and Soil Pollution* (1995) 201-213; Hans-Dieter Nagel and Heinz-Detlef Gregor (eds), *Ökologische Belastungsgrenzen – Critical Loads & Levels: Ein internationales Konzept für die Luftreinhaltepolitik* (Springer, 2013).

<sup>90</sup> Sands and Peel, *Principles*, *supra* note 75, at 257.

<sup>91</sup> Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Abate Acidification, Eutrophication and Ground-Level Ozone, Gothenburg, 30 November 1999, in force 17 May 2005, 2319 *United Nations Treaty Series* 81; amendments of 4 May 2012 not yet in force.

<sup>92</sup> See Young *et al*, ‘The Effectiveness’, *supra* note 2, at 4: ‘Economists want to know not only whether a regime generates the right outcome but also whether it does so at the least cost.’ See also Louka, *International Environmental Law*, *supra* note 7, at 73-75; and Chambers, *Interlinkages and the Effectiveness*, *supra* note 26, at 108 (‘cost-effectiveness’).

One of the lessons from this empirical experience is the paramount importance of interaction and mutual learning between multilateral environmental regimes,<sup>93</sup> in terms of both treaty design and treaty practice. Advances in international environmental law do not happen by accident, but typically by a process of diffusion of innovations,<sup>94</sup> often by transnational ‘borrowing’ or ‘transplants’ of successful legal models,<sup>95</sup> – such as the concept of environmental impact assessments (EIAs), originally developed as part of the 1969 US National Environmental Policy Act,<sup>96</sup> and since replicated in more than 130 other countries.<sup>97</sup> In parallel to its phenomenal ‘horizontal’ spread among legal systems worldwide, the EIA model also moved ‘vertically’ from national environmental laws to the international level.<sup>98</sup> In the field of regional seas, for example, ten of the framework conventions adopted under the auspices of the UN Environment (UNEP) since the 1970s now make environmental impact assessments mandatory.<sup>99</sup> So does the 1989 Basel Convention on Hazardous

<sup>93</sup> Peter M. Haas and Ernst B. Haas, ‘Learning to Learn: Improving International Governance’, 1 *Global Governance* (1995) 255-285; William C. Clark, Jill Jäger and Josee van Eindhoven (eds), *Learning to Manage Global Environmental Risks: A Comparative History of Social Responses to Climate Change, Ozone Depletion, and Acid Rain* (MIT Press, 2001), vol. 1, at 13-15; Thomas Gehring and Sebastian Oberthür, ‘Comparative Empirical Analysis and Ideal Types of Institutional Interaction’ in Oberthür and Gehring, *Institutional Interaction*, *supra* note 71, 307-371, at 327-331; Atsushi Ishii, ‘Scientists Learn Not Only Science But Also Diplomacy: Learning Processes in the European Transboundary Air Pollution Regime’ in Lidskog and Sundqvist, *Governing the Air*, *supra* note 74, 163-194.

<sup>94</sup> See Everett N. Rogers, *Diffusion of Innovations* (5th ed, Simon & Schuster, 2003); Kerstin Tews, ‘The Diffusion of Environmental Policy Innovations’ in Gerd Winter (ed.), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (Cambridge University Press, 2006) 227-253.

<sup>95</sup> See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed, University of Georgia Press, 1993); Ugo Mattei, ‘Efficiency in Legal Transplants’, 14 *International Review of Law and Economics* (1994) 3-19; William Twining, ‘Social Science and Diffusion of Law’, 32 *Journal of Law and Society* (2005) 203-240; Ivano Alogna, ‘The Circulation of Legal Models: Towards the Evolution of Environmental Law’ in Vasilka Sancin and Maša Kovič Dine (eds), *International Environmental Law: Contemporary Concerns and Challenges* (Založba, 2014) 59-69.

<sup>96</sup> Public Law 91-190, 83 Stat. 852 (1970).

<sup>97</sup> Charles M. Kersten, ‘Rethinking Transboundary Environmental Impact Assessment’, 24 *Yale Journal of International Law* (2009) 173-206 at 176; see also Marceyl Yeater and Lal Kurukulasuriya, ‘Environmental Impact Assessment in Developing Countries’ in Sun Lin and Lal Kurukulasuriya (eds), *UNEP’s New Way Forward: Environmental Law and Sustainable Development* (United Nations Environment Programme, 1995) 257-275.

<sup>98</sup> Jonathan B. Wiener, ‘Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law’, 27 *Ecology Law Quarterly* (2001) 1295-1372 at 1302; Aleksandar Momirov and Andria Naudé Fourie, ‘Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law’, 2 *Erasmus Law Review* (2009) 291-309.

<sup>99</sup> Revised Barcelona Convention, Art. 4; Kuwait Convention, Art. 11; Abidjan Convention, Art. 13); Djeddah Convention, Art. 11; Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, Lima, 12 November 1981, in force 19 May 1986, 1648 *United Nations Treaty Series* 3 (Art. 8); Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena, 24 March 1983, in force 11 October 1986, <<http://www.cep.unep.org/cartagena-convention/text-of-the-cartagena-convention>> (Art. 12); Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, Nairobi, 21 June 1985, in force 30 May 1996, *OJ* 1986 No. C253/10 (Art.13); Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Noumea, 25 November 1986, in force 22 August 1990, 26 *International Legal Materials* (1987) 38 (Art. 16); Convention for Cooperation in the Protection and Sustainable Development of the Northeast Pacific, Antigua, 18 February 2002, not yet in force (Art. 10(2)(b)); and the Tehran Convention, Art. 17.

Wastes,<sup>100</sup> the 1991 Environmental Protocol to the Antarctic Treaty,<sup>101</sup> the regional 1991 UNECE Espoo Convention,<sup>102</sup> and the two global 1992 Rio Conventions on Climate Change and Biodiversity.<sup>103</sup> Since 1989, environmental assessments are also required as a prerequisite for development projects funded or co-funded by the World Bank<sup>104</sup> and other multilateral financial institutions, under the banks' 'green conditionality' policies.<sup>105</sup> According to two recent judgments of the International Court of Justice (ICJ)<sup>106</sup> in 2010 and 2015, the undertaking of transboundary environmental impact assessments 'may now be considered a requirement under general international law'.<sup>107</sup> What still ranked as non-binding 'soft law' a generation ago<sup>108</sup> has thus 'hardened' into a new customary rule effectively binding all states.

#### 4 Epilogue: effectiveness and legitimacy

Finally, to revert from these practical 'lessons learned'<sup>109</sup> to our general theme, there is yet another dimension, sometimes referred to as the *normative effectiveness* of en-

<sup>100</sup> Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <<http://www.basel.int>>, Art. 4(2)(f).

<sup>101</sup> Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, in force 14 January 1998, 30 *International Legal Materials* (1991) 1461, Art. 8.

<sup>102</sup> Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, in force 10 September 1997, 30 *International Legal Materials* (1991) 802, Art. 2(3); see also the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki 17 March 1992, in force 6 October 1996, 31 *International Legal Materials* (1992) 1312, Art. 3(1)(h).

<sup>103</sup> United Nations Framework Convention on Climate Change (UNFCCC), New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>, Art. 4(1)(f); Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>, Art. 14(1).

<sup>104</sup> See <<http://www.worldbank.org>>.

<sup>105</sup> See *World Bank Environmental Assessment Operational Policy* OP 4.01 (1999, as revised in April 2013), now part of the Bank's new 'Environmental and Social Framework' adopted on 4 August 2016. See Charles E. Di Leva, 'International Environmental Law and Development', 10 *Georgetown International Environmental Law Review* (1998) 501-549 at 521-532; Günther Handl, *Multilateral Development Banking: Environmental Principles and Concepts Reflecting General International Law and Public Policy* (Kluwer Law International, 2001) 94-97; Maartje van Putten, *Policing the Banks: Accountability Mechanisms for the Financial Sector* (McGill-Queen's University Press, 2008) 82-83 and 334; Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press, 2008).

<sup>106</sup> See <<http://www.icj-cij.org>>.

<sup>107</sup> *Pulp Mills on the River Uruguay*, ICJ Reports (2010) 83, para. 204, 49 *International Legal Materials* (2010) 1118; and *Certain Activities Carried Out by Nicaragua in the Border Area*, ICJ Reports (2015) 45, para. 104.

<sup>108</sup> See Principle 12 of the 'Goals and Principles of Environmental Impact Assessment', UNEP Governing Council Dec. 14/ 25 of 17 June 1987. See also Principle 17 of the 1992 Rio Declaration (UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876); and Agenda 21, para. 8.5(b).

<sup>109</sup> Peter H. Sand, *Lessons Learned in Global Environmental Governance* (World Resources Institute, 1990) 25.

vironmental treaty-making.<sup>110</sup> It has been pointed out that a major challenge for any international regulatory regime is its legitimacy,<sup>111</sup> – in terms of its actual acceptance by those to whom it applies, be they states or individuals. In a legal-sociological perspective,<sup>112</sup> legitimacy is usually seen as a matter of due process:<sup>113</sup> it refers, in particular, to the transparency and fairness of decision-making,<sup>114</sup> including public participation and equality of treatment in the way a treaty is implemented. In this regard, the track record of most environmental agreements has been reasonably good, with a high rate of civil society involvement,<sup>115</sup> exemplified by procedural instruments such as the 1998 UNECE Aarhus Convention.<sup>116</sup> At the same time, however, the complex standard of legitimacy so injected in the evaluation also implies conformity with certain substantive values and normative expectations,<sup>117</sup> that must be shared (and seen to be shared) by the community of contracting Parties to keep the agreement effective over time.

If one takes a look at the table of trade sanctions imposed under the CITES Con-

<sup>110</sup> Young *et al.*, 'The Effectiveness', *supra* note 2, at 5; Chambers, *Interlinkages and the Effectiveness*, *supra* note 26, at 108.

<sup>111</sup> Laurence Boisson de Chazournes, 'Gouvernance et régulation au 21<sup>ème</sup> siècle: quelques propos iconoclastes' in Laurence Boisson de Chazournes and Rostane Mehdi (eds), *Une société internationale en mutation: quels acteurs pour une nouvelle génération?* (Bruylant, 2005) 19-40 at 40 ('la viabilité du phénomène 'régulateur' est liée à un défi majeur: celui de sa légitimité'); Dan Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *American Journal of International Law* (1999) 596-624.

<sup>112</sup> Steinar Andresen and Ellen Hey, 'The Effectiveness and Legitimacy of International Environmental Institutions', 5 *International Environmental Agreements: Politics, Law and Economics* (2005) 211-226 at 222; Steven Bernstein, 'Legitimacy in Global Environmental Governance', 1 *Journal of International Law and International Relations* (2005) 139-166 at 156; Dan Bodansky, 'Legitimacy' in Dan Bodansky, Jutta Brunnée and Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 704-723 at 709.

<sup>113</sup> Günther Handl, 'International "Lawmaking" by Conferences of the Parties and Other Politically Mandated Bodies' in Rüdiger Wolfrum and Volker Röben (eds), *Developments of International Law in Treaty Making* (Springer, 2005) 127-143 at 140 ('normative effectiveness as a function of legitimacy of process'). See also Daniel C. Esty, 'Good Governance at the Supranational Scale: Global Administrative Law', 115 *Yale Law Journal* (2006) 1490-1562 at 1521-1523 ('procedural legitimacy'); and the classic sociological analysis by Niklas Luhmann, *Legitimation durch Verfahren* ['Legitimation by Procedure'] (originally published 1969, 6th ed., Suhrkamp, 2001).

<sup>114</sup> Bodansky, 'The Legitimacy of International', *supra* note 111, at 717-718; see also Thomas M. Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995) 26.

<sup>115</sup> See Kal Raustiala, 'The "Participatory Revolution" in International Environmental Law', 21 *Harvard Environmental Law Review* (1997) 537-586; Sebastian Oberthür *et al.*, *Participation of Non-Governmental Organisations in International Environmental Cooperation: Legal Basis and Practical Experience* (Erich Schmidt Verlag, 2002).

<sup>116</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <<http://www.unece.org/env/pp/>>.

<sup>117</sup> Bernstein, 'Legitimacy in Global', *supra* note 112, at 156; Inger-Johanne Sand, 'Legitimacy in Global and International Law: A Sociological Critique' in Chris Thornhill and Samantha Ashenden (eds), *Legality and Legitimacy: Normative and Sociological Approaches* (Nomos, 2010) 147-169 at 163-167. On the various categories of values invoked in this context (ethical, cultural, economic, etc.), see Alexander Gillespie, 'An Introduction to Ethical Considerations in International Environmental Law' in Malgosia Fitzmaurice, David M. Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing, 2010) 117-136. See also Franck, *Fairness in International Law*, *supra* note 114, at 8-9 ('moral fairness' vs. 'process fairness').

vention for ‘inadequate national legislation’ from 1992 to date,<sup>118</sup> it reveals a rather perplexing North-South imbalance. More than 90 per cent of the states targeted by CITES trade embargoes were developing countries.<sup>119</sup> Even though inadequate implementation of the Convention is undoubtedly often caused by a lack of administrative and financial capacities in the Third World,<sup>120</sup> to find sanctionable compliance deficits almost exclusively in the South comes as something of an empirical surprise. Critics have not hesitated to attribute these findings to a hidden neo-colonial bias of the regime.<sup>121</sup> Past ‘infraction reports’ by the CITES Secretariat and by NGO observer groups certainly indicate that infringements of treaty rules and COP resolutions are in no way the sole prerogative of wildlife-exporting countries;<sup>122</sup> so there must be other explanations for the skewed geographical distribution of trade embargoes as currently practised.

To illustrate this latter point, this paper concludes with a recent case that is well documented and anything but trivial. Between 2001 and 2016, the Japanese Institute of Cetacean Research (ICR, *Nihon Geirui-Kenkyūjo*) caught a total of 1.369 sei whales (*Balaenoptera borealis*) from areas outside Japanese territorial jurisdiction in the North Pacific, as part of the Government’s ‘Research Plan for Cetacean Studies in the Western North Pacific Under Special Permit’ (JARPN-II).<sup>123</sup> Yet, the North Pacific population of sei whales has been listed as strictly protected under Appendix I of CITES ever since the entry into force of the Convention in 1976. Although Japan had entered a reservation against the Appendix-I-listing of the entire species in 1981, that reservation explicitly does not apply to the North Pacific population, which therefore remains categorically excluded from international trade or introduction from the sea.<sup>124</sup> Consequently, the Japanese catch and introduction of North

<sup>118</sup> *Supra* notes 33-34.

<sup>119</sup> By comparison, the share of developing countries in the overall CITES membership (currently 182 States) is less than 70 per cent.

<sup>120</sup> *Supra* note 37; see also Antonia H. Chayes, Abram Chayes and Ronald B. Mitchell, ‘Active Compliance Management in Environmental Treaties’ in Winfried Lang (ed.), *Sustainable Development and International Law* (Graham & Trotman, 1995) 75-89 at 80; and Jutta Brunnée, ‘Enforcement Mechanisms in International Law and International Environmental Law’ in Beyerlin *et al*, *Ensuring Compliance*, *supra* note 83, 1-23 at 19 (‘non-complying parties are most likely to be States with genuine capacity limitations’).

<sup>121</sup> Maaria Curlier and Steinar Andresen, ‘International Trade in Endangered Species: The CITES Regime’ in Miles *et al*, *Environmental Regime Effectiveness*, *supra* note 7, 357-378 at 368 (‘the North imposed its will’); Charlotte Epstein, ‘The Making of Global Environmental Norms: Endangered Species Protection’, 6 *Global Environmental Politics* (2006) 32-52 at 50 (‘CITES as a neo-colonial imposition’); Dilys Roe, ‘Blanket Bans: Conservation or Imperialism?’, 40 *Oryx* (2006) 1-3; Bowman, ‘Beyond the “Keystone”’, *supra* note 15, at 236; Rosaleen Duffy, ‘Global Environmental Governance and North-South Dynamics: The Case of CITES’, 31 *Environment and Planning (C): Government and Policy* (2013) 222-239.

<sup>122</sup> For instance, see the list of serious German compliance gaps, *Proceedings of the Third Meeting of the Conference of the Parties (New Delhi 1981)*, vol. I, 297-302 and 411-414; John Burton, ‘Comments on the Annual Report by the Federal Republic of Germany on its Implementation of CITES’, 3 *TRAFFIC Bulletin* (1981) 36-40.

<sup>123</sup> Text in International Whaling Commission (IWC) Scientific Committee Paper SC/54/O2 (2002).

<sup>124</sup> Current list of reservations (as of 21 November 2016) is available at <<http://cites.org/eng/app/reserve.php>>; see Mari Koyano, ‘Whaling Issues: International Law and Japan’, 63 *Hokkaido Law Review* (2013) 201-242 at 239.

Pacific sei whales raises a question of persistent non-compliance, and possible action under CITES Article XIII and Resolution Conf. 14.3 (Compliance Procedures), for several reasons.

To date, the Japanese Government has not designated an independent national scientific authority under Article IX(1)(b), qualified to issue ‘non-detriment findings’ for introduction from the sea under Article III(5)(a).<sup>125</sup> Resolution Conf. 10.3 (1997) expressly requires scientific authorities to be ‘independent of management authorities’. However, the ‘Resources and Environment Research Division’ in Tokyo, notified to the CITES Secretariat as Japan’s national ‘scientific authority for cetaceans’, is a mere administrative sub-division under orders from the Government’s Fisheries Agency (JFA), which serves as the designated ‘management authority for whales’.<sup>126</sup> The country therefore has for years been in manifest non-compliance with one of the elementary treaty obligations listed as a potential basis for trade sanctions.<sup>127</sup> Even so, Japan continues to be listed since 1997 in category 1 (‘meeting all requirements’) of the CITES ‘National Legislation List’,<sup>128</sup> critical comments in the literature notwithstanding.<sup>129</sup>

While the ‘special permits’ issued since 2001 by the JFA for the taking of North

<sup>125</sup> So-called ‘IFS Certificates’ for introduction from the sea of Appendix-I-specimens ‘taken in the marine environment not under the jurisdiction of any State’; see Resolution Conf. 14.6 (Rev. CoP16, 2007/2014), Annex I, paras 1-3, and Secretariat Report CoP17 Doc. 36 (2016).

<sup>126</sup> At the same postal address. Nevertheless, Japan’s most recent biennial national report (for the years 2013–2014) brazenly declares the scientific authority ‘independent from the Management Authority’; Report No. 01/12/15e, at 8 (D2), available at <[http://cites.org/sites/default/files/reports/13-14Japan\\_0.pdf](http://cites.org/sites/default/files/reports/13-14Japan_0.pdf)> (visited 10 February 2017).

<sup>127</sup> *Supra* note 30. Failure to designate an independent scientific authority was among the reasons for trade embargoes against Afghanistan and Rwanda in 1999; see CITES Notification to the Parties No. 1999/24 of 12 March 1999; Reeve, *Policing International Trade*, *supra* note 30, at 152–154.

<sup>128</sup> *Supra* notes 29–30; see CITES, ‘National Legislation Project’, available at <[https://www.cites.org/legislation/National\\_Legislation\\_Project](https://www.cites.org/legislation/National_Legislation_Project)> (visited 15 June 2017). An initial expert analysis commissioned by the Secretariat in 1994 (TRAFFIC-WWF USA) had ranked Japan in category 2 only (‘legislation believed not to meet all the requirements for the implementation of CITES’), COP9 Doc. 9.24/Rev., Annex 1 (1994); see Joni E. Baker, ‘A Substantive Theory of the Relative Efficiency of Environmental Compliance Strategies: The Case of CITES’, 2 *Journal of International Wildlife Law and Policy* (1999) 1–45 at 33. As from 1 May 1997, the Secretariat changed the ranking to category 1, apparently on the basis of legislative changes unilaterally reported by the Japanese Management Authority; COP10 Doc. 10.31/Rev., Annex 1 (1997). Since then, the country has consistently been ranked in category 1 in all subsequent lists; see COP16 Doc. 28, Annex 2/Rev. 1 (2013). – Japan in turn is among the important sponsors (USD 50,000 annually) for the National Legislation Project of the Secretariat; see ‘CITES External Trust Fund (QTL): Status of Contributions as of 31 December 2015’, COP17 Doc. 7.3, Annex 7, Activity D-1 (2016).

<sup>129</sup> See Phyllis A. Mofson, ‘Protecting Wildlife from Trade: Japan’s Involvement in the Convention on International Trade in Endangered Species’, 3 *Journal of Environment and Development* (1994) 91–107 at 96; Kanami Ishibashi, ‘The Effectiveness of Mechanisms for Supervision or Compliance Control of Multilateral Environmental Agreements: A Critical Study of Compliance with CITES’ [in Japanese], 15 *Kagawa Hōgaku* (1995) 53–128; Miyuki Taguchi, *International Regimes and Cooperation: An Analysis of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and Japan* (University of Oregon thesis, 1996); Hisakazu Kato, ‘Implementation of Multilateral Environmental Agreements in Japan Through Domestic Environmental Legislation’, 43 *Japanese Annual of International Law* (2000) 117–149 at 135–142; James V. Feinemann and Koichiro Fujikura, ‘Japan: Consensus-Based Compliance in Weiss and Jacobson, *Engaging Countries*, *supra* note 40, 253–290 at 269–273.

Pacific sei whales may meet the requirements of the controversial ‘loophole clause’ of Article VIII of the International Whaling Convention,<sup>130</sup> they do not meet the stricter stipulations of CITES Art. III(5) for introduction from the sea of specimens of a species listed in Appendix I. Those provisions require, in addition to the mandatory independent scientific ‘non-detriment’ certificate mentioned above, a specific finding by the competent Management Authority that ‘the specimen is not to be used for primarily commercial purposes’. Resolution Conf. 5.10 (Rev. CoP15) defined that requirement as follows: ‘[A]ll uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature, with the result that the import of specimens of Appendix-I species should not be permitted’.<sup>131</sup> In view of the notorious ‘factory ship’ practice of the ICR,<sup>132</sup> which only extracts less than 1 per cent of a whale’s biomass for subsequent scientific analysis (biopsy and stomach content samples), while the economically usable rest of

<sup>130</sup> International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72. On the relationship with CITES, see Ralph U. Osterwoldt, *International Law and Politics of Conservation: The Case of the Whales* (M.Phil. thesis: Oxford University, 1982) 58-122; and Ed Couzens, *Whales and Elephants in International Conservation Law and Politics: A Comparative Study* (Earthscan, 2014) at 155-166. The special permit issued to the ICR on 9 May 2016 (No. 28-SUIKA-155) by the Japanese Ministry of Agriculture, Forests and Fisheries, for the introduction of 90 sei whales and 25 Bryde’s whales from the Northwest Pacific for research purposes, was disseminated on 13 May 2016 by the International Whaling Commission as an annex to Circular Communication to Commissioners and Contracting Governments IWC.CCG.1205, available at <<https://iwc.int/home>>, Circulars, IWC Archive no. 5835. An IWC Expert Panel for Evaluation of Japan’s Whaling Program in the Northwest Pacific (Tokyo, February 2016) expressed doubts about the ‘scientific’ usefulness of the programme (‘the results have not led to improved conservation and management of cetaceans or other marine living resources or the ecosystem’); IWC Doc. SC/66b/Rep06, IWC Archive no. 5824, 48, available at <<https://archive.iwc.int/pages/view.php?ref=5824&k=>>> (visited 10 February 2017). Yet, the subsequent report of the IWC Scientific Committee (San Diego, May-June 2016, chaired by Japan) merely concluded: ‘The Committee was unable to reach consensus on whether the additional information was sufficient to justify the revised number of whales to be taken under the JARPN-II programme’; Report of the Scientific Committee, 17 *Journal of Cetacean Research and Management* (Supplement 2016) at 80.

<sup>131</sup> Definition of ‘primarily commercial purposes’ (1985/2014), available at <<https://cites.org/eng/res/05/05-10R15.php>> (visited 10 February 2017), general principle 3. According to the second sentence of the principle, the burden of proof is on the applicant, in this case on the Institute of Cetacean Research (ICR). See also Resolutions Conf. 12.3 (Rev. CoP16, 2002/2014) and Conf. 14.6 (Rev. CoP16, 2007/2014). Earlier special permits by the Japanese Fisheries Agency (JFA) expressly relied on CITES Art. XIV(5), which however applies to specimens of species listed on Appendix II only, hence not to the North Pacific population of sei whales.

<sup>132</sup> The ICR factory ship in the North Pacific (the *Nisshin-Maru*, owned by the Kyōdō-Senpaku Ltd. shipping agency) is the very same vessel that has been operating for years in the Antarctic Southern Ocean; see *Whaling in the Antarctic (Australia/Japan)*, ICJ Reports (2014) at 295 (para. 232). On the aftermath of the ICJ judgment, see Jeffrey J. Smith, ‘Evolving to Conservation? The International Court’s Decision in the *Australia/Japan Whaling Case*’, 45 *Ocean Development and International Law* (2014) 301-327; Anastasia Telesetsky, Donald K. Anton and Timo Koivurova, ‘The International Court’s Decision in *Australia v. Japan*: Giving Up the Spear or Refining the Scientific Design?’, 45 *Ocean Development and International Law* (2014) 328-340; Phillip J. Clapham, ‘Japan’s Whaling Following the International Court of Justice’s Ruling: Brave New World – Or Business as Usual?’, 51 *Marine Policy* (2015) 238-241; Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill/Nijhoff, 2016).

the catch is processed on board as ‘by-products’ for subsequent marketing,<sup>133</sup> that definition would seem to leave hardly any room for discretionary interpretation. The continuation of the lethal ICR practice for ‘research purposes’, as announced by the JFA,<sup>134</sup> appears all the less plausible in light of the fact that simultaneously with the 2016 North Pacific hunt yet another ICR vessel was at sea in the very same ocean region in order to collect scientific data (*inter alia* on sei whales) by ‘non-lethal’ methods, as part of an ongoing monitoring project under the auspices of the International Whaling Commission.<sup>135</sup>

Be that as it may, part of the political-empirical reality also is the fact that Japan has not only been a member of the CITES Standing Committee (chaired by Norway) for the past ten years,<sup>136</sup> but remains the second-largest contributor – after the Unit-

<sup>133</sup> Approximately 40 per cent of biomass is usually discharged on the spot as waste, i.e. thrown overboard at sea. Commercial sales of the usable rest as ‘by-products’ in Japan account for over 85 per cent of the ICR’s revenues; see Peter H. Sand, ‘“Scientific Whaling”: Wither Sanctions for Non-compliance with International Law?’, 19 *Finnish Yearbook of International Law* (2008) 93-124 at 109. On market allocation and price-setting by the ICR ‘Sales Council’, see Aiko Endo and Mashiro Yamao, ‘Policies Governing the Distribution of By-Products from Scientific and Small-Scale Coastal Whaling in Japan’, 31 *Marine Policy* (2007) 169-181. Sei whale meat from Japanese ‘scientific whaling’ in the North Pacific has also turned up in illegally exported products in South Korea and California, according to DNA tests carried out in 2009; see C. Scott Baker *et al.*, ‘Genetic Evidence of Illegal Trade in Protected Whales Links Japan with the US and South Korea’, 6 *Biology Letters: London Royal Society* (2010) 647-650.

<sup>134</sup> On 8 November 2016, the JFA submitted a ‘New Research Plan for the North Pacific’ to the IWC, which increased the annual catch quota of sei whales from 90 to 140 specimens, with the declared objective of data collection for the future resumption of commercial whaling; see *Circular Communication* IWC.ALL.270, file no. NEWREP\_NP\_final\_161108. Meanwhile, Resolution 6.055 of the 25th World Conservation Congress of the IUCN, held in Hawaii in September 2016, has called for termination of the programme, noting that the special permit issued in May 2016 (*supra* note 130) also contravened IWC Resolution 2014-5 of 31 March 2014. The 66th IWC meeting, held in Portoroz/Slovenia in October 2016, adopted Resolution 2016-11 on ‘Improving the Review Process for Whaling Under Special Permit’; voting results available at <<http://us.whales.org/wdc-in-action/decisions-taken-at-iwc-2016>> (visited 7 February 2017). However, Japan objected to the Resolution and requested that it ‘should not be given effect’; see *Circular Communication* IWC.ALL.276 of 31 January 2017. In May 2017, the IWC Scientific Committee reviewed NEWREP-NP and endorsed the recommendations of an expert panel held in Tokyo in February 2017, to the effect that ‘lethal sampling’ of North Pacific sei whales is ‘currently unjustified and should be halted until more research has been conducted’; see the Report of the Scientific Committee, Doc. IWC/67/Rep 01 (6 June 2017) at 109 and Annex P3 at 18. Yet, Japan dissented again and on 12 June 2017 issued new special permits for 134 sei whales to be taken offshore in the North Pacific between June and September 2017; see *Circular Communication* IWC.CCG.1264 of 15 June 2017.

<sup>135</sup> IWC/Japan Joint Cetacean Sighting Survey Cruise in the North Pacific (POWER), from 2 July to 30 August 2016; ICR Press Release of 1 July 2016, available at <<http://www.icrwhale.org/160701ReleaseENG.html>> (visited 7 February 2017). The objective of the project is the collection of data on the populations of sei whales, fin whales and Bryde’s whales in the North Pacific by photo identification and non-lethal biopsies, with the help of so-called Larsen air guns; on this technique, see the expert testimony (in the ICJ *Antarctic Whaling* case, *supra* note 132) by Nick Gales, available at <<http://www.icj-cij.org/docket/files/148/17422.pdf>> (visited 7 February 2017).

<sup>136</sup> At the 17th Conference meeting in October 2016, the composition of the Standing Committee changed, with China succeeding Japan as full member for the Asian region and Japan becoming the alternate member.



ed States – to the Convention’s budget.<sup>137</sup> For diplomatic reasons, other member states will inevitably think twice before antagonizing such a heavy-weight member country by allegations of non-compliance – let alone initiating adversarial legal proceedings (which in any event could only be brought, under Article XVIII, ‘by mutual consent’).<sup>138</sup> Future recourse to the International Court of Justice is precluded anyway, following Japan’s amendment of its acceptance of the court’s compulsory jurisdiction on 6 October 2015 (in the wake of the Antarctic Whaling judgment), which now expressly excludes ‘any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea’.<sup>139</sup>

When the United Kingdom’s CITES management authority in 2007 for the first time had the audacity to draw the attention of the Secretariat in Geneva to possible Japanese treaty infractions with regard to trade in whale meat of Appendix-I specimens, and to suggest non-compliance proceedings under Article XIII, the Secretariat’s mild response was that the granting of special permits for ‘research whaling’ under Article III(5) was entirely within the discretion of the national management authority concerned.<sup>140</sup> Whereupon the legal adviser of the ICR (who from 2005 to 2008 also served as a member of the Japanese delegation in the CITES Standing Committee) promptly declared both the Antarctic and the North Pacific whaling programmes compatible with the Convention, citing the Secretariat’s opinion in support.<sup>141</sup> Over the next six years, further appeals to the CITES Secretariat for

<sup>137</sup> According to the contribution scale for 2016 (USD 647,393), see ‘CITES Trust Fund (CTL): Status of Contributions as of 30 June 2016’, CoP17 Doc. 7.3, Annex 10, Tab. 1 (2016); plus voluntary contributions (extrabudgetary funding, QTL) for 2013–2015 in the amount of USD 220,994, and contributions to special projects such as the joint tropical timber programme of CITES with the International Tropical Timber Organization (ITTO) in Yokohama; see CoP17 Doc. 7.5, at 6, Tab. 1 (2016).

<sup>138</sup> The dispute settlement clause of CITES Art. XVIII is a notorious ‘paper tiger’, which – like similar clauses in other multilateral environmental agreements – has never been used in forty years of treaty practice; see Cesare P.R. Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer Law International, 2000) at 44; and Peter H. Sand, ‘Environmental Dispute Settlement and the Experience of the UN Compensation Commission’, 54 *Japanese Yearbook of International Law* (2011) 151–189 at 157.

<sup>139</sup> See ICJ, ‘Declarations Recognizing the Jurisdiction of the Court as Compulsory’, available at <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=I-4&chapter=1&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en)> (visited 7 July 2017).

<sup>140</sup> Email correspondence between Trevor Salmon (UK Department for Environment, Food and Rural Affairs) and Willem Wijnstekers (CITES Secretary General), on 7 November 2007 (‘re: commercial sale of whale meat’), on file with the author.

<sup>141</sup> Dan Goodman, ‘Japan’s Research Whaling Is Not Unlawful and Does Not Violate CITES Trade Rules’, 13 *Journal of International Wildlife Law and Policy* (2010) 176–182 at 181–182; contra Vassili Papastavrou and Patrick Ramage, ‘Commercial Whaling by Another Name? The Illegality of Japan’s Scientific Whaling: Response to Dan Goodman’, 13 *Journal of International Wildlife Law and Policy* (2010) 183–187.

action regarding North Pacific sei whale catches were unsuccessful;<sup>142</sup> most recently, however, the Secretariat informed the Standing Committee on 23 September 2016 that ‘international measures’ on the issue have now been initiated vis-à-vis Japan under Article XIII of the Convention.<sup>143</sup>

The legitimacy of an international nature conservation regime is crucially dependent on trust,<sup>144</sup> – trust that rules will be applied equally to all participants in the system, on a common basis of transparency and accountability.<sup>145</sup> CITES, and its unique compliance procedure in particular, is widely respected for its effectiveness in protecting endangered species against the threats of illegal trade and overexploitation. Yet, when an otherwise successful treaty regime begins to apply – for subtle diplomatic reasons – double standards in favour of prominent member states,<sup>146</sup> the regime as a whole could risk losing part of its credibility, and hence its sociological balance and legal certitude.

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<sup>142</sup> See the panel report by Kate Cook *et al.*, *The Taking of Sei and Humpback Whales by Japan: Issues Arising Under the Convention on International Trade in Endangered Species of Wild Fauna and Flora* (International Fund for Animal Welfare, 2007); and the email response from the CITES Legal Affairs and Compliance Unit to the author (3 September 2012): ‘We have concluded that Japan is adhering to Article III, paragraph 5, of the Convention with regard to CITES trade in sei whales located in the North Pacific. As such, the Secretariat will not be taking any further action on the concerns you have raised.’

<sup>143</sup> CITES Standing Committee, 67th Meeting (Johannesburg), Summary Record, Doc. SC67 SR (2016) at 7.

<sup>144</sup> Bodansky, ‘The Legitimacy of International’, *supra* note 114, at 721-722 (‘legitimacy – like trust more generally – is a fragile phenomenon. It is easier to destroy than to build up’).

<sup>145</sup> See generally Frank Biermann and Aarti Gupta, ‘Accountability and Legitimacy in Earth System Governance: A Research Framework’, 70 *Ecological Economics* (2011) 1856-1864 at 1858.

<sup>146</sup> Reeve, *Policing International Trade*, *supra* note 31, at 312, referring to earlier cases where infringements of the Convention by Japan and some European countries were quietly ignored (‘a non-discriminatory approach demands similar treatment for all non-compliant states’).



# EFFECTIVENESS OF MULTILATERAL ENVIRONMENTAL AGREEMENTS: AN INTRODUCTION TO GENERAL ASPECTS

*Sylvia Bankobeza*<sup>1</sup>

## 1 Introduction

This paper outlines general aspects relating to the effectiveness of multilateral environmental agreements (MEAs). For the purpose of this paper, the ‘effectiveness’ of an MEA is defined as the degree or extent to which an environmental treaty is successful in meeting its objectives by delivery of desired results.<sup>2, 3</sup> The paper focuses on global MEAs and the role played by Parties in implementing these by taking measures, individually and jointly, to achieve the objectives of a given treaty. It additionally comments on the mechanisms that MEAs make available to facilitate their implementation. Several methods can be used to assess whether a global MEA is effective in achieving its objectives and whether the measures taken by Parties are achieving the MEA’s desired results. For instance, the roles of Conferences and Meetings of the Parties (COPs and MOPs) include keeping a particular MEA under continuous review.<sup>4</sup> In addition, it is possible to commission specific reviews on the effectiveness of a treaty to evaluate the contribution that particular measures have made to achieving the objective of the treaty or its key provisions and thereby measure its performance.<sup>5</sup>

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<sup>2</sup> Concise Oxford Dictionary (12th ed., 2011).

<sup>3</sup> On the different aspects of MEA effectiveness, see the paper by Pater Sand in this volume of the *Review*.

<sup>4</sup> See, for instance, Art. 23(4) of the 1992 Convention on Biological Diversity (CBD) (Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>.).

<sup>5</sup> See, for instance, *ibid.* Art. 21(3) (providing that the effectiveness of the Convention’s financial mechanism shall be reviewed after two years of its entry into force, and regularly thereafter).

Implementation of global MEAs, just like other treaties, is mainly the responsibility of individual Parties. While each Party will always be required to take measures to give effect to the treaty within its jurisdiction and to report on its implementation, some treaties with ambitious targets to be achieved within a particular timeframe have mechanisms to assist Parties with limited capacities to implement their international commitments. At the global level, the practice of some MEAs<sup>6</sup> has thus moved from simply relying on each Party to play its part in achieving a collective outcome, to close monitoring of implementation and facilitation of Parties' compliance through treaty based mechanisms.

The paper begins by briefly outlining various methods that are used to assess the effectiveness of global MEAs by examining the extent to which they are successful in achieving their objectives. This is followed by an overview of aspects that contribute to making global MEAs effective. Several conclusions are presented in the final part of the paper.

## **2 Assessing the effectiveness of MEAs and measures that COPs/MOPs have taken to improve effectiveness**

Assessment of the extent to which a global MEA is achieving its objective(s) occurs primarily through regular reviews of performance by the MEA's governing or subsidiary bodies.<sup>7</sup> Apart from these reviews which occur at scheduled meetings,<sup>8</sup> some treaties commission assessments to measure the performance of the MEA in achieving its objectives; to assess the effectiveness of Parties' national legislation against the MEA's requirements; or to examine the effectiveness of a particular mechanism in enabling the MEA to achieve its objectives. Both approaches to assessing effectiveness are briefly considered below.

The institutional mechanisms established by MEAs play important roles in facilitating and overseeing the implementation of such agreements and assessing their effectiveness. For instance, dedicated MEA secretariats are mandated to both share

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<sup>6</sup> For instance, the 1992 United Nations Framework Convention on Climate Change (UNFCCC) (New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>); the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <<http://ozone.unep.org/>>).

<sup>7</sup> For instance, the CBD has a Working Group on Review of Implementation of the Convention (WGRI), while the UNCCD (UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <<http://www.unccd.int>>) has a Committee of the Review of implementation of the Convention.

<sup>8</sup> For instance, the Montreal Protocol's MOP takes place every year, as does the UNFCCC's COP. The Parties of the CBD meet every two years. The COP of the CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org>>) takes place every three years, but there is a Standing Committee Meeting in between sessions.

information and organize periodic meetings of each treaty's governing and subsidiary bodies<sup>9</sup> so as to ensure close monitoring of the implementation of an MEA.

The main purpose of the meetings of MEA governing bodies such as COPs or MOPs, and the work of their subsidiary bodies, is to review the implementation of and compliance with treaty provisions and to provide policy guidance through decisions and/or resolutions. The work of the subsidiary bodies complements the work of the COP or MOP – the latter being the body where decisions and resolutions are made. These bodies and their processes therefore contribute to enabling Parties to take individual or joint action more effectively, rather than being left alone without monitoring, guidance, or other assistance.

The decisions adopted by COPs and MOPs may result in strengthened environmental protections – for instance, by bringing additional hazardous products within an MEA's scope, with the result that they need to be controlled and regulated. Such decisions may also enable Parties to implement an MEA more effectively when they result in the review or guidance of national implementation, or contribute to joint implementation by providing for eligible Parties to be supported through technical and financial assistance. Depending on the global MEA, the scientific and expert assessment reports and the national reports can provide information on the progress the MEA is making to reach its objective.<sup>10</sup>

Examples of global MEAs whose effectiveness is monitored through regular review by COPs or MOPs include the United Nations Framework Convention on Climate Change, the Vienna Convention for the Protection of the Ozone Layer<sup>11</sup> and its Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), the Convention on Biological Diversity (CBD) and related Protocols, and the Convention on International Trade in Endangered Species, to mention just a few. The Montreal Protocol is a good example of a treaty in respect of which oversight of this nature has led to improvements. As science has advanced and information on new ozone depleting substances emerged, the Protocol's MOP has adopted new amendments to cater for such developments.

Evaluating effectiveness can also be done through studies that take stock of whether the treaty is achieving its objectives. Apart from regular review, periodic evaluation or commissioned studies have also been used by the Parties to determine effective-

<sup>9</sup> Scientific and technical bodies, compliance mechanisms, implementation committees etc.

<sup>10</sup> The CBD COP, for instance, has requested the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) to review and assess periodically the status and trends of the biological diversity of dry and sub-humid lands on the basis of the outputs of the activities of the programme of work, and make recommendations for the further prioritization, refinement and scheduling of the programme of work.

<sup>11</sup> Convention on the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 International Legal Materials (1985) 1529.

ness of MEAs. The outcome of these initiatives has been either to confirm the progress made to achieve a treaty's objectives or to determine that the treaty has not been complied with as initially envisaged.

There are several examples of studies which have been performed to evaluate the extent to which a global MEA is effective. For instance, the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal<sup>12</sup> took a decision in 1995 to commission a study on the MEA's effectiveness in regulating the movement of hazardous waste<sup>13</sup> (notably, Article 15(7) of the Basel Convention explicitly provides for the COP to undertake evaluations of the Convention's effectiveness<sup>14</sup>). Notably, the study, entitled 'Evaluation of the Effectiveness of the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal', *inter alia*, sets out the conditions, procedures and special rules for transboundary movements of hazardous wastes with the aim of facilitating the effective implementation of the Convention. In doing so, the study provided a source of information to the Parties on facilitating the effective implementation of the Convention. Pursuant to Article 15(7), the Basel Convention's COP ultimately sought to strengthen the Convention by adopting an amendment to ban certain transboundary movements of hazardous wastes.<sup>15</sup> However, this amendment has yet to enter into force.

Another example of studies undertaken to determine the effectiveness of an MEA or its mechanisms can be drawn from the experiences of the Convention on Biological Diversity. Parties to the CBD had an opportunity to assess the Convention's effectiveness in tackling biodiversity loss in view of the target, set in 2002, to 'achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth'.<sup>16</sup> The conclusion of this assessment<sup>17</sup> – which was drawn from national reports and the Global Biodiversity Outlook 3 – was essentially that the goal was not achieved due to continued biodiversity loss. As a result of this study,

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<sup>12</sup> Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <<http://www.basel.int>>.

<sup>13</sup> UN Docs UNEP/CHW.3/31 and UNEP/CHW.3/Inf.7 (1995) containing the summary and the study on 'Evaluation of the Effectiveness of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal'. Also referenced in Dec. III/10 of the Basel Convention.

<sup>14</sup> Article 15(7) of the Basel Convention provides for the Conference of the Parties 'to undertake three years after the entry into force of this Convention, and at least every six years thereafter, an evaluation of its effectiveness...'

<sup>15</sup> Basel Convention, 'The Basel Convention Ban Amendment', available at <<http://www.basel.int/Implementation/LegalMatters/BanAmendment/tabid/1484/Default.aspx>> (visited 29 October 2017).

<sup>16</sup> The goal was first endorsed by the Parties of the CBD, and it was later adopted by the 2002 World Summit on Sustainable Development and the United Nations General Assembly and was incorporated as a target under the Millennium Development Goals ('United Nations Millennium Declaration', UNGA Res. 55/2 of 8 September 2000).

<sup>17</sup> The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets', CBD Decision X/2 (2011).

the Parties agreed to a ten-year strategy, running up to 2020, to tackle biodiversity loss. This strategy went hand in hand with the adoption of the Aichi Targets,<sup>18</sup> which most countries are working towards as they implement the second generation of national biodiversity strategies and action plans (NBSAPs) under the Convention. The progress that the CBD is making towards achieving its objectives was further reviewed at the thirteenth Conference of the Parties, in 2016. At that COP, Parties agreed upon tools to evaluate the effectiveness of policy instruments for the implementation of the Strategic Plan for Biodiversity 2011-2020. The intention is that these will feed into the Sixth National Report.<sup>19</sup> In this regard, Parties are encouraged to evaluate the effectiveness of measures undertaken to implement the Strategic Plan for Biodiversity 2011-2020; to document experiences, including the methodologies applied; to identify lessons learned; and to provide this information to the Executive Secretary, including through their sixth national report and the clearing-house mechanism.<sup>20</sup>

### **3 Introduction to other factors that contribute to making MEAs effective**

For many years, issues of compliance with and enforcement of global MEAs were considered to be purely matters for the contracting Parties to address when implementing their international commitments. The required action for contracting Parties ranged from adopting national legislation, policy and administrative actions to give effect to the treaty at national level, to reporting periodically on these implementation measures. More recently, in addition to regular review of performance through COPs and/or MOPs, new mechanisms – such as expert bodies, financial mechanisms, technical assistance, technology transfer, differentiation in implementation, and non-compliance mechanisms and procedures – have been adopted, shifting the focus from rule-making to supporting implementation and thereby enhancing MEA effectiveness. There are examples of such measures having remarkable success. For instance, the Montreal Protocol has enabled the phase out of the production and consumption of 99 per cent of ozone-depleting substances, thereby averting the millions of cases of eye cataracts and skin cancers that could have impacted people had measures not been taken under the Protocol. Various measures

<sup>18</sup> *Ibid.* The United Nations Decade on Biodiversity 2011–2020 serves to support the implementation of the CBD’s Strategic Plan for Biodiversity and promote its overall vision of living in harmony with nature. Throughout the decade, governments are encouraged to develop, implement and communicate the results of strategies for implementing the Strategic Plan for Biodiversity and encourage stakeholders at different levels to play a role in biodiversity preservation. This Strategic Plan is important as biodiversity is disappearing at an alarming speed. The Strategic Plan for Biodiversity incorporates the Aichi Biodiversity Targets.

<sup>19</sup> ‘Approaches to Evaluating the Effectiveness of Measures Taken to Implement the Convention on Biological Diversity’, draft for review and inputs, see <<https://www.cbd.int/sbstta/sbstta-21-wg8j-10/EffectivenessMethods-draft-for%20SBSTTA-review.pdf>> (visited 25 July 2017).

<sup>20</sup> A clearance house mechanism is an information hub providing updated information from Parties on the actions they are taking to implement the MEA.



(both traditional and more recent) which contribute to enhancing the effectiveness of MEAs are unpacked in more detail below.

### **3.1 Implementation: national legislation, policy and administrative action and the effectiveness of MEAs**

Most global MEAs are not self-executing; they require states Parties to take action in their jurisdictions and to collaborate with others in joint action to implement their provisions. The actions required depend on the treaty and on what it seeks to regulate. Examples include establishing a licencing or permit system in respect of controlled products, setting up emission standards, banning or controlling the use of certain products, regulating the import and export of certain products, criminalizing and penalizing particular activities, establishing or empowering institutions, designating and conserving particular areas, nominating focal points, establishing and maintaining inventories, and preparing action plans. These actions can be effected through either developing or strengthening national legislation and/or developing national policies or action plans, as well as through taking administrative action at the national level. The legislative, policy and administrative requirements differ from treaty to treaty, depending on each MEA's objectives. If an MEA is to achieve its objectives, it is further necessary that the requisite national legislation and institutions are not only in place, but are effective in the sense that they are enforceable and operational. Providing technical and financial assistance to developing country Parties, as well as training and legal guidance materials as part of compliance assistance has therefore contributed to the improved effectiveness of some MEAs.

A good example of a global MEA which requires its Parties to put in place national legislation is CITES.<sup>21</sup> The effectiveness of CITES' species listings and regulatory measures depends, among other things, on Parties' ability to control illegal trade and on the enforceability of the national legislation adopted to implement the Convention.<sup>22</sup> Assessing the effectiveness of national legislation to tackle trade in endangered species has therefore been a key focus of the CITES regime. The requirements considered necessary for legislation to implement CITES are that it must enable national authorities to:

- designate at least one Management Authority and one Scientific Authority;
- prohibit trade in specimens in violation of the Convention;
- penalize such trade; or
- confiscate specimens illegally traded or possessed.<sup>23</sup>

CITES' National Legislation Project classifies national legislation into either category 1, 2 or 3. Category 1 includes legislation that is believed generally to meet the

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<sup>21</sup> See CITES Art. VIII(1).

<sup>22</sup> 'National Laws for Implementation of the Convention', Res. Conf. 8.4 (Rev. CoP15 (1992/2010)).

<sup>23</sup> *Ibid.*

minimum requirements for the implementation of CITES. Category 2 includes legislation that is believed to meet two or three of the requirements for the implementation of CITES; and Category 3 includes legislation that is believed not to meet the requirements for the implementation of CITES. Each Party is placed in one of these three categories. Countries with inadequate legislation, namely those in Category 2 or 3, are called upon to strengthen their legislation to ensure that their legislation complies with all four of the minimum requirements that have been identified for implementation of CITES.

Having a clear guide on the legislative requirements and the categorization has assisted CITES Parties to develop adequate legislation to address the trade in endangered species. This is an important step insofar as the enforcement of CITES is very much reliant on adequate regulation as the legal basis for controlling trade across borders. It is further necessary that the institutions involved in enforcement have well trained and equipped customs officials to ensure enforcement at border points.

An important aspect of the CITES example is that this Convention possesses decision-making and enforcement mechanisms which contribute to improved effectiveness.<sup>24</sup> Regular review of Party action at meetings of the CITES Standing Committee – and imposition of sanctions if Parties are found to be in non-compliance – can help to ensure compliance with and enforcement of this Convention. For instance, the CITES Standing Committee can recommend that all Parties suspend commercial trade in specimens of CITES-listed species from those Parties that require attention as a priority and have failed to adopt appropriate measures for the effective implementation of the Convention or to agree on an appropriate legislative timetable, as required under Decision 16.33.<sup>25</sup> This recommendation takes effect 60 days after the conclusion of the Standing Committee meeting at which it is made. The Standing Committee can also issue a warning to Parties that require attention as a priority but have not yet adopted the appropriate measures. Such warnings advise Parties that they are in non-compliance and reminds them of the need to accelerate their efforts to enact adequate legislation by the next Standing Committee meeting.

### **3.2 Institutional framework: regular meetings of the Parties**

Apart from keeping the global MEAs under continuous review, as referred to above, COPs and/or MOPs and treaty secretariats play an important role in coordinating joint and individual Party action and in facilitating the monitoring of the implementation of MEAs. The fact that most of the work of subsidiary bodies and mechanisms – such as the work of scientific and technical expert bodies, financial mechanisms, non-compliance mechanisms, and national reporting – end up at COPs and/

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<sup>24</sup> See decisions of the Standing Committee Meetings of CITES, available at <<https://cites.org/eng/com/sc/index.php>>.

<sup>25</sup> 'National laws for the implementation of the Convention', CITES Dec. 16.33 (2013).

or MOPs for decisions illustrates the importance of these governing bodies.<sup>26</sup> While the need for such institutional frameworks was not always recognized in the development of early MEAs, they are a common feature of contemporary environmental agreements. The gradual recognition of their importance is well illustrated by the evolution of the Ramsar Convention on Wetlands of International Importance,<sup>27</sup> the text of which was amended subsequent to its adoption to provide for, *inter alia*, a COP 'to review and promote the implementation of [the] Convention'.<sup>28</sup>

Even as one unpacks the development of mechanisms that facilitate compliance with and implementation of MEAs, it is important to note that not all MEAs have embraced these mechanisms in the same way. Some global environment-related treaties – such as those developed under the International Maritime Organization (IMO),<sup>29</sup> the Food and Agricultural Organization (FAO),<sup>30</sup> or the International Labour Organization (ILO)<sup>31</sup> – are reviewed through the governing body meetings of these organisations, which also approve their budgets for financial and technical assistance. The absence of autonomous bodies, in the form of specific secretariats to the MEA or specific meetings of the MEA, do not necessarily make them ineffective in achieving their objectives. This is because the test of a particular MEA's effectiveness is ultimately its success in achieving its desired results.

### 3.3 Considerations of differentiation

One of the environmental law principles on which the negotiation of some MEAs has been based is the principle of common but differentiated responsibility.<sup>32</sup> This principle recognizes that there are differences in both the capabilities and responsibilities of different Parties to MEAs. Accordingly, these differences are taken into consideration in determining the measures which Parties need to implement within the agreed timelines.<sup>33</sup> For instance, considerations regarding the varied economic capacities of countries to take action can result in differences of ambition/targets for developing and developed countries under an MEA. Other considerations include Parties' varied contributions to environmental damage due to differences in their levels of industrial development. In some MEAs, this is reflected in differences in the emissions reduction targets or phase out measures that apply to different Parties. The

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<sup>26</sup> The texts of core MEAs create Conferences and Meetings of the Parties while, for instance, the International Maritime Organization (IMO, see <<http://www.imo.org>>), the International Labour Organization (ILO, see <<http://www.ilo.org>>) and the Food and Agriculture Organization (FAO, see <<http://www.fao.org>>) do not create institutions such as COP/MOPs but expect the general governing body meetings of the organization to bring to the attention of the Parties any issues relating to the underlying Convention.

<sup>27</sup> Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <<http://www.ramsar.org>>.

<sup>28</sup> Ramsar Convention Art. 6.

<sup>29</sup> See <<http://www.imo.org>>.

<sup>30</sup> See <<http://www.fao.org>>.

<sup>31</sup> See <<http://www.ilo.org>>.

<sup>32</sup> See, for instance, Arts 3(2) and 4(1) of the UNFCCC.

<sup>33</sup> See, for instance, Arts 2 and 5 of the Montreal Protocol.

above factors have also sometimes led to differences in the timelines to be effected in MEA implementation, resulting in staggered implementation. The application of the principle of common but differentiated responsibility may contribute to MEA effectiveness in several ways. Naturally the weakened commitments allowed to certain countries have a direct negative effect on the environmental effectiveness of the treaty arrangement, but this can be ameliorated or offset by the potentially enhanced participation of states in the agreement which is perceived, thanks to the applied differentiated approaches, to be fairer and more realistic by the Parties.

A good example of the application of the principle of common but differentiated responsibility is seen in the Montreal Protocol, under which Parties have been classified into those operating under Article 2 and those operating under Article 5 of the Protocol. In the recently adopted Kigali Amendment to the Montreal Protocol, the Parties agreed to begin the phase down of hydrofluorocarbons (HFCs) by 1 January 2019 for Article 2 Parties, while developing countries operating under Article 5 of the Protocol will begin to take similar measures by 1 January 2024. When negotiating their commitments under such treaties, developing countries negotiate timelines that will enable them to comply while protecting their industries.

### 3.4 The role of scientific and expert panels

Some MEAs have scientific and technical panels<sup>34</sup> which serve as expert bodies. For example, the Montreal Protocol has three expert panels, namely a Scientific Assessment Panel; a Technology and Economic Assessment Panel; and an Environmental Effects Assessment Panel. An example of the importance of such bodies and how they work can be drawn from the 28th Meeting of the Parties to the Montreal Protocol, held in Kigali in 2016. At that meeting, the Technology and Economic Assessment Panel (TEAP) submitted reports on alternatives to ozone depleting substances, and an assessment of the climate benefits and financial implications of hydrofluorocarbons (HFC) phasedown schedules in the amendment proposals. This would in turn inform the decision made by Parties at the MOP to adopt the Kigali Amendment to the Montreal Protocol.

The Scientific Assessment Panel of the Montreal Protocol provides regular updates to the Protocol's MOP on the recovery of the ozone hole in the stratosphere, and these updates give Parties a clear indication of the effectiveness of the measures being taken to protect the ozone layer. Scientists have been observing and monitoring the ozone hole from the time it was discovered in 1984.<sup>35</sup> The flexibility provided by the Montreal Protocol to adopt new rules and amendments allows Parties to address any new substances that need to be regulated and has contributed to the Protocol's effectiveness in achieving its objectives.

<sup>34</sup> Examples include the CBD, Montreal Protocol, UNFCCC and UNCCD.

<sup>35</sup> In 1984, Scientists Joseph Farman, Brian Gardiner, and Jonathan Shanklin, discovered a recurring spring time Antarctic ozone hole.

### 3.5 National reporting mechanisms

Most global MEAs require their Parties to generate periodic national reports or collect certain data. This in turn provides a source of information which can be used to determine the extent to which the MEA is being implemented in each country and the effect of such implementation on the aspect of the environment that the MEA seeks to protect. In other words, periodic national reports, which are guided through templates, play an important role in enabling MEAs to verify implementation and to track progress towards achieving their objectives. The MEA's Secretariat circulates these reports to other Parties and makes them available in information portals as a basis for taking further action regarding implementation. In 2010, for example, the Conference of the Parties to the CBD analyzed the information from national reports and declared that this Convention had not made adequate progress in tackling biodiversity loss. As a result of this assessment, countries adopted new targets and a new generation of NBSAPs that are being implemented as a means of tackling biodiversity loss in the period until 2020.

### 3.6 Financial mechanisms

Recognition of the need for financial mechanisms in MEAs has evolved over time. Initially, each Party was expected to fund its MEA implementation at the national level and to contribute to a trust fund that would fund joint meetings and technical assistance to facilitate Parties' treaty implementation. From 1989, some global MEAs expanded the use of financial resources to not only fund meetings, capacity-building programs and joint activities through trust funds, but to provide additional assistance to some developing country Parties to ensure that they implement treaty obligations more effectively.<sup>36</sup>

The effect and levels of funding of financial mechanisms differ from one MEA to another. Some MEAs have access to more financial resources to assist Parties than others. It is therefore important to understand how the designated financial mechanisms are replenished, how the countries eligible for funding are determined, and how the available financial resources are disbursed. Bodies such as the Global Environmental Facility (GEF)<sup>37</sup> have been designated to be the financial mechanisms of various MEAs.<sup>38</sup> The GEF has been replenished several times by contributions from developed countries and, through its local area approach, is assisting developing countries to reverse environmental degradation and implement a number of

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<sup>36</sup> See, for instance, Art. 11 of the UNFCCC; Art. 9 of the Paris Agreement on Climate Change.

<sup>37</sup> See <<http://thegef.org>>. Support given to countries through projects of different sizes focusing on focal areas of the GEF, Star Allocation etc. See also the Instrument for the Establishment of the Restructured Global Environmental Facility (2015), available at <<https://www.thegef.org/documents/instrument-establishment-restructured-gef>> (visited 7 October 2017).

<sup>38</sup> Such as the CBD, Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <<http://chm.pops.int>>), UNFCCC, and United Nations Convention on Combating Desertification.

MEAs. Other examples of financial mechanisms include the Multilateral Fund for the Montreal Protocol,<sup>39</sup> Green Climate Fund,<sup>40</sup> Adaptation Funds,<sup>41</sup> and Climate Investment Funds.<sup>42</sup> These mechanisms enable eligible Parties to access resources to, *inter alia*, acquire ozone friendly technologies, low carbon technologies and renewable energy resources, and thereby assist them in implementing various environmental treaties.

In recent years, the private sector has been involved in making more funds available to developing countries to implement MEAs such as the UNFCCC. For instance, developing countries can now access financial resources through loans and grants from multilateral development banks, which assist these countries in funding the technologies required to implement their commitments under various MEAs.

### 3.7 Technology transfer

Some MEAs provide for mechanisms to assist developing countries to access clean technologies. This is also referred to as technology transfer.<sup>43</sup> As is alluded to above, under some MEAs this issue is linked to financial mechanisms. For instance, Article 10 of the Montreal Protocol<sup>44</sup> links the Protocol's financial mechanism to the transfer of technology to phase out ozone-depleting substances. This financial commitment linked to technology transfer was extended through the recent Kigali Amendment to the Montreal Protocol, adopted in October 2016. In terms of the amendment, technology transfer to assist developing countries to transition to non-HFC alternatives will be supported through the Protocol's Multilateral Fund.

Under the framework of the UNFCCC, the Climate Technology Centre and Networks (CTCN)<sup>45</sup> assists developing countries to make better informed decisions about mitigation and adaptation technologies. By 2016, CTCN reported that 160 technology transfers were underway in 60 countries for sectors ranging from ag-

<sup>39</sup> See <<http://www.multilateralfund.org/default.aspx>>.

<sup>40</sup> See <<http://www.greenclimate.fund/home>>.

<sup>41</sup> Most importantly, see <<https://www.adaptation-fund.org/>>.

<sup>42</sup> See <<https://www.climateinvestmentfunds.org/>>.

<sup>43</sup> Article 10 of the Paris Agreement on Climate Change.

<sup>44</sup> Article 10A ('Transfer of technology'):

Each Party shall take every practicable step, consistent with the programmes supported by the financial mechanism, to ensure that the best available, environmentally safe substitutes and related technologies are expeditiously transferred to Parties operating under paragraph 1 of Article 5; and (b) that the transfers referred to in subparagraph (a) occur under fair and most favourable conditions.

<sup>45</sup> See <<https://www.ctc-n.org/>>.

riculture and energy to industry and transportation.<sup>46</sup> Some Clean Development Mechanism (CDM) projects, such as the Waste to Energy Projects, have also been used to enable developing countries to acquire clean technologies.<sup>47</sup>

### 3.8 Compliance mechanisms: non-compliance procedures and bodies

Some MEAs have established compliance mechanisms to monitor, and contribute to the improvement of, implementation. The structure, composition and mandate of these bodies, how their procedures are initiated, and the nature of their decisions differs from one MEA to another.<sup>48</sup> This part of the paper briefly summarizes the salient features of the non-compliance procedures and bodies of the following treaties: the Montreal Protocol, the Kyoto Protocol<sup>49</sup> and the Basel Convention.

#### 3.8.1 The Non-compliance Procedure of the Montreal Protocol

The Non-compliance Procedure of the Montreal Protocol can be initiated in various ways. For instance, by a Party reporting to the Implementation Committee that it cannot meet its obligations; or by any Party or Parties expressing their concern about another Party's implementation of its obligations and communicating these concerns in writing, along with corroborating information, to the Protocol's Secretariat. The Implementation Committee can also request information from the Parties alleged to be in non-compliance. At the end of the procedure, the Implementation Committee – which has 10 members – reports to the Meeting of the Parties with appropriate recommendations. The Meeting of the Parties can then decide on the actions to be taken to bring about compliance with the Protocol. The Parties subject to the procedure must subsequently inform the Meeting of the Parties of the measures they have taken in response to the decisions or recommendations on non-compliance.

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<sup>46</sup> For 2017, the CTCN has received more than 160 requests for assistance. Support ranges from providing capacity-building support for national energy efficiency policies in Colombia, to technical assistance for design and financing of crop drying and storage technologies for enhanced food security in Mali, to facilitation of south-south technology transfer in Bhutan for reduction of greenhouse gas emissions in the transport sector. See CTCN, 'Countries pledge over \$23 million to support technology transfer in developing countries through the CTCN' (2016), available at <<https://www.ctc-n.org/news/countries-pledge-millions-technology-transfer-implement-paris-agreement>> (visited 7 October 2017).

<sup>47</sup> See Art. 12 of the Kyoto Protocol (Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22).

<sup>48</sup> See, for instance, 'Non-Compliance Procedure', Decision X/10 (1998), adopted pursuant to Art. 8 of the Montreal Protocol, the decision contains an indicative list of measures that might be taken by the Meeting of the Parties in respect of non-compliance with the Protocol. The Kyoto Protocol compliance regime was developed pursuant to Art. 18 of the UNFCCC by the COP serving as the MOP to the Protocol. A Joint Working Group elaborated a draft regime on compliance that COP 7 approved in 2001 as part of the Marrakesh Accords (Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001. Addendum. Part two: Action taken by the Conference of the Parties, Volume I, UN Doc. FCCC/CP/2001/13/Add.1 (2001)). The Committee administering the Mechanism for Promoting Implementation and Compliance with the Basel Convention was established in 2002 under Art. 15(5)(e) of the Convention.

<sup>49</sup> See 'Procedures and mechanisms relating to compliance under the Kyoto Protocol', Kyoto Dec. 27/ CMP.1 (2005).

The Meeting of the Parties can take any of the following measures:<sup>50</sup>

- provide for appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer, financial assistance, information transfer and training;
- issue cautions;
- suspend, in accordance with applicable rules of international law concerning the suspension of the operation of the treaty, specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanisms, and institutional arrangements.

A number of countries have been considered under the Montreal Protocol's Non-Compliance Procedure.<sup>51</sup>

### 3.8.2 Kyoto Protocol compliance regime

The Kyoto Protocol compliance regime was approved in 2001 as part of the Marrakesh Accords.<sup>52</sup> The objective of this procedure is to facilitate, promote and enforce compliance with Parties' commitments under the Protocol. The compliance mechanism has a Compliance Committee with two branches: a facilitative branch and an enforcement branch, each of which has ten members. The facilitative branch supports efforts of the Parties to comply, while the enforcement branch monitors compliance with the most important obligations and has several tools at its disposal to bring about compliance. The Committee can impose sanctions upon a Party that fails to comply with its commitments. There is an Appeals procedure which provides for a review of decisions of the UNFCCC COP/MOP.<sup>53</sup> Overturning a decision against a Party requires three-fourths majority of the COP/MOP. This compliance regime and its branches have been successful in improving compliance. Examples of countries that have been considered under this regime are available in the reports of the Committee on the UNFCCC website.<sup>54</sup>

### 3.8.3 Mechanism for Promoting Implementation and Compliance with the Basel Convention

The Mechanism for Promoting Implementation and Compliance with the Basel Convention is a subsidiary body of the Conference of the Parties to the Convention and was established in 2002. Its objective is to assist Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and

<sup>50</sup> Annex V of the Report of the Fourth Meeting of the Parties.

<sup>51</sup> For better insight, read the *Handbook on the Implementation of Ozone Conventions*. See the Publication section of the UN Environment website <<http://www.unep.org/ozone>>.

<sup>52</sup> 'Procedures and mechanisms relating to compliance under the Kyoto Protocol', UNFCCC Dec. 24/CP.7 (2001).

<sup>53</sup> Kyoto Dec. 27/CMP.1.

<sup>54</sup> See <[http://unfccc.int/kyoto\\_protocol/compliance/](http://unfccc.int/kyoto_protocol/compliance/)>.



aim to secure the implementation of and compliance with the obligations under the Convention. The mechanism is non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping Parties to implement the provisions of the Basel Convention. It pays particular attention to the special needs of developing countries and countries with economies in transition, and is intended to promote cooperation between all Parties. The mechanism complements the work performed by other Convention bodies and by the Basel Convention Regional Centres.<sup>55</sup> A Committee of 15 members, elected among the Parties, administers this mechanism. It reviews both specific submissions and general issues of compliance with and implementation of the Convention, adopts decisions, and reports to the Conferences of the Parties on the implementation of its work programme according to its terms of reference.

The triggers to the mechanism's procedures may be initiated either by the Committee; by a Party that concludes that, despite its best efforts, it is or will be unable to fully implement or comply with its obligations under the Convention; or by a Party that has concerns regarding, or is affected by, a failure to comply with and/or implement the Convention's obligations by another Party with whom it is directly involved under the Convention. A Party intending to make a submission regarding another Party's compliance should inform the Party whose compliance is in question, and both Parties should then try to resolve the matter through consultations. Finally, a Party can be brought before the Committee if the Convention's Secretariat<sup>56</sup> becomes aware of possible difficulties of any Party in complying with its obligations under the Convention.<sup>57</sup>

### 3.9 Dispute settlement mechanisms

An MEA's dispute settlement procedures are designed to address disputes between Parties concerning the interpretation and application of the Convention, and guide them to resolve these disputes through negotiations if possible. An elaborate dispute settlement procedure provides various options, such that if negotiation fails there is an option for mediation and/or conciliation, if this fails then arbitration, and finally the International Court of Justice if outlined as an option. An example of an elaborate dispute settlement procedure is that articulated by the Vienna Convention for the Protection of the Ozone Layer.<sup>58</sup> The appropriate form of dispute settlement mechanism depends upon the specific provisions contained in an MEA and the nature of the dispute. It is important to note that a range of procedures could be considered, including negotiations, mediation, conciliation,

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<sup>55</sup> There are fourteen autonomous Basel Convention Regional Centres, based in Africa, Latin America and Caribbean, Eastern Europe and Asia Pacific. See <<http://www.basel.int/Partners/RegionalCentres/>>.

<sup>56</sup> While acting pursuant to its functions under Arts 13 and 16.

<sup>57</sup> This refers to specific articles – Arts 3(1), 4(1), 5 and 13(2)-(3) – provided that the matter has not been resolved within three months by consultation.

<sup>58</sup> Article 11 ('Settlement of disputes').

fact-finding commissions, dispute resolution panels, arbitration and other possible judicial arrangements.

### **3.10 The role of global mechanisms in addressing gaps at transnational levels and supporting other additional measures**

Various types of global mechanisms established by MEAs have the potential to enhance these treaties' effectiveness. For instance, it is envisaged that the Global Multilateral Benefit-sharing Mechanism referred to by the Nagoya Protocol<sup>59</sup> will address the fair and equitable sharing of benefits derived from the utilization of genetic resources and associated traditional knowledge that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally,<sup>60</sup> thus contributing to achieving the objectives of the Protocol and its parent Convention (the CBD).

Another example is the International Mechanism for Loss and Damage,<sup>61</sup> which was established in 2013 by the 19th Conference of the Parties of the UNFCCC.<sup>62</sup> The mechanism addresses loss and damage associated with the impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change. The Executive Committee of this mechanism has established the expert group on non-economic losses, the technical expert group on comprehensive risk management and transformational approaches and the task force on displacement.

The first of the above global mechanisms will address gaps in national regimes in relation to the Nagoya Protocol by focusing on genetic resources in transboundary situations; the second mechanism (for the UNFCCC) has the role of enhancing understanding, action and support, including in finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change.

### **3.11 Other important measures and mechanisms that contribute to the effectiveness of MEAs**

Various other measures and mechanisms can make a significant contribution to de-

<sup>59</sup> See Art. 10 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, in force 16 October 2014, <<http://www.cbd.int/abs/>>.

<sup>60</sup> *Ibid.*

<sup>61</sup> See <[http://unfccc.int/adaptation/workstreams/loss\\_and\\_damage/items/8134.php](http://unfccc.int/adaptation/workstreams/loss_and_damage/items/8134.php)> (visited 30 July 2017).

<sup>62</sup> 'Warsaw international mechanism for loss and damage associated with climate Change', UNFCCC Dec. 2/CP.19 (2013).

livering on an MEA's objectives. These include providing technical assistance and building capacity by equipping all stakeholders that are responsible for the implementation of a given MEA with the necessary technical guidance materials, training and skills set to be able to implement the Convention effectively. This can be done at the national level or through sub-regional or regional formats or centers. For instance, the Basel Convention benefits from a network of 14 Regional and Coordinating Centres for Capacity-Building and Technology Transfer (BCRCs) that can address region-specific capacity building and technology transfer needs.<sup>63</sup> The Centres have clear mandates on their core functions and responsibilities. Their focus is on training and technology transfer regarding the management of hazardous and other wastes and the minimization of their generation, and they aim to ensure efficient regional delivery of technical assistance in a highly professional manner. These institutions operate under the authority of the Conference of the Parties of the Basel Convention. A methodology for the evaluation of their performance has been developed, based on specific criteria, and the performance evaluation reports from the Centres located in Africa, Asia Pacific, Eastern Europe, Latin America and the Caribbean indicate that they are adding value to countries in terms of building their capacity to implement the Basel Convention.<sup>64</sup>

Further, as science and technology evolves, some global MEAs are equipped with a measure of flexibility to adopt new rules (for instance, through amendments, annexes, appendices or protocols) to regulate the new developments without subjecting the MEA to renegotiation. In the context of effectiveness, this flexibility enables Parties to achieve the objectives of the treaty by responding relatively quickly to the new developments. For instance, the adjustment provision in the Montreal Protocol on Substances that Deplete the Ozone Layer has resulted in the Protocol being amended several times to respond quickly to new scientific information and to accelerate the reductions required to meet the Protocol's objectives. In the same way, the Stockholm Convention on Persistent Organic Pollutants has evolved to regulate additional added chemicals. This development of new rules can play an important role in ensuring that an MEA is effective in achieving its objectives.

In recent years, increasing attention has been paid to promoting synergies amongst MEAs. Joint implementation of action plans and strategies that involve more than one MEA, as well as in the course of implementation at the national level, can improve MEA effectiveness.<sup>65</sup>

Finally, strengthening stakeholder engagement and developing partnerships with a

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<sup>63</sup> See <<http://www.basel.int/?tabid=2334>> (visited 30 July 2017).

<sup>64</sup> See Basel Convention, 'Performance Evaluation of the Regional Centres', available at <<http://www.basel.int/Partners/RegionalCentres/PerformanceEvaluationReports/tabid/4465/Default.aspx>> (visited 7 October 2017).

<sup>65</sup> For instance, National Biodiversity Strategies and Action Plans are used as tools to implement all biodiversity-related MEAs.

variety of actors can play an important role in enhancing an MEA's effectiveness. One such example is the actions that have been taken by the Basel Convention's e-waste programme to engage mobile phone companies, computer companies and other stakeholders in a partnership to facilitate waste recycling programs in the area of e-waste.<sup>66</sup>

## 4 Conclusion

Assessing the effectiveness of an MEA entails the examination of changes that have been effected as a result of implementing the agreement over time.<sup>67</sup> This should include an assessment of the extent to which the measures being taken are achieving the objectives for which the MEA was adopted. Notably, the implementation of some global MEAs goes beyond the traditional approach to implementation (involving only the adoption of national legislation, and taking of administrative and policy action) to include other measures that can be difficult for some developing countries to take within a particular time frame. Some MEAs consequently apply the principle of common but differentiated responsibility – an example of application being the 2016 Kigali Amendment of the Montreal Protocol, giving developing countries more time to comply with the obligations of the treaty and supporting them through funding from the Multilateral Fund. This ensures that developing countries are not left behind in the implementation of their international commitments.

Expert subsidiary bodies, such as scientific or technological and economic advisory bodies,<sup>68</sup> guide Parties as they consider technical issues and their implications for the implementation of MEAs. National reports and other data collection mechanisms play an important role in the monitoring and verification of compliance<sup>69</sup> and the assessment of MEAs' effectiveness; and financial mechanisms are also important – especially insofar as they support the implementation of MEAs.<sup>70</sup> Strengthening institutions and technical assistance mechanisms for the implementation of MEAs by developing countries is also necessary. Compliance mechanisms have been developed by various treaties to help ensure their effectiveness. The flexibility of treaty regimes to change existing rules and adopt new ones, the optimization of synergies among MEAs in the course of implementation, and the development of partnerships with various stakeholders all contribute to making global MEAs more effective. Finally, it is important for MEAs to have methodologies and criteria in place to measure their effectiveness, so that shortfalls therewith can be identified and addressed.

<sup>66</sup> See Basel Convention, 'E-waste. Overview', available at <<http://www.basel.int/Implementation/Ewaste/Overview/tabid/4063/Default.aspx>> (visited 30 July 2017).

<sup>67</sup> Compliance Mechanisms Under Selected Multilateral Environmental Agreements (UNEP, 2005), available at <[http://www.acpmeas.info/publications/Compliance\\_mechanisms\\_under\\_selected\\_MEAs.pdf](http://www.acpmeas.info/publications/Compliance_mechanisms_under_selected_MEAs.pdf)> (visited 25 July 2017) at 20.

<sup>68</sup> That meet within sessions or inter-sessionally.

<sup>69</sup> Sometimes according to set measurable and time bound targets, which can expire and be updated.

<sup>70</sup> Such as in the acquisition of clean technologies.



# **PART II**

## **GENERAL ASPECTS OF MEA COMPLIANCE REGIMES**



# LEGAL CHARACTER OF COMPLIANCE MECHANISMS

*Malgosia Fitzmaurice*<sup>1</sup>

## 1 Introduction

This paper shall outline the legal character of the Conferences of the Parties (COPs) of multilateral environmental agreements (MEAs), focusing especially on the legal character of COP decisions such as those through which compliance procedures and mechanisms tend to be established. The legal character of the decisions adopted by the governing bodies of MEAs is a subject of many publications. As will be explained below, on the basis of these decisions, states become subject to new international legal obligations, which were not included in an original treaty – including those stemming from the establishment of compliance mechanisms. In classical international law, such changes in the legal obligations of states, which are quite far reaching and impact states' original consent to be bound, are effected through the procedure of amendments to the treaty.

This paper will examine the legal character of COP decisions as well as provide a few practical examples on law-making through COPs. Following the discussion on COPs, the paper will provide a brief overview of common features of MEA compliance mechanisms.

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## 2 Law-making character of MEA COP decisions

### 2.1 Key theories on the legal effect of COP decisions

Compliance mechanisms in the context of MEAs are in general related to the functions of the organs of these agreements and to what is referred to in the law of treaties as 'consent to be bound'. MEAs establish such mechanisms on the basis of the decisions of their Conferences of the Parties or Meetings of the Parties (MOPs).<sup>2</sup> The theories underlying the effect of COP decisions for the development of a treaty regime in practice can be grouped into three categories:

- (i) Theories that accord legally binding force to COP decisions, deriving from the intention of the Parties (i.e. in the broadest sense from the treaty that the decisions are based on). There are several versions of this theory.
- (ii) Theories which, assuming that such decisions do not have a formally binding legal effect, nevertheless attempt to find some intermediate ('soft' or '*de facto*') status for such decisions.
- (iii) Theories which, also assuming that the decisions do not have a formally binding character on the basis of the intention of the Parties, seek to substitute an alternative basis from outside the realm of the law of treaties for their binding character in the law of international organisations, i.e. their implied powers.<sup>3</sup>

Functions of COPs can include powers to extend the obligations of states Parties, and in other cases powers to give these obligations greater precision as a result of the interpretation of a basic treaty provision. This, however, is arguably a simplified way of understanding the powers of COPs. There must be a difference between detailing an existing obligation (such as in the case of the Convention on International Trade in Endangered Species (CITES)<sup>4</sup>) and creating a new obligation (as in the case of the Montreal Protocol's<sup>5</sup> adjustment procedures). In the first case, it is possible to rely on treaty interpretation as a formal basis for this power. In the second case, the more persuasive explanation would be to treat the powers of a COP as a type of secondary legislation adopted under a primary treaty, or perhaps even as constituting a new treaty, depending on the decision at hand. Matters become even more complex in cases involving COP activity that cannot be legally justified on the basis of a primary

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<sup>2</sup> To simplify the terminology, these organs throughout this paper will be referred to as COPs.

<sup>3</sup> See Jutta Brunnée, "Reweaving" the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements' in Rudiger Wolfrum and Volker Röben (eds), *Developments in International Law-Making* 12 (Springer, 2005) 101-126 at 122.

<sup>4</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org>>

<sup>5</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <<http://ozone.unep.org/>>.

treaty provision, such as, for example, the Basel Convention<sup>6</sup> COP's establishment of a compliance procedure. This type of secondary decision-making can perhaps be categorized as a form of *de facto* law-making.

The next question concerns the legally binding force of COP decisions. Again, there is great variation in possibilities depending on the provisions of the primary instrument. Not all COP decisions have a *de facto* or 'soft' law status. In the case of adjustments under the Montreal Protocol, the main procedure is that of consensus. Failing that, a decision by the majority is considered binding upon the minority. This procedure has never been used, yet it remains theoretically available. Decisions taken under this procedure are binding, not in a 'soft' or *de facto* way, but in the full sense of the word.

For the most part, compliance regimes are established by COPs on the basis of enabling clauses. Clauses of this type are seen, for instance, in Article 8 of the Montreal Protocol and Article 18 of the Kyoto Protocol.<sup>7, 8</sup> The legal character of setting up such compliance mechanisms has to be investigated on a case-by-case basis because the variety of possible COP functions and their legal effects escape generalization. These COP activities can also be examined from the point of view of consent to be bound. States consent to be bound by a primary treaty. This treaty can contain certain provisions, such as the Kyoto Protocol for instance does, which enable COPs to develop or create rules for states Parties under the treaty. These rules may form a new level of obligations and rights that the primary treaty had not provided for.

The question one must ask within this context is whether such a set of new obligations constitutes a new treaty, an amendment to an existing treaty, or a treaty in a simplified form. As noted above, there are also theories that consider such new obligations for states to lie outside the realm of treaty law altogether. Under this view, these obligations are the result of an exercise of certain implied powers that international organizations enjoy.

Where the primary treaty contains no enabling clause, the characterization of the practice by a treaty body and of the developed or new instrument is even more difficult.

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<sup>6</sup> Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <<http://www.basel.int>>.

<sup>7</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22.

<sup>8</sup> See also 'Non-compliance procedure', Montreal Protocol Dec. IV/5 (1992) (through which a non-compliance procedure and an indicative list of measures that might be taken in respect of non-compliance were adopted for the Protocol); and 'Procedures and mechanisms relating to compliance under the Kyoto Protocol', KP Dec. 27/CMP.1 (2006) (through which procedures and mechanisms relating to compliance under the Kyoto Protocol were approved and adopted).

These 'new' functions of COPs have given rise to concerns with respect to the legitimacy of MEA-based secondary law. According to Bodansky, for instance, 'legitimacy' has two meanings in international law, one sociological and the other normative.<sup>9</sup> The sociological meaning is concerned with the addressees of the authority accepted as 'justified' (i.e. as legitimate). The normative meaning is devoted to the question of whether 'a claim of authority is well founded'.<sup>10</sup>

In areas such as climate change (that is, a global environmental concern where decision-making has implications for civil society), the legitimacy of COP decision-making is very important. Camenzuli shares such a view.<sup>11</sup> This leads her to the conclusion that a COP decision adopted on the basis of majority voting is 'inconsistent with the traditional consent based structure of treaty law and, consequently, threatens its legitimacy and validity'.<sup>12</sup> Therefore, she postulates that in order to avoid the risk of alienating powerful minorities, the law-making powers by COPs 'must be exercised with caution'.<sup>13</sup> It may be noted, however, that the only example of such a power is the Montreal Protocol, under which a majority decision binds the minority in the case of 'adjustments', in cases where consensus could not be reached. Again, however, this procedure has never been used. Churchill and Ulfstein aptly call these phenomena 'autonomous institutional arrangements'. They believe this development 'marks a distinct and different approach to institutional collaboration between states, being both more informal and more flexible, and often innovative in relation to norm creation and compliance'.<sup>14</sup>

The necessity to create 'strong' regimes and possibly binding, rule-making characteristics has warranted these novel institutional or quasi-institutional solutions in all MEAs. There is a degree of ambivalence among states on these novel practices, specifically with respect to the consent to be bound. The question concerning the lack of uniformity arises in relation to the powers of COPs when traditional, uniform means of expressing consent to be bound by a treaty are abandoned, and modifications to an MEA are brought about directly by the COP, absent any further act of validation by the Parties. While the traditional law of treaties reflected in the Vienna Convention on the Law of Treaties<sup>15</sup> does not regulate this practice, it has become accepted in the context of certain multilateral instruments, notably certain MEAs.

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<sup>9</sup> Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *American Journal of International Law* (1999) 596-624.

<sup>10</sup> *Ibid.* at 601.

<sup>11</sup> Louise Kathleen Camenzuli, 'The Development of International Environmental Law at the Multilateral Environmental Agreements: Conference of the Parties and its validity' (2007), available at <[https://cms-data.iucn.org/downloads/cel10\\_camenzuli.pdf](https://cms-data.iucn.org/downloads/cel10_camenzuli.pdf)> (visited 24 December 2016).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Robin Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *American Journal of International Law* (2000) 623-659.

<sup>15</sup> Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331.

However, scepticism remains with respect to whether the decision of such a body can create a new, free-standing rule under such an instrument.

An example of an MEA that purports to modify treaty obligations is, as noted above, the Montreal Protocol, Article 2(9) of which provides for a so-called 'adjustment procedure'. This procedure regulates the modification of the scope of the Parties' duties under the Protocol, such as the tightening of control measures by bringing forward the phasing out of certain substances. Decisions adopting an adjustment are as a rule adopted by consensus. However, in the case of a failure of all efforts to reach a consensus, such decisions can be adopted by a two-thirds majority vote of all Parties present and voting, and representing a majority of both developed and developing countries. The decision has to be communicated to the Parties and it then enters into force for all Parties, including those that opposed the adoption, six months from the date of circulation of the communication.

The second method for modifying states' obligations under a treaty in this way relies on so-called enabling clauses in conventions or protocols thereto, which charge COPs with the elaboration of rules in particular areas without expressly providing for the actual amendment of the convention or protocol. Such measures by COPs may, however, result in the modification of states Parties' obligations, as is the case, for instance, under the Kyoto Protocol. Article 17 of the Kyoto Protocol grants the COP of the 1992 United Nations Framework Convention on Climate Change (UNFCCC)<sup>16</sup> the power to 'define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading'.

Ulfstein and Churchill maintain that the notion of 'rules' presupposes that they have a legally binding character.<sup>17</sup> The same authors note that this position is supported by the wording of Article 17, which refers to 'relevant principles, modalities, rules and guidelines', thus indicating that rules are different from non-binding 'principles' or 'guidelines'. Ulfstein further supports his analysis on the basis of substantive considerations. He gives an example of a Party that makes use of 'rules' on emissions trading by buying emission quotas. The Party cannot, according to him, be accused of non-compliance with the Protocol when it wants to add these quotas to its emission limits in the Protocol. This example demonstrates that there may only be a very small difference between 'effective interpretation and the use of implied powers: relevant arguments may be found in both the wording and object and purpose of the treaty'.<sup>18</sup> Ulfstein and Churchill's view that these 'rules' are binding is not shared by all authors. For example, Brunnée is more sceptical about the legally binding character of these 'rules'. She argues that '[g]iven the exceptional nature of COP

<sup>16</sup> United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>.

<sup>17</sup> Churchill and Ulfstein, 'Autonomous Institutional', *supra* note 14, at 438.

<sup>18</sup> *Ibid.*

authority to bind states, even the terms “procedures” (used in arts 12.7 and 18) or “rules” (used in arts 3.4 and 17) do not necessarily imply COP authority to bind. Procedures or rules *can* be binding, but need not be.<sup>19</sup>

The mere use of the word ‘rule’ should not be conclusive as to a COP determination’s binding character. Rather, it is necessary to look beyond the term to the substance of the agreement in order to determine whether it was intended to grant the relevant treaty body the power to make a binding determination giving rise to an international legal obligation, the breach of which would engage a member state’s international responsibility. It is, however, important to know when a ‘rule’ has been created. If an obligation is breached, a state engages its international responsibility, depending on the type of obligation, bilaterally towards one or more states Parties, or collectively to all states Parties to the treaty. Where it remains unknown whether an international legal obligation exists or not, international legal obligations indeed risk becoming a matter of ‘more or less’,<sup>20</sup> if that is not already the case.

## 2.2 Further examples on law-making through COPs

Other examples of law-making through decisions by COPs are seen in the contexts of the CITES COP, the Convention on Long-range Transboundary Air Pollution (LRTAP),<sup>21</sup> the Berne Convention on the Conservation of European Wildlife and Natural Habitats (the Berne Convention)<sup>22</sup> and the Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention).<sup>23</sup> For instance, the CITES COP has interpreted and provided detailed guidance on various issues regarding the primary CITES treaty, one example of which is the species that can be regarded as captive stock. CITES includes a special provision for specimens that are captive-bred or artificially propagated. Article VII(4) provides that specimens of Appendix I animals ‘bred in captivity for commercial purposes’ and specimens of Appendix I plants ‘artificially propagated for commercial purposes’ shall be treated as Appendix II specimens. While the Convention excludes commercial trade in species belonging to Appendix I almost entirely, trade in Appendix II species is allowed subject to certain conditions. Davies notes that the treaty text does not provide a further definition of either ‘bred in captivity for commercial purposes’ or ‘artificially propagated for commercial purposes’.<sup>24</sup> Therefore, the CITES COP, in 1997, adopted

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<sup>19</sup> Jutta Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International Law* (2002) 1-52 at 24.

<sup>20</sup> See Prosper Weil, ‘Towards Relative Normativity in International Law’, 77 *American Journal of International Law* (1983) 413-422 at 421.

<sup>21</sup> Convention on Long-Range Transboundary Air Pollution, Geneva, November 13 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, <<http://www.unece.org/env/lrtap/>>.

<sup>22</sup> Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, into force 1 June 1982, <<http://www.coe.int/en/web/bern-convention>>.

<sup>23</sup> Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <<http://www.cms.int>>.

<sup>24</sup> Peter G. G. Davies, ‘Non-Compliance – a Pivotal or Secondary Function of CoP Governance?’, 15 *International Community Law Review* (2013) 77-101 at 82.

Resolution Conf. 10.16(Rev.), which clarifies that an animal specimen ‘bred in captivity’ must be ‘born or otherwise produced in a controlled environment’, and that the parents must have either mated in a controlled environment (if reproduction is sexual) or must have been in a controlled environment when offspring development commenced (if reproduction is asexual). The breeding stock must be established ‘in accordance with the provisions of CITES and relevant national laws and in a manner not detrimental to the survival of the species in the wild’; it must be maintained ‘without the introduction of specimens from the wild, except for the occasional addition of animals, eggs or gametes’ *inter alia* to prevent or alleviate deleterious inbreeding’; and it must either be managed in a way shown to be ‘capable of reliably producing second-generation offspring in a controlled environment’ or indeed ‘produced offspring of second generation ... or subsequent generation’ in such an environment. In 2000, the CITES COP established criteria to be satisfied before plants can be considered ‘artificially propagated’.<sup>25</sup>

Another example of law-making occurred under the Convention on the Conservation of European Wildlife and Natural Habitat (Berne Convention). Article 4(1) of the Berne Convention stipulates that each Party must ‘take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and the conservation of endangered natural habitats’. Article 4(2) provides that the Parties ‘in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimize as far as possible any deterioration of such areas’. The COP addressed the ambiguous character of these provisions by adopting Recommendation No. 25 (1991) on the conservation of natural areas outside protected areas proper, which calls upon Parties to consider adopting a variety of measures, such as the setting-up of environmental corridors and a network of nature parks to fulfil obligations under Article 4.

The Executive Body of LRTAP, the name for that treaty regime’s COP, provided interpretations of ambiguous wording in a legally binding agreement. The 1985 Sulphur Dioxide Protocol stipulates that Parties ‘shall reduce their national annual sulphur emissions or their transboundary fluxes by at least 30 per cent as soon as possible and at the latest by 1993, using 1980 levels as the basis of calculation of reductions’. Four years after the Protocol’s adoption, the Executive Body reached a ‘common understanding’ that this obligation for the Parties to ‘reduce their national annual sulphur emissions or their transboundary fluxes by at least 30 per cent as soon as possible and at the latest by 1993’ meant that ‘reductions to that extent should be reached in that timeframe and the levels maintained or further reduced after being reached’.<sup>26</sup>

<sup>25</sup> ‘Interpretation and implementation of the Convention. Trade in traditional medicines’, CITES COP 11 Doc.11.56 (2000).

<sup>26</sup> UN Doc ECE/EB.AIR/20, para 22. See further ECE/EB.AIR/24, para 18 and UN Doc ECE/EB.AIR/33, para. 14.

In the 1979 Bonn Convention, states commit to various conservation measures in respect of the endangered migratory species listed in Appendix I. However, the Convention fails to provide a comprehensive definition of 'endangered', with Article I(1) (e) providing merely that a migratory species is 'endangered' where it is 'in danger of extinction throughout all or a significant portion of its range'. In 1997, the Bonn Convention COP adopted Resolution 5.3 to clarify the term 'endangered', which is to be interpreted as meaning a species 'facing a very high risk of extinction in the wild', and that the Parties would be guided in this regard by findings of the IUCN Council or by an assessment by the CMS Convention's Scientific Council.

### 3 MEA compliance mechanisms: the common features

A distinction must be made between compliance procedures, on the one hand, and mechanisms for the settlement of disputes, on the other. The purpose, triggering and functioning of these two processes are completely different. In the majority of MEAs, there are parallel mechanisms for the settlement of disputes and compliance. However, unresolved questions remain in this regard, including what happens when these mechanisms are triggered at the same time (a question of the *res judicata*). Such a problem of the parallel running of these procedures is especially complex in relation to legally binding dispute settlement procedures (the decisions of international courts and tribunals and international arbitration).<sup>27</sup>

Decisions adopted by COPs/MOPs establishing compliance mechanisms are perhaps not strictly binding, but they are nevertheless generally accepted by states Parties to an MEA. These compliance procedures frequently result in the application of certain measures taken by COPs/MOPs towards states Parties as a result of non-compliance. The legal character of decisions concerning non-compliance is best investigated on a case-by-case basis, because the variety of possible COP functions and their legal effects escape generalization. They vary from purely recommendatory and weak (such as the compliance mechanism to the 1972 London Convention<sup>28</sup>) to very strong, as in the Kyoto Protocol (binding on Parties and resulting in the suspension of certain rights for Parties in non-compliance).

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<sup>27</sup> Malgosia Fitzmaurice and Catherine Redgwell, 'Environmental Non-Compliance Procedures and International Law', 31 *Netherlands Yearbook of International Law* (2000), 35-65; Martti Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol', 3 *Yearbook of International Environmental Law* (1992) 123-162.

<sup>28</sup> Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 13 November 1972, in force 30 August 1975, 11 *International Legal Materials* (1972) 1294; 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 7 November 1996, in force 24 March 2006, <<http://www.imo.org>>.

However, these regimes share certain common characteristics. The best definition of such a mechanism has been provided by the COP of the Basel Convention,<sup>29</sup> which lacks a specific treaty provision on compliance mechanisms. The compliance mechanism of this Convention is based on a rather general clause in Article 15, which has given rise to the establishment of the compliance (implementation) mechanism by the decision of the COP.<sup>30</sup>

In principle, such mechanisms are conceived as a non-confrontational and, in essence, friendly means of enabling states to comply with their obligations under a treaty. States in non-compliance may report themselves, and any state Party may report concerns regarding other states Parties' performance. The Secretariat of the MEA may also report a state's non-compliance. The remedies primarily take the form of assistance (for instance, financial). However, repeated non-compliance may lead to cautions and even a suspension of a Party's rights under an MEA.<sup>31</sup>

The non-compliance regimes of various MEAs are designed in such a way as to fit in with a character of the treaties under which they function. For example, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,<sup>32</sup> which is in essence a human rights treaty, enables non-governmental organizations (NGOs), civil society and individuals to lodge a case before the Compliance Committee. In fact, almost all the cases thus far brought to the Committee's attention were brought by civil society.

The institutional structure of non-compliance mechanisms is rather similar with a special body, a non-compliance (or implementation) committee, which makes a preliminary assessment and proposal to the COP of the MEA. Secretariats play an important role as, during evaluation of states' national reports on implementation of the MEA, they may also note a (potential) instance of non-compliance and inform the non-compliance body. The final decisions on non-compliance are adopted by the highest organ of the MEA (usually the COP). In principle, such decisions are legally non-binding, but they have a great political importance and states tend

<sup>29</sup> The relevant COP decision provides that '[t]he mechanism shall be non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention. It will pay to promote cooperation between all Parties...' 'Establishment of a mechanism for promoting implementation and compliance', Basel Dec. VI/12 (1998), Appendix (Mechanism for promoting implementation and compliance; Terms of reference), para. 2.

<sup>30</sup> Article 15 (5e) 'The Conference of the Parties shall keep under continuous review and evaluation the effective implementation of this Convention, and, in addition, shall: (a) Promote the harmonization of appropriate policies, strategies and measures for minimizing harm to human health and the environment by hazardous wastes and other wastes'.

<sup>31</sup> Under the CITES non-compliance mechanism, trade was suspended with a total of 43 states (since 1985). Peter H. Sand, 'Enforcing CITES: the Rise and Fall of Trade Sanctions' 22 *Review of European, Comparative and International Environmental Law* (2013) 251-263.

<sup>32</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <<http://www.unece.org/env/pp/>>.



to abide by them. However, the *raison d'être* of very soft non-compliance regimes appears to be lacking purpose. An example is seen in the compliance procedures and mechanisms that have been developed under the 1996 Protocol to the London Convention 1972. The non-compliance response measures which can be adopted under this regime are very soft:

Following consideration and assessment of an issue regarding a Party's possible non-compliance, and taking into account the capacity of the Party concerned, and the comments or information provided under 4.5, and such factors as the cause, type, degree and frequency of any non-compliance, the Compliance Group may recommend to the Meeting of Contracting Parties that one or more of the following measures be taken:

1. the provision of advice and recommendations, with a view to assisting the Party concerned to implement the Protocol;
2. the facilitation of co-operation and assistance;
3. the elaboration, with the co-operation of the Party or Parties concerned, of compliance action plans, including targets and timelines; and
4. the issuing of a formal statement of concern regarding a Party's compliance situation.<sup>33</sup>

It appears that a certain degree of pressure on a state Party in non-compliance would render the mechanism more effective.

## 4 Concluding remarks

This paper has examined the law-making character of MEA COP decisions – such decisions being the route through which MEAs generally establish compliance mechanisms. The legally binding force of COP decisions varies, depending on the provisions of the primary instrument. In the same vein, MEA compliance mechanisms vary from one treaty regime to the next, and thus the legal character of MEA compliance mechanisms has to be investigated on a case-by-case basis. However, despite the variation, it is possible to distinguish some common features to such mechanisms.

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<sup>33</sup> 'Compliance procedures and mechanisms pursuant to Article 11 of the 1996 Protocol to the London Convention 1972', Doc. LC 29/17 (2007), para. 5.1.

# COMPARATIVE REVIEW OF COMPLIANCE REGIMES IN MULTILATERAL ENVIRONMENTAL AGREEMENTS

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## 1 Introduction

Environmental law is one of the fast-developing areas of international law, and the speed at which it has developed since the advent of the 20th century is remarkable.<sup>3</sup> Since the 1970s in particular, the number of international environmental principles, instruments and mechanisms adopted by states to help protect the environment has increased tremendously. A variety of multilateral environmental agreements (MEAs) have been adopted to address a wide range of transboundary environmental problems such as the international movement of and trade in endangered species,<sup>4</sup> the

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<sup>3</sup> Daniel Bodansky, Jutta Brunnee, and Ellen Hey, 'International Environmental Law: Mapping the Field' in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law*, (Oxford University Press, 2007) 1-25 at 3. See also Donald Anton, "Treaty Congestion" in *Contemporary International Environmental Law*, Australian National University College of Law Research Paper No. 12-05 (2012), available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1988579##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988579##)> (visited 26 June 2017) at 1.

<sup>4</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org>>; Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <<http://www.cms.int>>.

loss of biological diversity,<sup>5</sup> desertification,<sup>6</sup> the negative effects of chemicals and waste,<sup>7</sup> deterioration of the ozone layer and of atmospheric quality,<sup>8</sup> as well as marine environmental quality,<sup>9</sup> and climate change.<sup>10</sup>

It is estimated that there are 700 or more international environmental agreements governing various aspects of the environment; and several more are being negotiated at the bilateral, regional, and global levels.<sup>11</sup> Most of these environmental agreements duplicate or overlap with each other in several aspects, including principles,

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<sup>5</sup> Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>; Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027, <<http://www.cbd.int/biosafety>>; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, in force 16 October 2014, <<http://www.cbd.int/abs/>>.

<sup>6</sup> UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <<http://www.unccd.int>>.

<sup>7</sup> Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <<http://www.basel.int>>; Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <<http://www.pic.int>>; 38 *International Legal Materials* (1999) 1; Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <<http://chm.pops.int>>; Minamata Convention on Mercury, Geneva, 19 January 2013, in force 16 August 2017, <<http://www.mercuryconvention.org/>>; The Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Bamako, 30 January 1991, in force 22 April 1998, 30 *International Legal Materials* (1991) 773.

<sup>8</sup> Convention on the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1985) 1529; Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <<http://ozone.unep.org/>>.

<sup>9</sup> Regional Seas Convention and associated Protocols: Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi, 21 June 1985, in force 30 May 1996, available at <<http://www.unep.org/nairobiconvention/about-us/structure/protocols>> (visited 26 June 2017); Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena, 24 March 1983, in force 11 October 1986, 22 *International Legal Materials* (1983) 227, <<http://www.cep.unep.org/cartagena-convention/text-of-the-cartagena-convention>>; Convention for the Protection of the Mediterranean Sea against Pollution, Barcelona, 16 February 1976, in force 12 February 1978, 15 *International Legal Materials* (1976) 290, amended to be the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, Barcelona, 10 June 1995, in force 9 July 2007, <<http://web.unep.org/unepmap/>> and its seven Protocols; Framework Convention for the Protection of the Marine Environment of the Caspian Sea, Tehran, 4 November 2003, in force 12 August 2006, 44 *International Legal Materials* (2005) 1; Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan, 23 March 1981, in force 5 August 1984, 20 *International Legal Materials* (1981) 746.

<sup>10</sup> United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22.; Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, 12 December 2015, in force 4 November 2016; 'Adoption of the Paris Agreement', UNFCCC Dec. 1/CP.21 (2015).

<sup>11</sup> UNEP, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (2006), available at <[http://www.acpmeas.info/publications/Manual\\_on\\_Compliance\\_with\\_and\\_Enforcement\\_of\\_MEAs.pdf](http://www.acpmeas.info/publications/Manual_on_Compliance_with_and_Enforcement_of_MEAs.pdf)> (visited 22 February 2017) at 29.

norms, structures and institutional arrangements regarding, *inter alia*, their implementation, compliance, follow-up actions, reporting and coordination.<sup>12</sup>

While these numerous environmental agreements are in place, the world continues to witness high levels of biodiversity degradation, threats of extinction of wild species in nature, illegal exploitation and trade in wildlife and wildlife products, climate change and environmental pollution. It is clear that the speed at which the environmental agreements were and are being developed does not as yet match their speed in tackling the ever looming environmental problems which they are designed to address. Despite the efforts being made, bridging the gap between the positive and remarkable development of environmental agreements and the value impact of their implementation remains a major challenge to the international community, and a threat to the world's ability to meet the needs of present generations and gratify the hope of future generations.

At various levels of implementation, efforts are being made to seek out ways of turning environmental agreements into concrete actions and positive environmental developments. International focus has now shifted from the development of new agreements to implementation of and compliance with the existing agreements, including how to effectively deal with Parties that fail to meet their obligations and contribute to the concerted realization of the objectives of the agreements.<sup>13</sup>

This paper seeks to provide a comprehensive review and comparison of the existing and emerging mechanisms for ensuring compliance with environmental agreements. The first section will be devoted to explaining the importance of MEA compliance and identifying some of the basic approaches to developing a compliance mechanism to an MEA. The second section will provide a more detailed discussion of the existing compliance mechanisms of various MEAs, their application and effectiveness. The importance of issue linkages, synergies and cooperation, including linkages to the 2030 Agenda for Sustainable Development (the 2030 Agenda) and the Sustainable Development Goals (SDGs),<sup>14</sup> in enhancing treaty compliance mechanisms will also be discussed. Some of the challenges that countries face in their efforts to comply with their international obligations concerning the environment will be identified and analyzed. Solutions and opportunities for solving such problems will be suggested throughout the paper. The paper concludes that, to increase the ef-

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<sup>12</sup> Elizabeth Maruma Mrema, 'Cross-Cutting Issues Related to Ensuring Compliance with MEAs' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia* (Martinus Nijhoff, 2006) 201-227 at 202.

<sup>13</sup> Xeuman Wang and Glenn Wiser, 'The implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol', 11(2) *Review of European Community & International Environmental Law* (2002) 181-198 at 181.

<sup>14</sup> 'Transforming our world: The 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015. See also 'Delivering on the 2030 Agenda for Sustainable Development', United Nations Environment Assembly of the UNEP Res. 2/5 (2016) at 2.

fectiveness of international environmental law, the set of rules and principles that aim to protect living and non-living elements and the Earth's ecological processes, compliance with all MEAs is in the best interest of all Parties and member states, for the benefit of the present and future generations. The need to continuously develop, enhance and give effect to the compliance mechanisms of such agreements should thus be the concern of all countries and stakeholders.

In this regard, the compliance regimes for the following MEAs, for which: (1) the United Nations Environment Programme (UN Environment) provides secretariat support and services (this being the case for the agreements listed below as numbers 1 to 8); or (2) the UN Environment considers as priority MEAs and facilitates and promotes some of the major tangible activities for their successful implementation, will be closely reviewed:

1. The Convention on Biological Diversity (Biodiversity Convention); the Cartagena Protocol on Biosafety (Cartagena Biosafety Protocol); and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol on Access and Benefit Sharing).
2. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).
3. The Convention on the Conservation of Migratory Species of Wild Animals (Migratory Species Convention).
4. The Minamata Convention on Mercury (Minamata Mercury Convention).
5. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Waste Convention).
6. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam PIC Convention).
7. The Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention).
8. The Vienna Convention for the Protection of the Ozone Layer (Vienna Ozone Convention), and its Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).

9. The International Treaty on Plant Genetic Resources for Food and Agriculture (Food and Agriculture Treaty).<sup>15</sup>
10. The Ramsar Convention on Wetlands of International Importance (Ramsar Wetlands Convention).<sup>16</sup>
11. The United Nations Convention on the Law of the Sea (Law of the Sea Convention).<sup>17</sup>
12. The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Convention to Combat Desertification).
13. The United Nations Framework Convention on Climate Change (Convention on Climate Change); the Kyoto Protocol to the Convention on Climate Change (Kyoto Protocol); and the Paris Agreement.

## 2 The need for MEA compliance mechanisms

International environmental law is a very important and unique legal system for several reasons. This section of the paper outlines these reasons and explains the relevance of compliance in relation thereto, and the role of MEA compliance mechanisms.

Firstly, international environmental law is one of the branches of international law that has direct linkages to human wellbeing. These linkages include safeguarding of livelihoods, regulation of economic and social development, and security.

Secondly, environmental degradation does not stop at the border. The seriousness of cross-border environmental challenges demand that states adopt common and mutually beneficial instruments to halt these challenges and progressively restore the quality of their environment by holding responsible any Party that does not comply with the instruments.<sup>18</sup>

<sup>15</sup> International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, in force 29 June 2004, <<http://www.planttreaty.org/>>.

<sup>16</sup> Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <<http://www.ramsar.org/>>.

<sup>17</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

<sup>18</sup> *Increasing the Effectiveness of International Environmental Law: Duties of States, Rights of Individuals*, Report from the Club Des Juristes (Environment Committee, 2015), available at <<http://www.leclubdesjuristes.com/report-increasing-the-effectiveness-of-international-environmental-law-duties-of-states-rights-of-individuals/>> (visited 27 June 2017) at 23-29.

Thirdly, international environmental agreements are based upon member states' free will<sup>19</sup> and consent to compromise part of their sovereignty, and balance national and international political, social and economic interests for the benefit of the global environment. Such promises are meant to be fairly and equally honored for the greater and mutual benefit of the Parties involved.<sup>20</sup> To a large extent, a state is considered to be an honorable member of the international community based on the extent to which it fulfills its obligations under the cooperative and multilateral relationships with other states.<sup>21</sup> The substantive benefits a country gains from multilateral relationships are directly affected by the quality and history of its multilateral relationships.<sup>22</sup> Compliance with international obligations concerning the environment may not seem like a high priority, especially in the face of competing international and national interests and the occasional absence of incentives and capacity to comply. However, the need to overcome the ever scorching transnational environmental challenges – such as biodiversity loss, pollution, desertification or climate change – establishes the development of tools to facilitate and promote compliance with MEAs as a central process in the international environmental law platform.<sup>23</sup> In addition, failure to comply can be perceived as exposing a state to more internal threats, such as poor economic turnover and social and political shocks as a result of deterioration of the environment and loss of natural resources.<sup>24</sup>

Furthermore, based on the level of trust hinging the international environmental multilateralism processes, any Party that fails to comply and fulfill its MEA commitments, at the expense of its partners, stands to suffer, for example, by losing reputation amongst its partners and facing stricter measures such as direct or indirect economic and political sanctions.<sup>25</sup> The cost of losing reputation amongst member states and other international partners not only impacts a country's status on inter-

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<sup>19</sup> *The Case of the S.S. Lotus (France v. Turkey)*, 1927 Permanent Court of International Justice (ser. A) No. 10 (7 Sept.) at 18:

International law governs relations between independent States. The rules of law binding upon States therefor emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.

<sup>20</sup> Christopher Greenwood, 'Sources of International Law: An Introduction' (2008), available at <[http://legal.un.org/avl/pdf/ls/greenwood\\_outline.pdf](http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf)> (visited 4 January 2017) at 2:

Strictly speaking a treaty is not a source of law so much as a source of obligation under law. Treaties are binding only on States which become parties to them....Why is a treaty binding on those States which have become parties to it? The answer is that there is a rule of customary international law – *pacta sunt servanda* – which requires all States to honour their treaties.

<sup>21</sup> George W. Downs and Michael A. Jones, 'Reputation, Compliance, and International Law', 31 *Journal of Legal Studies* (2002) S95-S114 at S96.

<sup>22</sup> *Ibid.* at S97.

<sup>23</sup> Andrew T. Guzman, 'The Design of International Agreements', 16 *European Journal of International Law* (2005) 579-612 at 606.

<sup>24</sup> Downs and Jones, 'Reputation, Compliance, and', *supra* note 21, at 104.

<sup>25</sup> Andrew T. Guzman, 'A Compliance-Based Theory of International Law', 90 *California Law Review* (2002) 1823-1887 at 1823.

national platforms but also its ability to enter into future agreements and commitments.<sup>26</sup> Compliance is, therefore, key to reciprocity practices and the enjoyment of privileged and respected status on various global platforms, including those dealing with matters likely to pose serious external threats to any sovereign territory.

Through international environmental law, states create multilateral obligations that should be realized, as fully and promptly as possible, if the degradation of the global environment is to be reversed.<sup>27</sup> To fulfill these obligations, a Party to an MEA must always possess *the motivation, willingness and capacity* to comply. *Motivation* inspires a Party's willingness to give effect to an MEA, whereas *capacity* determines the Party's ability to fulfill the MEA's obligations.<sup>28</sup> To a large extent, in international environmental law, compliance procedures are means for monitoring and enhancing the capacity and willingness of a Party to comply with the agreed obligations, including by providing assistance to Parties who fail to comply because of specific challenges. They are also means for understanding a given MEA, its demands and objectives, and putting in place effective systems and mechanisms to monitor, promote and enhance compliance.

The period between 1972 and 1992 following the culmination of the United Nations Conference on the Human Environment (the Stockholm Conference),<sup>29</sup> the third United Nations Conference on the Law of the Sea,<sup>30</sup> and the 1992 United

<sup>26</sup> Downs and Jones, 'Reputation, Compliance, and', *supra* note 21, at 100.

<sup>27</sup> Tuula Kolari, 'Promoting Compliance with international environmental agreements – an interdisciplinary approach with special focus on sanctions', Masters Thesis, University of Joensuu, Department of Law (2002), available at <<https://www.peacepalacelibrary.nl/ebooks/files/C08-0029-Kolari-Promoting.pdf>> (visited 19 January 2017) at 3.

<sup>28</sup> *Ibid.*

<sup>29</sup> The Stockholm Conference, held in Stockholm, Sweden 5-16 June 1972, led to the creation of the United Nations Environment Programme (UNEP; now UN Environment) in 1972. Following the provisions of Chapter 39 of Agenda 21 (UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc. A/CONF.151/26/Rev.1 (1992), available at <<https://sustainabledevelopment.un.org/agenda21/>>) on procedures and mechanisms to promote and review effective, full and prompt implementation of international agreements, including by contributing towards the further development of such implementation mechanisms, UN Environment has been instrumental in contributing to, promoting and enhancing compliance with environmental agreements and strengthening the rule of environmental law. UN Environment's work in this regard includes promoting coherence and synergies among environmental agreements by developing and advocating for tools and other initiatives for institutional approaches in compliance, as well as facilitating cooperation and interlinkages among MEAs and their thematic clusters, compliance, and participation in regional and global environmental fora, including Conferences and Meetings of the Parties (COPs/MOPs).

<sup>30</sup> The Third United Nations Conference on the Law of the Sea, held between 1973 and 1982, was mandated to adopt a Convention dealing with all matters relating to the Law of the Sea ('Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of the third United Nations Conference on the Law of the Sea', UNGA Res. 3067 of 16 November 1973).



Nations Conference on Environment and Development (UNCED)<sup>31</sup> witnessed an increased incorporation of environmental issues into the agendas of global platforms on economic development, human rights, international trade, and international security.<sup>32</sup> Steady progress towards addressing environmental issues was achieved around this period, given the number of environmental agreements that were negotiated and adopted.<sup>33</sup> However, within the adopted MEAs, insistence on compliance was not as established as it is today.<sup>34</sup> If an MEA specifically insisted on procedures and mechanisms for promoting and ensuring compliance or for identifying possible situations of non-compliance at an early stage, including causes of non-compliance, and formulating appropriate responses for mitigating non-compliance, the compliance regimes themselves were not clearly established by the MEA text or subsequent decisions.<sup>35</sup> In the post 1992 period, the ineffectiveness of MEAs, which was clearly illustrated through the continued deterioration and degradation of the global environment, and the failure to achieve some of the set environmental targets, such as the 2010 biodiversity targets, inspired focus on the development of economic, market-based instruments to achieve environmental compliance and solve the underlying problems.<sup>36</sup>

Views on how to enhance and strengthen the effectiveness of existing and future MEAs were submitted by various agreements' member states and other stakehold-

<sup>31</sup> UNCED, Rio de Janeiro, Brazil from 3 to 14 June 1992 adopted major agreements and declarations aimed at enhancing the relationship between environment and human development. They include Agenda 21 on various developmental and environmental objectives; The Rio Declaration on Environment and Development (UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876); the Statement of Forest Principles (Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. III)); and the Convention on Climate Change; and the Biodiversity Convention.

<sup>32</sup> Edith Brown Weiss, 'The Evolution of International Environmental Law', 54 *Japanese Yearbook of International Law* (2011) 1-27, available at <<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2684&context=facpub>> (visited 8 February 2017).

<sup>33</sup> Convention on Long-Range Transboundary Air Pollution, Geneva, November 13 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, <<http://www.unece.org/env/lrtap/>>; Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe (EMEP), Geneva, 28 September 1984, 1491 *United Nations Treaty Series* 67; Convention for the Protection of the Ozone Layer; Montreal Protocol; the Amendment to the Montreal Protocol Agreed by the Second Meeting of the Parties, London, 1990; the Amendment to the Montreal Protocol Agreed by the Fourth Meeting of the Parties, Copenhagen, 1992; United Nations Convention on the Law of the Sea; Barcelona Convention; Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, Barcelona, 16 February 1976, in force 12 February 1978; Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <<http://whc.unesco.org/>>; Convention on Climate Change; Basel Waste Convention; Biodiversity Convention; CITES; Migratory Species Convention; and Convention to Combat Desertification.

<sup>34</sup> Brown Weiss, 'The Evolution of', *supra* note 32, at 26.

<sup>35</sup> UNEP, *Auditing the Implementation of Multilateral Environmental Agreements (MEAs): A Primer for Auditors* (UNEP, 2010), available at <<http://www.environmental-auditing.org/LinkClick.aspx?fileticket=NrVuKEhCRq8%3D&tabid=128&mid=568>> (visited 15 November 2016) at 22.

<sup>36</sup> Mrema, *Cross-Cutting Issues*, *supra* note 12, at 203. See also A. K. Pandey, 'International Environmental Law: Concepts and Issues', 37-38 *Banaras Law Journal* (2008-2009) 156-166 at 159.

ers.<sup>37</sup> The UN Environment Governing Council, in consultation with its member states and other stakeholders, and following Decision 21/27 on Compliance with and enforcement of multilateral environmental agreements,<sup>38</sup> adopted the Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements,<sup>39</sup> followed by the development of a hands-on Manual on Compliance with and Enforcement of Multilateral Environmental Agreements.<sup>40</sup> The Guidelines and Manual are designed to provide guidance, ideas, approaches and experiences that member states may take into consideration when seeking to improve compliance with MEAs.<sup>41</sup> Various guidelines relating to compliance have also been developed at the regional level, as well as by specific environmental agreements and their Parties.<sup>42</sup>

Compliance with MEAs is a slippery concept that is often confused to mean enforcement, effectiveness or implementation of the agreements.<sup>43</sup> This paper uses the term *compliance* as defined in the two sections of the UN Environment Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreement.<sup>44</sup> The Guidelines define compliance as the 'fulfillment by the contracting parties of their obligations under a multilateral environmental agreement and any amend-

<sup>37</sup> Mrema, *Cross-Cutting Issues*, *supra* note 12, at 203; See also Brown Weiss, 'The Evolution of', *supra* note 32.

<sup>38</sup> Report of the Governing Council of the United Nations Environment Programme at its Twenty-first session (5-9 February 2001), Supplement No. 25 (A/56/25) at 54.

<sup>39</sup> UNEP, *Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements* (2002), available at <<http://staging.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf>> (visited 13 February 2017).

<sup>40</sup> UNEP, *Manual on Compliance*, *supra* note 11.

<sup>41</sup> *Ibid.* at 29.

<sup>42</sup> *Ibid.* at 30. See also the 1999 Caribbean Guidelines for MEA Implementation, available at <<http://www.pnuma.org/foroalc/esp/bbexb07i-MEAsImplementationintheCaribbean.pdf>>; the 2002 Guiding Principles for Reform of Environmental Enforcement Authorities in Transition Economies of Eastern Europe, Caucasus and Central Asia (EECCA), developed by the EECCA Member States and the Organisation for Economic Cooperation and Development (OECD), available at <<http://www.oecd.org/dataoecd/36/51/26756552.pdf>>; and the 2003 Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements in the ECE (UN Economic Commission for Europe) Region, available at <<https://www.unece.org/fileadmin/DAM/env/documents/2003/ece/cep/ece.cep.107.e.pdf>> (all visited 27 June 2017).

<sup>43</sup> For clear differences, see UNEP, *Guidelines on Compliance*, *supra* note 39; and UNEP, *Manual on Compliance*, *supra* note 11. See also 'Key concepts, procedures and mechanisms of legally binding multilateral agreements that may be relevant to furthering compliance under the future mercury instrument', Background document for the Intergovernmental negotiating committee to prepare a global legally binding instrument on mercury, UN Doc. UNEP(DTIE)/Hg/INC.1/11 (2010), available at <[http://www.mercuryconvention.org/Portals/11/documents/meetings/inc1/English/INC1\\_11\\_compliance.pdf](http://www.mercuryconvention.org/Portals/11/documents/meetings/inc1/English/INC1_11_compliance.pdf)> (visited 30 May 2017) at 4.

<sup>44</sup> UNEP, *Manual on Compliance*, *supra* note 11, at 2. Para. 9(a): 'Compliance means the fulfillment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement'. See also UNEP, 'Guidelines for National Enforcement, and International Cooperation in Combating Violations, of Laws Implementing Multilateral Environmental Agreements', in UNEP, *Manual on Compliance*, *supra* note 11 at 8: 'Compliance means the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorizations, in implementing multilateral environmental agreements', available at <<http://staging.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf>> (visited 23 August 2017).

ments to the multilateral environmental agreement'.<sup>45</sup> *Enforcement*, on the other hand, refers to, *inter alia*, 'all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt to meet their obligations under a multilateral environmental agreement and its amendments if any'.<sup>46</sup> Furthermore, enforcement includes consequences, procedures and actions employed to ensure that a non-compliant Party is brought into compliance.<sup>47</sup> *Effectiveness* is generally the level to which an environmental agreement accomplishes its objectives as a result of implementation, which is the aggregate of all actions taken by a Party to fulfill its commitments under an MEA.<sup>48</sup> *Effectiveness* also includes the total outputs and infrastructure created to move an MEA from paper to practice and the outcomes or changes in the behavior of actors or conditions of elements relevant to meeting the objectives of the MEA.<sup>49</sup> On the other hand, *implementation* is the adoption of necessary domestic measures, including legislation and policies, for purposes of meeting a Party's obligations under an MEA. For the purposes of this paper, the relationship between compliance, enforcement, effectiveness and implementation of MEAs is important, especially because there are many ways of causing and ensuring compliance, and enforcement and implementation are only some of the ways.<sup>50</sup> Also, while enforcement and implementation can be seen as tools for ensuring compliance, they are not necessarily sufficient tools for a compliance framework.<sup>51</sup> The role and importance of compliance in, for instance, providing data, information and procedures necessary to evaluate and determine the effectiveness of an MEA has been pointed out by commentators.<sup>52</sup>

<sup>45</sup> UNEP, *Guidelines on Compliance*, *supra* note 39, at 2.

<sup>46</sup> *Ibid.*

<sup>47</sup> Gregory L. Rose, 'Gaps in the Implementation of Environmental Law at the National, Regional and Global Level', First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability, 12-13 October 2011, Kuala Lumpur, Malaysia, available at <<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=2684&context=lhapapers>> (visited 28 January 2017) at 8.

<sup>48</sup> Whereas this paper's approach to effectiveness projects the idea that compliance with MEAs is largely and solely a total aggregate of national level actions, it serves to place compliance along a continuum ranging from individual accomplishment of the set MEA objectives to the aggregate global success of the MEA and the ultimate change of behavior of the targeted actors at different levels. It also projects the aggregate importance of MEAs' compliance actions in tackling the severe impacts of real national and international social, political and economic problems such as poverty, hunger, pollution, political incompatibility, inequality and breakdowns in economic systems.

<sup>49</sup> W. Bradnee Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements* (United Nations University Press, 2008) at 116; See also Oran R. Young, 'Effectiveness of international environmental regimes: Existing knowledge, cutting-edge themes, and research strategies', 8(50) *The Official Scientific Journal of the National Academy of Sciences (PNAS)* (2011), available at <<http://www.pnas.org/content/108/50/19853.full.pdf>> (visited 23 August 2017) at 19854

<sup>50</sup> Kal Raustiala, *Reporting and Review Institutions in 10, Multilateral Environmental Agreements* (UNEP, 2001) 4. See also Teall E. Crossen, 'Multilateral Environmental Agreements and the Compliance Continuum', a working paper at the Berkeley Electronic Press (2003), available at <[https://www.ipcc.int/sites/default/files/documents/1182330508307\\_Compliance\\_and\\_theory\\_MEAs.pdf](https://www.ipcc.int/sites/default/files/documents/1182330508307_Compliance_and_theory_MEAs.pdf)> (visited 28 June 2017) at 7.

<sup>51</sup> Geir Ulfstein, 'International Framework for Decision-Making' in Malgosia Fitzmaurice and David Ong (eds), *Research Handbook on International Environmental Law* (Edward Elgar, 2010), available at <<http://ulfstein.net/wp-content/uploads/2012/08/UlfsteinRHIEL2010.pdf>> (visited 12 January 2017) at 34. See also Raustiala, *Reporting and Review Institutions*, *supra* note 50, at 4.

<sup>52</sup> Chambers, 'Interlinkages and the Effectiveness', *supra* note 49, at 122.

Developing MEAs without assessing whether particular Parties actually have the financial, personnel, and technical capacity to implement and comply will not produce significant results concerning the protection of the environment.<sup>53</sup> Most environmental agreements have developed and/or are developing compliance mechanisms, which are potentially powerful tools for encouraging compliance and ensuring the effective protection of the global environment.<sup>54</sup> This has been hailed as a great development in international environmental law, as it marks a move away from the traditional *ex post facto*, punitive and sanction-oriented means of settling compliance disputes, towards modern procedures and mechanisms which have been designed to facilitate compliance without the emphasis being on punishing or incriminating the non-compliant Party.<sup>55</sup>

Ensuring compliance with environmental agreements is necessary and critical because, *inter alia*, environmental agreements deal with global commons such as climate, atmosphere, oceans, and biological diversity. The individual and global benefits of compliance outweigh the benefits that a Party can derive from non-compliance; with non-compliance undermining the foundations of MEAs and of the entire international law framework, under which a treaty's contracting Parties are required to fulfill their commitments in good faith.<sup>56</sup> Furthermore, compliance contributes to the effectiveness of any MEA, insofar as the fulfillment of individual Parties' obligations contributes towards achieving an MEA's negotiated goals for the wellbeing of present and future generations.

It is presumed that by becoming a Party to any MEA, a state has already shown its intention to fully comply with the obligations the agreement establishes and to contribute to its implementation as: 1) the MEA is in the state's best interest; 2) the state wants to be a responsible international actor; 3) the state wants to access financial or technical assistances under the agreement; or 4) other states encourage it to sign the agreement as part of enhancing the prospects of its international relationships in a mutually beneficial manner.<sup>57</sup> However, states recognize an environmental problem, negotiate an MEA to address the problem, and then sign and ratify the agreement, without conducting assessments of whether particular states have the capacities and resources needed to effectively implement and comply with the provisions of the agreement.<sup>58</sup> In addition, once the MEA has been ratified, politicians and other

<sup>53</sup> Mrema, *Cross-Cutting Issues*, *supra* note 12, at 203.

<sup>54</sup> North Atlantic Salmon Conservation Organization Council, 'Compliance and Accountability Mechanisms in Six International Environmental Treaties', a paper tabled by World Wildlife Fund (US) at Open Session on 'Next Steps for NASCO', 2005 Council Document CNL(05)35, available at <[http://www.nasco.int/pdf/2005%20papers/CNL\(05\)35.pdf](http://www.nasco.int/pdf/2005%20papers/CNL(05)35.pdf)> (visited 10 April 2017).

<sup>55</sup> Gilbert Bankobeza, *Ozone protection: The international legal regime* (Eleven International Publishing, 2005) at 218-219.

<sup>56</sup> Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331, Article 26: '*Pacta sunt servanda* – Every treaty in force is binding upon the Parties to it and must be performed by them in good faith.'

<sup>57</sup> UNEP, *Manual on Compliance*, *supra* note 11, at 54.

<sup>58</sup> *Ibid.* at 29.

decision-makers at the national level often need to be convinced of the importance of complying with the agreement in the face of other pressing national issues and priorities.<sup>59</sup>

In many instances, capacities to comply with the MEA, and the importance of compliance, is therefore assessed only after the negotiation of an agreement has been completed, and in some cases even after the adopted agreement has entered into force, as is presently the case in the ongoing negotiations for compliance mechanisms for, *inter alia*, the Rotterdam PIC Convention<sup>60</sup> and the Stockholm POPs Convention.<sup>61</sup> While compliance procedures and mechanisms are now being given a lot of attention and are formally required in the provisions of the most recent MEAs, it is often difficult for Parties to take compliance seriously at the time of negotiating, signing and entry into force of the agreement. It is also difficult for negotiators to envisage how a compliance mechanism might and should look like when substantive obligations are being negotiated in parallel. Lack of streamlined approaches to compliance has seen Parties selectively comply with the rules and obligations of specific MEAs, but fail to do so with respect to other agreements. Suspending action on the development of compliance mechanisms has resulted in an uneven realization of the international environmental goals and objectives and, if not curbed, is likely to slow progress towards the realization of the environmental dimension of the 2030 Agenda and the SDGs.

To improve the current status of the global environment, deliver the environmental dimension of the 2030 Agenda and the SDGs, and safeguard the interests of the present and future generations, states are strongly and quickly shifting focus away from the development of more MEAs and towards the adoption of frameworks and mechanisms for ensuring and monitoring compliance with the existing agree-

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<sup>59</sup> *Ibid.*

<sup>60</sup> Article 17 of the Rotterdam PIC Convention: 'the Conference of the Parties [is] to develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of the Convention and for the treatment of Parties found to be in non-compliance.' The first meeting of the Conference of the Parties convened an Open-ended Ad-Hoc Working Group on Article 17 that met in 2005. The matter of compliance was considered during the second, third, fourth fifth, sixth, seventh and eighth meetings of the Conference of the Parties. In May 2017, the COP at its eighth meeting decided to further consider the issue of procedures and mechanisms on compliance with the Rotterdam PIC Convention at the ninth meeting of the COP in 2019. See Rotterdam Convention, 'Compliance', available at <<http://www.pic.int/TheConvention/Compliance/tabid/3606/language/en-US/Default.aspx>> (visited 28 May 2017).

<sup>61</sup> Article 17 of the Stockholm POPs Convention: 'the Conference of the Parties shall develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of the Convention and for the treatment of Parties found to be in non-compliance'. To prepare draft procedures on non-compliance for its consideration, the Conference of Parties established an ad hoc open-ended working group on non-compliance that met in April 2006 and April 2007. Further work on the issue was undertaken by the COP at its third, fourth, fifth, sixth, seventh and eighth meetings. At its eighth meeting in May 2017, the COP decided that further work on the procedures and mechanisms on compliance with the Convention shall be placed on the agenda at its ninth meeting in 2019. See Stockholm Convention, 'Compliance', available at <<http://chm.pops.int/TheConvention/Compliance/tabid/61/Default.aspx>> (visited 28 May 2017).

ments.<sup>62</sup> New MEAs are being developed and adopted only when priority needs have been assessed and determined.<sup>63</sup> For instance, the recent adoption of the Minamata Mercury Convention, the Paris Agreement, and the Kigali Amendment to the Montreal Protocol, present some of the recent trends of adopting MEAs based on top global priorities and scientific and political considerations.

Some of the challenges confronting Parties when it comes to compliance with MEAs include lack of coherence in implementation, duplication of environmental goals and obligations, inadequacy and ineffectiveness in implementation, and weak synergies or interlinkages at the global, regional and national levels.<sup>64</sup> These challenges have resulted in the weak participation of key stakeholders, lack of financial and technological capacity and the existence of loopholes, and thus the worsening of the very problems the environmental agreements were developed to solve.<sup>65</sup> For example, failure to prosecute an illegal sale or sale without appropriate documentation of a species protected by CITES can lead to more violations because the loopholes will continuously be perceived as opportunities by individuals seeking to profit from non-compliance with CITES. Compliance mechanisms are therefore systems calculated to not only encourage sealing of the potential loopholes, but also facilitate the provision of assistance to enable Parties overcome the specific challenges that would lead to non-compliance.

### 3 Developing MEA compliance mechanisms

MEAs are negotiated within the international law framework, where compliance has emerged as one of the most central questions.<sup>66</sup> Each MEA is negotiated separately, exhibits uniqueness in its objectives and provisions, and even where linkages exist to other MEAs, it enjoys an independent and autonomous personality, thus the clear recognition of the individual mandates and distinct legal status.<sup>67</sup> While respecting the independence of each MEA, and noting the interlinkages and opportunities for synergies, the international community has recognized compliance as a key issue in all MEAs.<sup>68</sup>

At the design and negotiation stages, or the entry into force of an MEA, Parties usually have complete control over how to develop and adopt a compliance mechanism,

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<sup>62</sup> Mrema, Cross-Cutting Issues, *supra* note 12 at 203. See also UNEP, *Manual on Compliance*, *supra* note 11 at 29; Bankobeza, *Ozone protection*, *supra* note 55, at 218-219.

<sup>63</sup> Mrema, Cross-Cutting Issues, *supra* note 12, at 202-203.

<sup>64</sup> *Ibid.* at 202.

<sup>65</sup> *Ibid.*

<sup>66</sup> Guzman, 'A Compliance-Based Theory', *supra* note 25, at 1826.

<sup>67</sup> Richard Caddell, 'The Integration of Multilateral Environmental Agreements: Lessons from the Biodiversity-Related Conventions' (2012) 22 *Yearbook of International Environmental Law* (2012) 37-75.

<sup>68</sup> UNEP, *Manual on Compliance*, *supra* note 11, at 59.

taking into consideration the uniqueness of the specific agreement.<sup>69</sup> Parties are also best placed to choose the best set of behaviors, approaches and incentives that are useful and appropriate for enhancing, encouraging and fostering compliance, as well as to address non-compliance.<sup>70</sup>

In this regard, various approaches are used to lay the groundwork for, and subsequently develop and put in place a tailor-made compliance mechanism for an MEA. The most common approaches are discussed in below.

In all MEAs, a compliance mechanism cannot exist unless the objectives of the agreement and the obligations with which Parties are required to comply are clearly spelt out in the negotiation text. Insertion of state obligations in the substantive text of an MEA is usually a process controlled by negotiating states and the obligations are largely results of, *inter alia*, compromise, regular exchange of information, and consultations to ensure that once adopted, each state has the capacity and willingness to comply.<sup>71</sup> The primary starting point to developing a compliance mechanism is therefore to clearly spell out the objectives of the agreement and the obligations of each Party, as the general basis for determining the scope, nature, structure and design of a compliance mechanism.

Taking into consideration the objectives and obligations, the negotiating states can establish a competent body of an MEA mandated to lead the development of a compliance mechanism and, once the mechanism is developed, regularly examine the levels of compliance, including the specific difficulties of compliance and the measures needed to improve compliance.<sup>72</sup> Within the negotiated text of the agreement, Parties can include national obligations such as establishment of institutions, development of national implementation plans, data collection, environmental monitoring, reporting and verification as strategies for facilitating and monitoring compliance.<sup>73</sup> National obligations are the primary source of information the Parties and compliance bodies of MEAs can rely on as the basis for determining each Party's compliance levels, as well as the effectiveness of the MEA.<sup>74</sup>

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<sup>69</sup> Guzman, 'The Design of International Agreements', *supra* note 23 at 581. See also UNEP, *Manual on Compliance*, *supra* note 11 at 59.

<sup>70</sup> Guzman, 'A Compliance Based', *supra* note 25, at 1931.

<sup>71</sup> UNEP, *Manual on Compliance*, *supra* note 11, at 59.

<sup>72</sup> UNEP, *Guidelines on Compliance*, *supra* note 39, at 4: 'The competent body of a multilateral environmental agreement could, where authorized to do so, regularly review the overall implementation of obligations under the multilateral environmental agreement and examine specific difficulties of compliance and consider measures aimed at improving compliance.' See also UNEP, *Auditing the Implementation*, *supra* note 35, at 21.

<sup>73</sup> Bankobeza, *Ozone protection*, *supra* note 55, at 220.

<sup>74</sup> UNEP, *Manual on Compliance*, *supra* note 11, at 59; See also UNEP, *Compliance Mechanisms under Selected Multilateral Environmental Agreements* (2007), available at <<http://wedocs.unep.org/bitstream/handle/20.500.11822/75071-Compliance%20Mechanisms%20under%20selected%20Multilateral%20Environmental%20Agreements-2007761.pdf?sequence=3&isAllowed=>>> (visited 28 June 2017) at 20.

Based on the first and second approaches outlined above, negotiators may agree to approve the establishment of a compliance mechanism as part of the MEA at the time of adoption.<sup>75</sup> For instance, the texts of the Biodiversity Convention,<sup>76</sup> the Convention on Climate Change,<sup>77</sup> the Kyoto Protocol and the Paris Agreement,<sup>78</sup> and the Minamata Mercury Convention<sup>79</sup> all include components and structures of these treaties' compliance mechanisms, which were agreed upon at the negotiation and adoption stages.

Where the above approach is not adopted, negotiators may introduce a text within the agreement (as was, for instance, done in Article 8 of the Montreal Protocol) empowering Parties to, through the Conference or Meeting of the Parties, and following entry into force of the agreement, consider and approve procedures and institutional mechanisms for determining compliance and non-compliance.<sup>80</sup> The Rotterdam PIC Convention,<sup>81</sup> the Stockholm POPs Convention,<sup>82</sup> and the Food

<sup>75</sup> UNEP, *Guidelines on Compliance*, *supra* note 39, at 4.

<sup>76</sup> Article 11 of the Biodiversity Convention (Incentive Measures); Art. 12 (Research and Training); Art. 13 (Public Education and Awareness); Art. 14 (Impact Assessment and Minimizing Adverse Impacts); Art. 16 (Access to and Transfer of Technology); Article 17 (Exchange of Information); Article 18 (Technical and Scientific Cooperation); Art. 20 (Financial Resources); and Art. 21 (Financial Mechanism).

<sup>77</sup> Convention on Climate Change, Art. 10 (Subsidiary body for implementation); Art. 11 (Financial mechanism pursuant to which COP-4 designated GEF as an operating entity of the financial mechanism); Art. 12 (Communication of information related to implementation); Art. 13 (Multilateral Consultative Process under which pursuant to Decision 10/CP.4 ('Multilateral consultative process' (1998)) the Multilateral Consultative Committee was established); and Art. 14 (Settlement of disputes).

<sup>78</sup> Kyoto Protocol, Arts 3.1, 4, 6, 10, 12, 17, 18 and 20. Article 12 establishes the Clean Development Mechanism, which allows Annex I countries to invest in projects to reduce emissions in non-annex I countries. Pursuant to Arts 18 and 20, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol confirmed Decision 27/CMP.1 (2005) adopting 'Procedures and mechanisms relating to compliance under the Kyoto Protocol'. See also Art. 15 of the Paris Agreement.

<sup>79</sup> Minamata Mercury Convention, Arts 13 (Financial resources and mechanism); 14 (Capacity-building, technical assistance and technology transfer); 15 (Implementation and Compliance Committee); and 17 (Information exchange). See also Jessica Templeton and Pia Kohler, 'Implementation and Compliance under the Minamata Convention on Mercury', 23 *Review of European, Comparative and International Environmental Law* (2014) 211-220.

<sup>80</sup> Pursuant to Art. 8 of the Montreal Protocol, Parties, at the Fourth MOP, adopted decision IV/5 ('Non-compliance procedure', 1992) establishing a non-compliance procedure and establishing the Implementation Committee. See also UNEP, *Guidelines on Compliance*, *supra* note 39, at 4: 'Compliance mechanisms or procedures could be introduced or enhanced after a multilateral environmental agreement has come into effect, provided such mechanisms or procedures have been authorized by the multilateral environmental agreement, subsequent amendment, or conference of the parties decision, as appropriate, and consistent with applicable international law.'

<sup>81</sup> Article 17 of the Rotterdam PIC Convention: 'The Conference of the Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance.'

<sup>82</sup> Article 17 of the Stockholm POPs Convention: 'The Conference of the Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance.'



and Agriculture Treaty<sup>83</sup> have also developed or are developing their compliance mechanisms through this approach.

Finally, where an MEA is silent as to the means of developing its compliance mechanisms, Parties through a competent body, usually the Conference or Meeting of the Parties can still take subsequent action to adopt a compliance mechanism through an amendment to the agreement or adoption of a resolution.<sup>84</sup> For instance, pursuant to Article 15(5)(e) of the Basel Waste Convention, the COP adopted decisions BC-V/16 and BC-VI/12 establishing a mechanism for promoting the implementation of and compliance with the obligations of the Convention.<sup>85</sup> CITES, through the COP, and pursuant to Decision 12.84 and under Resolution 14.3 adopted the *CITES compliance procedures* which are continuously reviewed, updated and enhanced under the COP's guidance.<sup>86</sup>

In the above approaches to developing a compliance mechanism, the following ingredients are given great significance under most MEAs:<sup>87</sup>

- a) regular exchange of information and experiences among Parties, including information on the ability of Parties to comply;
- b) synergies between and amongst the existing MEAs and consideration of the need to avoid overlaps and duplication;
- c) establishment of special funds and other appropriate mechanisms to facilitate compliance, including technology transfer and financial and technical assistance for environmental management;
- d) employment of principles such as common but differentiated responsibilities, and taking into consideration domestic capabilities during negotiations, as well as regular review of the overall implementation of obligations under an MEA, and examination of specific difficulties in compliance and consideration of measures aimed at improving compliance;
- e) enhancement of compliance through clarity in stating state obligations under the MEAs;

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<sup>83</sup> Article 21 of the Food and Agriculture Treaty:

The Governing Body shall, at its first meeting, consider and approve cooperative and effective procedures and operational mechanisms to promote compliance with the provisions of this Treaty and to address issues of non-compliance. These procedures and mechanisms shall include monitoring, and offering advice or assistance, including legal advice or legal assistance, when needed, in particular to developing countries and countries with economies in transition.

Pursuant to Art. 21, at its 5th Session the Governing Body of the Food and Agriculture Treaty adopted Resolution 9/2013 on the Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-Compliance.

<sup>84</sup> UNEP, *Manual on Compliance*, *supra* note 11, at 163.

<sup>85</sup> 'Mechanism for Promoting Implementation and Compliance of the Basel Convention', Basel Convention Dec. BC-V/16 (1999) 'Establishment of a mechanism for promoting implementation and compliance', Basel Convention Dec. VI/12 (2002).

<sup>86</sup> 'Compliance with the Convention', CITES Dec. 12.84 (2002); 'CITES compliance procedures', CITES Res. 14.3 (2007).

<sup>87</sup> Bankobeza, *Ozone protection*, *supra* note 55, at 219. See also UNEP, *Guidelines on Compliance*, *supra* note 39, at 2.

- f) development of national implementation plans, including reporting, monitoring, verification and evaluation of progress in implementation and environmental improvement;
- g) establishment of compliance procedures, including committees with appropriate mandates and expertise;
- h) clear stating of the compliance provisions, procedures and mechanisms;
- i) regular review of the MEA's effectiveness in Conferences and Meetings of the Parties; and
- j) dispute resolution procedures for resolving disagreements between two or more Parties.

Compliance can be either procedural or substantive or both.<sup>88</sup> *Procedural compliance*, on one hand, is the fulfilling of obligations such as preparing and filing national reports, attending meetings, and other specified procedural requirements which are not deeply rooted in the intent and spirit of the MEA.<sup>89</sup> *Substantive compliance*, on the other hand, is the fulfilling of obligations which are specifically and deeply rooted in the intent and objectives of the MEA, for example reversing and halting climate change, curbing atmospheric pollution, controlling international trade in endangered species and their products or halting biological diversity loss.

Compliance mechanisms are usually 'tailor-made' to suit the specific requirements of the MEA for which they are developed. The few MEAs that have not yet devised means for ensuring compliance are, through their respective Conferences or Meetings of the Parties, in the process of developing a compliance mechanism, in accordance with the provisions of the agreement concerned and sometimes building on and borrowing from progress made by other MEAs in this regard.<sup>90</sup>

#### 4 The distinction between diplomatic compliance mechanisms and coercive compliance mechanisms

In order to make the multilateral environmental system more effective, Parties have increasingly begun calling for enhanced action in finding mechanisms and measures to help them increase the strength and credibility of the existing environmental agreements through compliance.<sup>91</sup> As a result, various environmental agreements have – as highlighted in the previous section – developed or begun developing unique compliance mechanisms.

<sup>88</sup> Crossen, 'Multilateral Environmental Agreements', *supra* note 50, at 6.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.* See also Bankobeza, *Ozone protection*, *supra* note 55, at 219.

<sup>91</sup> UNEP, *Guidelines on Compliance*, *supra* note 39, at 2. Part II of the Guidelines defines compliance from a domestic perspective as 'the state of conformity with obligations, imposed by a state, its competent authorities and agencies on the regulated community, whether directly or indirectly through conditions and requirements, licenses and authorizations, in implementing multilateral environmental agreements'. See also Bankobeza, *Ozone protection*, *supra* note 55, at 221.

While the nature of the compliance mechanisms varies from one environmental agreement to another, largely due to each agreement's unique features and peculiarities, they can generally be grouped into two types, as specified below.

#### 4.1 Diplomatic or managerial compliance mechanisms

These are the simple, facilitative, non-adversarial, non-confrontational, cooperative, and problem solving mechanisms tied with incentives aimed at promoting compliance at all levels. All MEAs compared in this paper have put a great emphasis on environmental diplomacy, including emphasis on diplomatic and cooperative approaches to compliance. These approaches include, *inter alia*, treaty interpretation; transfer of technology and provision of technical assistance based on the common but differentiated responsibility principle (most MEAs);<sup>92</sup> exchange of information (all MEAs);<sup>93</sup> peaceful dispute settlement procedures including, *inter alia*, negotiation, conciliation, and mediation (all MEAs);<sup>94</sup> third-party facilitation, monitoring and verification (some MEAs);<sup>95</sup> and promoting of best practice, including identification of opportunities for simplification and streamlining of compliance processes.

The third-party verification or monitoring role is usually assigned to another Party or the Secretariat or a Committee of the particular MEA or a non-Party subject to approval by the Conference or Meeting of the Parties.<sup>96</sup> The third-party verification practice has been effectively implemented by the Ramsar Wetlands Convention and the Convention on Climate Change and its Kyoto Protocol, whereas third-party monitoring has been successfully implemented by CITES; the Ramsar Wetlands Convention; and the Antarctic Treaty.<sup>97</sup>

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<sup>92</sup> Article 10(a) of the Montreal Protocol; Art. 4(5) of the Convention on Climate Change; Art. 8 of the Food and Agriculture Treaty; CITES compliance procedures; Arts 19, 20, 21 of the Convention to Combat Desertification; and Art. 14 of the Minamata Mercury Convention.

<sup>93</sup> Articles 11, 12, 13, 16, 17, 18, 20 and 21 of the Biodiversity Convention; Arts 10, 12, 13 and 14 of the Convention on Climate Change; Arts 3(1), 4, 6, 10, 12, 17, 18 and 20 of the Kyoto Protocol; Arts 19, 20 and 21 of the Convention to Combat Desertification; and Art. 17 of the Minamata Mercury Convention.

<sup>94</sup> Article 28 of the Convention to Combat Desertification; Art. 11 of the Vienna Ozone Convention; Art. 11 of the Montreal Protocol; Art. 14 of the Convention on Climate Change; Art. 19 of the Kyoto Protocol which adopted Art. 14 procedures of the Convention on Climate Change; Art. 20 of the Basel Waste Convention; Art. 20 of the Rotterdam PIC Convention; Art. 18 of the Stockholm POPs Convention; Art. XIII of the Migratory Species Convention; and Art. 22 of the Food and Agriculture Treaty.

<sup>95</sup> Article 8 of the Kyoto Protocol; Annex 1 to Recommendation 4.7 ('Mechanisms for improved application of the Ramsar Convention', 1990) of the Ramsar Wetlands Convention; CITES; Food and Agriculture Treaty; and the Basel Waste Convention.

<sup>96</sup> Operational Guidelines 174, 184 and 194 of the World Heritage Convention; Art. 8 of the Convention on Climate Change; Arts 6 and 12 of the Kyoto Protocol; Annex 1 to Recommendation 4.7 of the Ramsar Wetlands Convention; and CITES compliance procedures.

<sup>97</sup> Antarctic Treaty, Washington, 1 December 1959, in force 23 June 1961, 19 *International Legal Materials* (1980) 860.

## 4.2 Coercive or sanction-oriented compliance mechanisms

As opposed to managerial and diplomatic mechanisms, coercive or sanction-oriented compliance mechanisms are basically the confrontational; disincentive; coercive; accusatory; sanction-oriented; and adversarial mechanisms, backed with ‘forceful’ or ‘punitive’ measures, calculated to ultimately compel compliance.

Such measures include:

- *sanctions* (Montreal Protocol; Kyoto Protocol);<sup>98</sup>
- *warnings* (CITES, Basel Waste Convention, Cartagena Biosafety Protocol, Montreal Protocol, and the Whaling Convention);
- *suspension of rights and privileges* (CITES, World Heritage Convention, Montreal Ozone Protocol, and the Kyoto Protocol);
- *trade suspension* (CITES,<sup>99</sup> Montreal Protocol, Kyoto Protocol, and the Whaling Convention);
- *liability* (Kyoto Protocol, Basel Waste Convention,<sup>100</sup> and the Cartagena Biosafety Protocol)<sup>101</sup> (liability to undertake more duties and burdens to ensure compliance with the MEA obligations differs considerably from compensation liability, which is the liability determined through arbitral or judicial dispute settlement mechanisms);<sup>102</sup>

<sup>98</sup> While measures under the Kyoto Protocol are in the nature and form of sanctions, they are referred to as ‘consequences’ in the annex to decision 27/CMP.1.

<sup>99</sup> CITES, ‘Countries currently subject to a recommendation to suspend trade’, available at <<https://cites.org/eng/resources/ref/suspend.php>> (visited 3 March 2017):

As of 1 August 2017, at least 30 member States were subject to a recommendation to suspend trade. Recommendations to suspend trade in specimens of CITES-listed species are made by the Conference of the Parties under the recommendations of the Standing Committee. A country can be subject to several recommendations to suspend trade and these recommendations may be different in scope. For example, there may be a recommendation to suspend all trade in specimens of CITES species with a certain country, or all commercial trade in CITES species, or all trade in specimens of a particular species. In such cases, all of the recommendations should be taken into account by Management Authorities considering applications for permits or certificates. A country can be subjected to more than one trade suspension because there are several processes that can result in different recommendations. The recommendations are made at different times, independently of each other, and each one remains in effect until the criteria for its withdrawal have been met.

<sup>100</sup> Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999, <<http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>> (visited 3 March 2017).

<sup>101</sup> Article 27 of the Cartagena Biosafety Protocol. See also the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Nagoya, 15 October 2010, <<http://bch.cbd.int/protocol/supplementary/>>.

<sup>102</sup> UNEP, *Compliance Mechanism under, supra* note 74, at 12. It is important to note that amongst all the MEAs considered in this paper, only the Basel Convention Protocol on Liability and Compensation defines liability to compensate damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes. This form of liability is not presently considered as part of a multilateral non-compliance procedure for any MEA.

- *reparations* (Basel Convention Protocol on Liability and Compensation);<sup>103</sup> and
- *judicial dispute settlement procedures* (the Law of the Sea Convention).<sup>104</sup>

Coercive or sanction-oriented mechanisms are rarely developed under MEAs because, unlike national environmental law systems, international environmental law is a product of a voluntary process, and during negotiations Parties 1) tend not to agree entirely on how harsh measures can contribute to achieving the desired results and 2) are reluctant to subject themselves to mistrust and fear if they adopt a largely coercive mechanism. Across-the-board, the preference is therefore for soft diplomatic, managerial and non-confrontational compliance mechanisms.<sup>105</sup> It is only in rare instances that coercion and forceful authority can be implemented as a means of last resort.

### 4.3 Characteristics of MEA compliance mechanisms

None of the above measures have a universal standing or across-the-board application by MEAs. As emphasized above, compliance mechanisms are tailored to suit the specific provisions and objectives of the adopting agreement or MEA. Differences are also influenced by the fact that compliance mechanisms are products of long negotiations and huge compromise, and flexibility is usually created to encourage cooperation, reduce decision-making costs, increase interactions amongst Parties and reduce chances for non-compliance.

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<sup>103</sup> Article 5 of the Basel Protocol on Liability and Compensation (Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999, <<http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConvention-Text-e.pdf>> (visited 28 August 2017): ‘...any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions.’ See also *Yearbook of the International Law Commission, Responsibility of States for Internationally Wrongful Acts* (2001), available at <[http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)> (visited 28 August 2017) at Arts 1-3:

Article 1: *Responsibility of a State for its internationally wrongful acts*

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2: *Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

Article 3: *Characterization of an act of a State as internationally wrongful*

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

The wrongful act usually results from non-compliance with international peremptory norms, and the legality of such a violation under national law cannot be raised to justify non-compliance.

<sup>104</sup> Article 287 of the Law of the Sea Convention establishes various choices of forums for settlement of disputes: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

<sup>105</sup> Thomas M. Franck, ‘Legitimacy in the International System’, *82 American Journal of International Law* (1988) 705-759 at 705.

In this regard, MEAs have developed compliance mechanisms with distinguishable characteristics that<sup>106</sup> create internal dispute resolution procedures without external recourse and with broad based accessibility; unlike the traditional dispute settlement procedures are largely binding and not consent based; reflect the need to enhance synergies, participation and fulfillment of common international environmental commitments and obligations; contain preventive elements such as reporting, assessment, monitoring, verification, capacity transfer, and information sharing; and create institutional mechanisms to continuously and progressively monitor and control compliance by Parties through a process called a compliance ‘continuum’.<sup>107</sup>

## 5 Categories of MEA compliance mechanisms

The above characteristics lay the foundation on which all MEA compliance mechanisms are based. In general, the mechanisms fall into the following four specific categories:

- a) *performance review information*: a requirement for submission of national information and its review to determine levels of compliance and fulfillment of international obligations;
- b) *compliance and non-compliance procedures*: institutional settings and procedures within an MEA to deal with non-compliance issues;
- c) *non-compliance response measures*: measures adopted by an MEA to respond to non-compliance issues; and
- d) *dispute resolution procedures*: tools and procedures to help Parties solve their compliance disputes in a peaceful and cooperative manner, through negotiation, conciliation, and arbitration, including through legally binding third party dispute resolution procedures.

### 5.1 Performance review information

Performance review information is the most common compliance mechanism implemented by almost all MEAs. Relevant data and information about each Party’s fulfillment of environmental obligations and commitments is gathered primarily through national reporting and is subject to assessment, verification, and review by the appointed internal or external individuals and institutions.

<sup>106</sup> Bankobeza, *Ozone protection*, *supra* note 55, at 219

<sup>107</sup> Malgosia A. Fitzmaurice and Catherine Redgwell ‘Environmental Non-compliance Procedures and International Law’, *XXXI Netherland Yearbook of International Law* (2000) 35-65 at 40.

### 5.1.1 National reporting

National reporting is one of the easiest and most widely applied means of promoting effective compliance with an MEA. Nearly all MEAs require Parties to periodically self-report their own performance in the implementation of their obligations, and their progress towards achieving the objectives of the agreements.

CITES,<sup>108</sup> the Migratory Species Convention,<sup>109</sup> the Ramsar Wetlands Convention,<sup>110</sup> the Biodiversity Convention,<sup>111</sup> the Cartagena Biosafety Protocol,<sup>112</sup> the Stockholm POPs Convention,<sup>113</sup> the Basel Waste Convention,<sup>114</sup> the Vienna Ozone

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<sup>108</sup> Article VIII(7) of CITES.

<sup>109</sup> 'Information Management Plan and National Reporting', Migratory Species Convention Res. 6.5 (1999). See also 'Strategy for the future development of the Convention', Migratory Species Convention Res. 5.4 (1997):

All Parties should be encouraged to submit reports on their implementation of the Migratory Species Convention well before each meeting of the Conference of the Parties (COP). An analysis of reports submitted by Parties should be prepared before each meeting. The Secretariat should engage a specialized Organization on a permanent basis to review and evaluate the reports and to prepare a comprehensive report for the COP on the status and population trends for the relevant species, and conservation measures undertaken by the Parties and non-Party Range States, using also information from other sources.

<sup>110</sup> 'Submission of National Reports', Ramsar Wetlands Convention Recommendation 2.1 (1984):

[A]ll Parties should submit detailed national reports to the Bureau at least six months prior to each ordinary meeting of the Conference of the Parties; and...the Bureau should draft a simplified version of the questionnaire upon which national reports are based with a view to making the reports easier to prepare while at the same time ensuring that they reveal the information desired.

<sup>111</sup> Article 2 of the Biodiversity Convention: 'Each Contracting Party shall...present to the Conference of the Parties, reports on measures which it has taken for the implementation of the provisions of this Convention and their effectiveness in meeting the objectives of this Convention.'

<sup>112</sup> Article 33 of the Cartagena Biosafety Protocol: 'Each Party shall monitor the implementation of its obligations under this Protocol, and...report to the Conference of the Parties serving as the meeting of the Parties to this Protocol on measures that it has taken to implement the Protocol'. See also 'Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety', BS Dec. 1/7 (2004) at Part VI(1)(d): 'Invite the Party concerned to submit progress reports to the Committee on the efforts it is making to comply with its obligations under the Protocol'.

<sup>113</sup> Article 15 of the Stockholm POPs Convention: 'Each Party shall report to the Conference of the Parties on the measures it has taken to implement the provisions of this Convention and on the effectiveness of such measures in meeting the objectives of the Convention...provide to the Secretariat: (a) Statistical data on its total quantities of production, import and export of each of the chemicals listed in Annex A and Annex B...'

<sup>114</sup> Article 13(3) of the Basel Waste Convention:

The Parties, consistent with national laws and regulations, shall transmit, through the Secretariat, to the Conference of the Parties, before the end of each calendar year, a report on the previous calendar year, containing information on, inter alia, (a) Competent authorities and focal points designated by them pursuant to Article 5; (b) Information regarding transboundary movements of hazardous wastes or other wastes in which they have been involved; (c) Information on the measures adopted by them in implementation of the Convention; (d) Information on available qualified statistics on the effects on human health and the environment of the generation, transportation and disposal of hazardous wastes or other wastes; (e) Information concerning bilateral, multilateral and regional agreements and arrangements entered into pursuant to Article 11; (f) Information on accidents occurring during the transboundary movement and disposal of hazardous wastes and other wastes and on the measures undertaken to deal with them; (g) Information on disposal options operated within the area of their national jurisdiction; (h) Information on measures undertaken for development of technologies for the reduction and/or elimination of production of hazardous wastes and other wastes; and (i) Such other matters as the Conference of the Parties shall deem relevant.

Convention<sup>115</sup> and its Montreal Protocol<sup>116</sup> and Kigali Amendment,<sup>117</sup> the Convention on Climate Change<sup>118</sup> and its Kyoto Protocol<sup>119</sup> and Paris Agreement,<sup>120</sup> the Food and Agriculture Treaty,<sup>121</sup> the Minamata Mercury Convention,<sup>122</sup> and the World Heritage Convention<sup>123</sup> all require Parties to submit periodic reports to the agreements' Secretariats indicating their performance and the measures and steps taken to ensure compliance.

On the other hand, the Rotterdam PIC Convention, the Law of the Sea Convention and the Whaling Convention do not require periodic national reporting. The Rotterdam PIC Convention requires each Party that takes a final regulatory action on banned or severely restricted chemicals to notify the Secretariat no later than ninety

<sup>115</sup> Article 5 of the Vienna Ozone Convention:

The Parties shall transmit, through the Secretariat, to the Conference of the Parties information on the measures adopted by them in implementation of this Convention and of protocols to which they are party in such form and at such intervals as the meetings of the parties to the relevant instruments may determine.

<sup>116</sup> Article 7 of the Montreal Protocol: 'Each Party shall provide to the Secretariat, within three months of becoming a Party, statistical data on its production, imports and exports of each of the controlled substances, or the best possible estimates of such data where actual data are not available.'

<sup>117</sup> This Agreement amends Article 7(4) of the Montreal Protocol to introduce an obligation to report on 'production', of controlled substances by Parties which are Member States of a regional economic integration organization as defined in Art. 1(6) of the Convention, and such Parties may jointly fulfill their obligations under the Protocol.

<sup>118</sup> Article 12 of the Convention on Climate Change: 'Each Party shall communicate to the Conference of the Parties, through the Secretariat, inter alia, a national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases, and any other information that the Party considers relevant to the achievement of the objective of the Convention.'

<sup>119</sup> Articles 7(1)-(2) of the Kyoto Protocol:

Each Party included in Annex I shall incorporate in its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, submitted in accordance with the relevant decisions of the Conference of the Parties, the necessary supplementary information for the purposes of ensuring compliance with Article 3; ...incorporate in its national communication the supplementary information necessary to demonstrate compliance with its commitments under this Protocol.

<sup>120</sup> Article 13(7) of the Paris Agreement:

Each Party shall regularly provide: (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement; and (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4.

<sup>121</sup> 'The Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-Compliance', ITPGREFA Res. 9/2013 provides that 'the first report is to be submitted within three years from the approval of this standard format.'

<sup>122</sup> Minamata Mercury Convention, Article 21(1): 'Each Party shall report to the Conference of the Parties, through the Secretariat, on the measures it has taken to implement the provisions of this Convention and on the effectiveness of such measures and the possible challenges...'

<sup>123</sup> Article 29(1) of the World Heritage Convention:

The States Parties shall, in the reports which they submit to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this Convention, together with details of the experience acquired...



days after the date on which the final regulatory action has taken effect.<sup>124</sup> Under Law of the Sea Convention, the UN Secretary-General provides an annual report to the General Assembly regarding the implementation of the Convention and areas of further coordination and cooperation.<sup>125</sup>

While it can be assumed that Parties generally endeavor to implement their MEA obligations in good faith, not all Parties have been successful in complying with the self-reporting requirements.<sup>126</sup> Further, national self-reporting requirements vary greatly in the number of reporting documents required, content and periodicity. For instance, some MEAs, such as the Montreal Protocol, require annual reports, while others, such as the Migratory Species Convention, call for triennial reports. To support countries in addressing national reporting challenges, the UN Environment has been involved in a number of initiatives to identify options for enhancing synergies and cooperation, specifically under the project being implemented for the last three years on improving the effectiveness of and cooperation among biodiversity-related conventions and exploring opportunities for further synergies. Similar efforts are being enhanced amongst MEAs dealing with chemicals and hazardous waste (Basel, Rotterdam and Stockholm Conventions) and will be extended to the Minamata Mercury Convention. As a result of these initiatives, there has been an increase in the number of countries undertaking reviews of, and adopting recommendations for, enhanced compliance with MEAs through national reporting.

Often, data submitted through national reporting varies in quality and format, and reporting rates vary from one MEA to another as well as from one reporting period to another, with minimal levels of consistency.<sup>127</sup> To tackle the inconsistencies and variability in the data submitted, Parties to various MEAs recognized the need to simplify and streamline reporting processes, and have cooperated with UN Environment to achieve this. The Montreal Protocol, the Convention on Climate Change and its Kyoto Protocol, the Ramsar Wetlands Convention and the Convention on Biological Diversity have developed tools and templates aimed at streamlining national reporting, enhancing the quality of data submitted, reducing gaps and inconsistencies in the reports, and harmonizing the format and timeliness of the reports.<sup>128</sup> Within the biodiversity cluster of environmental agreements, the UN Environment continues to enhance and contribute to interoperable data, information, knowledge and tools which support clear implementation of the biodiversity-related MEAs, includ-

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<sup>124</sup> Article 15 of the Rotterdam PIC Convention.

<sup>125</sup> Articles 204-206 of the Law of the Sea Convention.

<sup>126</sup> United States General Accounting Office, *International Environment: International Agreements Are Not Well-Monitored*, GAO/RCED-92-43 (1992), available at <<http://www.gao.gov/assets/160/151430.pdf>> (visited 29 June 2017).

<sup>127</sup> Rosalind Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (Royal Institute of International Affairs, 2002) 277.

<sup>128</sup> *Ibid.*

ing tools to support reporting.<sup>129</sup> The UN Environment *Sourcebook of Opportunities for Enhancing Cooperation among the Biodiversity-related Conventions at National and Regional Levels*, for instance, offers examples of how the National Focal Points of biodiversity-related MEAs are contributing to joint reporting processes through joint resources, collaboration and cooperation, and gives advice on how synergies could reduce in-country and international duplication and inefficiency, and contribute to the collaborative implementation of the Strategic Plan for Biodiversity 2011-2020.<sup>130</sup> In this regard, the role of the National Focal Points would entail liaising with the relevant national authorities on roles and functions of the authority in delivering national obligations under an MEA; providing advice and inputs into activities and actions aimed at enhancing MEAs' effectiveness at the national level; providing inputs, data and information to facilitate compliance; and improving communication, coordination and collaboration with relevant national, regional and global stakeholders in the promotion of streamlining and harmonizing.<sup>131</sup>

In almost all MEAs that have adopted national reporting as a compliance mechanism, the reports are made available online and can be accessed by any interested Party or stakeholder. Most MEAs have subjected their reports to a systematic review process, which is often led by the Secretariat, Conference or Meeting of the Parties or a specific subsidiary body established within the agreement. Reports and fact-sheets on compliance rates and trends are publicly available and can be relied on by Parties to further enhance compliance. Within the MEA clusters, compliance rates and trends are used to determine the progress made in fulfilling cluster goals and objectives. Under the biodiversity cluster, for instance, the aggregate global biodiversity status is estimated based on compliance rates and trends of, *inter alia*, CITES, the Migratory Species Convention and the Biodiversity Convention. Similarly, under the chemicals and waste cluster, the rates and trends in compliance are used to establish the overall global chemicals and waste control status under, *inter alia*, the Basel, Rotterdam, and Stockholm Conventions, and the same maybe for the Minamata Mercury Convention, which recently entered into force.

National reporting requirements are primarily implemented through national self-reporting. However, a few MEAs – such as the World Heritage Convention, CITES, and the Kyoto Protocol – also provide for supplementary third-party verification, monitoring, triggering of information and submission of data and reports by non-party sources, including non-governmental organizations and the private sector. To avoid intrusiveness, reports submitted by non-governmental organizations

<sup>129</sup> UNEP, *Elaboration of options for enhancing synergies among biodiversity related conventions* (2016), available at <<https://wedocs.unep.org/rest/bitstreams/35154/retrieve>> (visited 20 January 2017) at 7.

<sup>130</sup> UNEP, *Sourcebook of opportunities for enhancing cooperation among the Biodiversity-related Conventions at national and regional levels* (2015), available at <<https://www.cbd.int/doc/nbsap/unep-sourcebook-web.pdf>> (visited 18 January 2017) at 48.

<sup>131</sup> UNEP-WCMC, *Promoting synergies within the biodiversity cluster of biodiversity-related multilateral environmental agreements* (2012), available at <[http://old.unep-wcmc.org/medialibrary/2012/04/27/8b832e8c/Final\\_MEA\\_synergies\\_27April2012\\_cover.pdf](http://old.unep-wcmc.org/medialibrary/2012/04/27/8b832e8c/Final_MEA_synergies_27April2012_cover.pdf)> (visited 30 August 2017) at 14-18.

and the private sector are only given consideration to the extent that the receiving agreement may deem appropriate.<sup>132</sup>

In most MEAs that have adopted national self-reporting as a compliance mechanism, failure to submit national reports may result in sanctions such as suspension of trade and other privileges and issuance of cautions, as may be recommended by the relevant compliance and implementation monitoring body and adopted by the Conference or Meeting of the Parties.<sup>133</sup> Given the national reporting burden and the constraints that many states Parties face in preparing and timeously submitting their national reports, monitoring bodies and verification steps have become effective tools for enhancing compliance with reporting obligations. In this regard, the elements of natural justice, including the right to due process, the right to be heard, impartiality, confidentiality and transparency in the MEA compliance process are usually given effect before sanctions and other strict measures are imposed.<sup>134</sup> In fact, before recommending sanctions, most MEA compliance monitoring bodies work closely with non-compliant Parties to encourage and facilitate compliance. Under such a diplomatic approach, Parties to, *inter alia*, the Montreal Protocol, the Kyoto Protocol, the Convention on Climate Change, CITES, the Biodiversity Convention, and the Cartagena Biosafety Protocol have adopted mechanisms to provide technical and financial assistance to enable Parties to collect data for national reports.

From a practical perspective, the national reporting process faces a lot of cross-cutting challenges, including the following: most of the reports submitted are often not comparable; the quality of data submitted varies widely; governments, particularly Least Developed Countries and Small Island Developing States, have submitted complaints that compliance with reporting requirements is too expensive and time-consuming, and that the cumulative burden of such requirements is too heavy, given that they have to submit different reports for each agreement they are Party to. Finally, in the area of national reporting, a Party or governing body of an MEA cannot independently and directly gather national information about another Party, with the aim of determining compliance levels, unless the other Party agrees or consents. Where requested, a state rarely agrees to such a process because of the fear that the exercise would amount to an intrusive scrutiny.

Various efforts by UN Environment to enhance the quality of environmental data have contributed to improvements in the quality of data submitted through national reports to MEAs. For instance, the UN Environment Live,<sup>135</sup> a data analysis

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<sup>132</sup> UNEP, *Manual on Compliance*, *supra* note 11, at 106 and 176.

<sup>133</sup> Peter H. Sand, 'Enforcing CITES: the rise and fall of trade sanctions', 22(3) *Review of European Community and International Environmental Law* (2013) 251-263. See also CITES Res. Conf. 11.17 (Rev. CoP14).

<sup>134</sup> Donald Kaniaru, *The Montreal Protocol: Celebrating 20 Years of Environmental Progress - Ozone Layer and Climate Protection* (Cameron May and UNEP, 2007) 90. See also Bankobeza, *Ozone protection*, *supra* note 56, at 276-281.

<sup>135</sup> See <<https://uneplive.unep.org/>>.

tool, provides UN member states and other stakeholders open access to information and knowledge, including integrated assessments of the state, trends and outlooks of the environment at the global, regional and national levels. The Environment Live Indicator Reporting Information System has technology and capacity-building advantages in providing up-to-date information and supporting countries in monitoring the state and trends of the environment and reporting to MEAs. Through the scientific linking and harmonization of data, member states are able to establish how challenges in different national reports are interlinked and how addressing one problem in one member state or area of compliance can bring multiple benefits in other countries or areas of compliance and reduce unnecessary reporting burdens.<sup>136</sup> The tool also provides access to the latest data from publications, maps, charting and other mapping functionalities and other resources for tracking improvements and changes. This kind of information is highly valuable to decision-makers and supports efforts to increase compliance with MEAs. Furthermore, the Environment Live National Reporting System, owned and run by countries, enables member states to streamline their data collection, share information, develop indicators, and report to the environmental agreements, thus enhancing the national reporting process.<sup>137</sup>

### 5.1.2 Synergies and cooperation in national reporting

To facilitate compliance with MEAs, UN Environment has spearheaded processes to avoid overlaps through synergy and cooperation processes, and mutually benefi-

<sup>136</sup> UN Environment pilot projects on harmonization of national reporting: In October 2000, UN Environment convened a workshop 'Towards the harmonization of national reporting', where representatives of eight convention and MEA secretariats, eight countries and several international organizations met in Cambridge, United Kingdom, to discuss options for the harmonization of reporting. The workshop resulted in the establishment of UN Environment-sponsored pilot projects implemented by the UNEP-WCMC (World Conservation Monitoring Centre) in four countries (assessing the opportunities for linking national reporting to the State of the Environment reporting process (*Ghana*); identifying common information modules, and using this as a basis for developing a coordinated modular approach to reporting (*Indonesia*); exploring potential regional support mechanisms for national information management and associated reporting (*Panama*); assessing the potential for producing a consolidated national report responding to the needs of several conventions (*Seychelles*)) to explore different approaches to the harmonization of national reporting to biodiversity-related conventions. Later workshops led by UN Environment and UNEP-WCMC and Conferences and Meeting of the Parties to the Biodiversity Convention, CITES, Migratory Species Convention and Ramsar Wetlands Convention have reviewed the results of the pilot projects and made further recommendations to their Parties. See also 'National reporting', CBD Dec. XIII/27 (2016) para. 9.

Under the atmospheric-related MEAs, during the 20th Meeting of the Parties to the Montreal Protocol in 2008, Parties adopted Decision XX/7 on Environmentally Sound Management of banks of ozone-depleting substances and Decision XX/8 on High global warming potential alternatives for ozone-depleting substances. The decisions called for collaboration with the Convention on Climate Change in the preparation of reports, sharing information, participation in workshops on these topics and dissemination of their outcomes. The results of the collaboration contributed to the drafting and adoption of the Kigali Amendment to the Montreal ozone Protocol agreed by the Twenty-Eighth Meeting of the Parties (2016). The amendment will enter into force on 1 January 2019. Collaborative implementation of the Amendment by the three MEAs would ameliorate climate change and protect the ozone layer. See also 'Promotion and strengthening of relationships with other relevant conventions and international organizations, institutions and agencies', Convention to Combat Desertification Dec. 8/COP9 (2009) at 50.

<sup>137</sup> *Supra* note 135.

cial tools and procedures for receiving and reviewing national reports.<sup>138</sup> Building on these processes, most MEAs have embraced and incorporated synergies and cooperation as a tool for promoting compliance. In this regard, most MEAs have mutually consented through their Conferences or Meetings of the Parties to extending their national reporting tools and procedures to other MEAs, thus streamlining the process and reducing the national reporting burden.

For example, in the climate change regime, to improve the quality and consistency of the data submitted by Parties, the Convention on Climate Change, the Kyoto Protocol and the Paris Agreement have embraced synergies in the preparation, collection and validation of data, and established common guidelines for reporting and preparation of biennial update reports.<sup>139</sup>

The synergies process among the chemicals and waste MEAs, specifically the Basel Waste Convention and Stockholm POPs Convention, identified and recommended streamlining of reporting formats and synchronizing the submission of joint national reports as a means to advancing compliance within the two Conventions.<sup>140</sup> In 2011, the Conferences of the Parties to the conventions adopted decisions on synergies and, *inter alia*, approved joint activities and the ‘National reporting: revise the reporting systems of the Basel and Stockholm conventions and identify possible areas for streamlining’ work-plan<sup>141</sup> to progressively implement the decision.

Under the biodiversity cluster, CITES, the Migratory Species Convention and the Biodiversity Convention are developing common synergies and approaches for aligning the reporting process and analyzing the reports submitted as a result of the implementation of the National Biodiversity Strategies and Action Plans (NBSAPs), the Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets.<sup>142, 143</sup> The online reporting system developed for the African-Eurasian Migratory Waterbird Agreement (AEWA)<sup>144</sup> has been used by other agreements under the Migratory

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<sup>138</sup> UNEP, *Compliance Mechanisms under, supra* note 74, at 22:

[S]ynergy refers to the production of greater effectiveness and efficiency in effects than the MEA compliance mechanisms can achieve separately. For example, greater effects might be achieved through complementarity and mutual reinforcement. The complementarity and mutual reinforcement are the products of appropriate linkages between the separate compliance mechanisms of MEAs. Thus, synergy is the output of interlinkages between MEAs.

<sup>139</sup> See UNFCCC, ‘National Reports’, available at <[http://unfccc.int/national\\_reports/items/1408.php](http://unfccc.int/national_reports/items/1408.php)> (visited 18 April 2017).

<sup>140</sup> On national reporting under the Basel Waste Convention and the Stockholm POPs Convention, see <<http://www.brsmeas.org/Implementation/ScientificAndTechnicalActivities/NationalReporting/Overview/tabid/2626/language/en-US/Default.aspx>> (visited 18 April 2017).

<sup>141</sup> See Synergies among the Basel, Rotterdam and Basel Conventions, ‘National Reporting’, available at <<http://www.brsmeas.org/Implementation/ScientificAndTechnicalActivities/NationalReporting/Overview/tabid/2626/language/en-US/Default.aspx>> (visited 30 August 2017).

<sup>142</sup> The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets’, CBD Decision X/2 (2011).

<sup>143</sup> UNEP, *Elaboration of options, supra* note 129, at 27.

<sup>144</sup> Agreement on the Conservation of African-Eurasian Migratory Waterbirds, The Hague, 16 June 1995, in force 1 November 1999, <<http://www.unep-aewa.org>>.

Species Convention family, including the Migratory Species Convention itself.<sup>145</sup> The online reporting system model has further been customized for use by CITES and the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention).<sup>146, 147</sup>

### 5.1.3 Verification

Verification is the process of comparing data and information submitted through national reports in order to assist in ascertaining (i) whether a Party is in compliance, and (ii) in the event of non-compliance, the degree, type and frequency of non-compliance.<sup>148</sup> The process is non-confrontational in nature, and its primary aim is to analyze the national information and data, identify problems and challenges and make recommendations on solutions and opportunities for avoiding non-compliance.<sup>149</sup> Rules and modalities to govern the process are usually envisaged within the provisions of the MEA, and/or within resolutions and decisions adopted by the Meetings and Conferences of the Parties or the specific subsidiary body mandated to conduct the process. Based on the modalities and rules, independent third parties, including non-governmental organizations, may be invited to corroborate the national data submitted.<sup>150</sup>

Although verification is not a common practice among MEAs, and Parties generally prefer to avoid the process, some environmental agreements do employ various forms of verification to test the accuracy of the information submitted and determine Parties' levels of compliance. For instance, under CITES, the *ad hoc* inspection activities – including requesting of additional information from a Party when not satisfied by the information submitted – are treated as a form of verification.<sup>151</sup> Likewise, while the Montreal Protocol does not explicitly establish a verification process, verification can be undertaken by the Protocol's Implementation Committee whenever specific complaints lodged by a Party against another Party, or by third party non-state actors, including non-governmental organizations, individuals and communities, against a Party, substantiate the need to verify the quality of data submitted.<sup>152</sup>

<sup>145</sup> The AEW Online Reporting system was developed by UNEP-WCMC in partnership with the secretariats of the Convention on Migratory Species and AEW, and was first used for the submission of national reports under AEW to the Meeting of the Parties at its fifth session in 2012. The online reporting system enables secretariats easily to generate tailored online questionnaires for completion by Parties.

<sup>146</sup> Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, into force 1 June 1982, < <http://www.coe.int/en/web/bern-convention>>.

<sup>147</sup> UN Environment, *Sourcebook of opportunities*, *supra* note 130, at 29.

<sup>148</sup> UNEP, *Guidelines on Compliance*, *supra* note 39, at 4.

<sup>149</sup> Wang and Wisner, 'Compliance Regimes under', *supra* note 13, at 183.

<sup>150</sup> *Ibid.* at 4.

<sup>151</sup> Rosalind Reeve, 'Verification mechanisms in CITES', *Verification Yearbook 2001*, available at <[http://www.vertic.org/media/Archived\\_Publications/Yearbooks/2001/VY01\\_Reeve.pdf](http://www.vertic.org/media/Archived_Publications/Yearbooks/2001/VY01_Reeve.pdf)> (visited 25 January 2017). See also Art. XII(d) of the CITES Convention.

<sup>152</sup> 'Report of the Implementation Committee under the NonCompliance Procedure for the Montreal Protocol on the work of its forty eighth meeting', UN Doc. UNEP/OzL.Pro/ImpCom/48/5 (2012).

The Convention on Climate Change (coordinated by the Secretariat and conducted by an international team of experts), the Basel Waste Convention (Compliance Committee), the Kyoto Protocol (Compliance Committee), the Ramsar Wetlands Convention, and CITES<sup>153</sup> may specifically call for verification of the data submitted by Parties.<sup>154</sup> CITES relies on the verification process conducted by the Wildlife Trade Monitoring Unit (WTMU) and the Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC),<sup>155</sup> as well as non-governmental organizations with significant expertise in wildlife conservation.<sup>156</sup> The Ramsar Wetlands Convention relies on the International Union for Conservation of Nature (IUCN),<sup>157</sup> Wetlands International,<sup>158</sup> Birdlife International,<sup>159</sup> the Nature Conservancy and the Society of Wetlands Scientists.<sup>160</sup> In this regard, only the Convention on Climate Change, CITES and the Ramsar Wetlands Convention may authorize consensual *ad hoc* country visits by the Secretariat, compliance bodies or appointed experts to gather information, and to assess and verify the data submitted.<sup>161</sup> In addition, under CITES, *ad hoc* country visits can be undertaken to assess compliance with the Convention's permitting processes and trade controls.<sup>162</sup> The Basel Waste Convention, under Article 19, is empowered to conduct procedural verification and information gathering with the consent of a Party. To avoid intrusive monitoring, all country visits by MEAs are only conducted under the approval of, and in cooperation with, the Party being visited.

Environmental agreements that do not provide for data verification could consider the positive impact of mandating compliance bodies to request additional information and further inquire into the information submitted by states. In depth inquiries through the verification process can enhance the accuracy of assessments of compliance levels, and help to identify reasons for non-compliance and ways in which to address these.<sup>163</sup>

<sup>153</sup> In terms of Art. 8 of the Kyoto Protocol, verification of the information submitted in national reports is conducted by expert review teams. Under Art. 17, the Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading.

<sup>154</sup> Wang and Wisner, 'Compliance Regimes under', *supra* note 13, at 183.

<sup>155</sup> See <<http://www.traffic.org>>.

<sup>156</sup> Glenn M. Wisner, *Compliance Systems Under Multilateral Agreements: A Survey for the Benefit of Kyoto Protocol Policy Makers* (Center for International Environmental Law, 1999), available at <<http://www.ciel.org/Publications/SurveyPaper1.pdf>> (visited 28 August 2017) at 8.

<sup>157</sup> See <<http://www.iucn.org>>.

<sup>158</sup> See <<https://www.wetlands.org/>>.

<sup>159</sup> See <<http://www.birdlife.org>>.

<sup>160</sup> See <<http://www.sws.org/>>.

<sup>161</sup> Wang and Wisner, 'Compliance Regimes under', *supra* note 13, at 183.

<sup>162</sup> Reeve, 'Verification mechanisms in CITES', *supra* note 151, at 143: 'CITES Secretariat missions to Bolivia, Greece and Italy yielded information on non-compliance that, in part, contributed to eventual recommendations for trade sanctions. The CITES country visits to Italy and Thailand have been used to verify progress in complying with conditions specified for the lifting of trade sanctions.'

<sup>163</sup> Larry MacFaul, 'Developing the Climate Change Regime: The Role of Verification' in Rudolf Avenhaus, Nicholas Kyriakopoulos, Michel Richard and Gotthard Stein (eds), *Limiting the Spread of Weapons of Mass Destruction and Monitoring the Kyoto Protocol* (Springer, 2006) 171-209 at 172.

#### 5.1.4 Implementation review

Implementation review refers to the formal and informal compliance assessment and monitoring steps taken on the national reports to provide a thorough and comprehensive technical assessment of all aspects of a Party's implementation of its obligations.<sup>164</sup> The review process varies from one environmental agreement to another, and is usually based on guidelines for review of implementation adopted by a Conference or Meeting of the Parties. The main aim of the review process is to identify trends concerning effectiveness of the implementation of the agreement, compliance with the obligations set by the agreement, and trends pointing towards non-compliance, including identification of primary compliance problems.

Under CITES, for instance, all national reports submitted under Article VIII of the Convention are fed into a database which provides a basis for a comparative trade analysis, the Review of Significant Trade, quota management, identification of Parties with high trade volumes under the National Legislation Project,<sup>165</sup> and assessment of the overall levels of compliance.<sup>166</sup> For clarity in comparison, all CITES national reports are prepared and submitted in accordance with the *Guidelines for the preparation and submission of CITES annual reports*.<sup>167</sup>

In comparison, the Convention on Climate Change's national communications, including the annual inventories and the national reports submitted after every four years, are systematically analyzed in two steps.<sup>168</sup> The first is the technical check undertaken by the Secretariat to analyze, compile and synthesize the information received; and the second is the in-depth review, which includes centralized review and on-site in-country visits undertaken by a group of experts with the aim of providing a thorough and comprehensive technical review and assessment of compliance with the Convention.<sup>169</sup> Both reviews are conducted under the mandate of the Conference of the Parties.<sup>170</sup>

Similarly, under Article 8 of the Kyoto Protocol, the national information submitted is subjected to review by expert review teams as may be determined by the Conference of the Parties serving as the Meeting of the Parties to the Protocol. The review process is conducted according to the provisions of the review guidelines adopted by the Parties, with the aim of providing a comprehensive annual compilation and accounting of emissions inventories to determine and assess the levels of national compliance, and

<sup>164</sup> Article 8 of the Kyoto Protocol.

<sup>165</sup> 'National laws for implementation of the Convention', CITES Res. Conf. 8.4 (1992).

<sup>166</sup> CITES, 'Reporting under the Convention', available at <<https://cites.org/eng/resources/reports.php>> (visited 28 April 2017).

<sup>167</sup> 'Guidelines for the preparation and submission of CITES annual reports', available at <<https://cites.org/sites/default/files/eng/notif/2002/022A.pdf>> (visited 28 April 2017).

<sup>168</sup> UNFCCC, 'Review Process', available at <[http://unfccc.int/national\\_reports/annex\\_i\\_ghg\\_inventories/review\\_process/items/2762.php](http://unfccc.int/national_reports/annex_i_ghg_inventories/review_process/items/2762.php)> (visited 28 April 2017).

<sup>169</sup> *Ibid.*

<sup>170</sup> Article 7(2) (j) of the Convention on Climate Change.



identify potential problems and factors influencing the fulfillment of commitments.<sup>171</sup> The final technical assessment report, including recommendations for decision-making by the Conference of the Parties serving as the Meeting of the Parties, is circulated by the Secretariat to all Parties. In addition, deliberations by the Facilitative Branch and the Enforcement Branch of the Protocol's Compliance Committee usually take into consideration information submitted by the review teams.<sup>172</sup>

The Biodiversity Convention Secretariat is mandated to prepare a general synthesis of information contained in national reports, discussing the data received and identifying the general compliance and non-compliance trends, gaps, challenges and opportunities reported by the Parties, for consideration by the Conference of the Parties.<sup>173</sup>

The Montreal Protocol implementation review procedure enables Parties and other bodies to exchange data, share information, monitor compliance activities, assess adequacy, and find mutual solutions for compliance challenges.<sup>174</sup> The Montreal Protocol Implementation Committee is specifically mandated to administer the non-compliance procedure, review implementation, and advise and make recommendations to the Conference of the Parties. The Committee consistently engages and works closely with the Protocol's Secretariat, the Montreal Protocol Multilateral Fund,<sup>175</sup> the Global Environment Facility (GEF),<sup>176</sup> the Technology and Economic Assessment Panel, its subsidiary committees and working groups, and other relevant stakeholders on the provision of financial and technical cooperation, including the transfer of technologies to Parties facing compliance difficulties.<sup>177</sup>

Implementation review essentially promotes synergies among MEAs; ensures the effectiveness of compliance regimes; increases transparency and promotes access to information; encourages creativity in the provision of financial and capacity-building assistance and transfer of technology to Parties facing compliance challenges; and enhances the role of non-governmental organizations and other stakeholders in multilateral environmental compliance processes.

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<sup>171</sup> 'Guidelines for the technical review of information reported under the Convention related to greenhouse gas inventories, biennial reports and national communications by Parties included in Annex I to the Convention', Kyoto Protocol Dec. 13/CP.20 (2014).

<sup>172</sup> 'Procedures and mechanisms relating to compliance under the Kyoto Protocol', Kyoto Protocol Dec. 24/CP.7 (2001), Part VIII(3).

<sup>173</sup> CBD, 'Syntheses of National Reports and Reporting Mechanism', available at <<https://www.cbd.int/reports/syntheses.shtml>> (visited 28 April 2017).

<sup>174</sup> Implementation Committee under the Non-compliance Procedure of the Montreal Protocol, available at <[http://42functions.net/en/mp\\_institutions.php?committee\\_id=4](http://42functions.net/en/mp_institutions.php?committee_id=4)> (visited 28 April 2017).

<sup>175</sup> The Multilateral Fund for the Implementation of the Montreal Protocol, available at <<http://www.multilateralfund.org/default.aspx>> (visited 28 April 2017).

<sup>176</sup> See <<http://www.thegef.org/>>.

<sup>177</sup> *Ibid.*

### 5.1.5 Compliance review

To a certain extent, compliance review is viewed as being part of, or feeding into, the implementation review process.<sup>178</sup> However, compliance review is the process taken by a mandated compliance review body of an MEA, or a group of mandated experts, to answer specific compliance questions so as to establish the levels of compliance and provide clarity on any emerging issues and challenges. Where need be, a request will be made for additional information, with the aim of determining a Party's level of compliance and fulfillment of the obligations set out by the agreement.<sup>179</sup> Compliance review is designed to help Parties identify and establish specific compliance obligations, and to identify deficiencies, inconsistencies and gaps in compliance. It also facilitates the establishment of procedures and mechanisms for addressing the identified deficiencies, gaps and inconsistencies. The Ramsar Wetlands Convention, CITES, the Convention on Climate Change, the Kyoto Protocol, the Paris Agreement, and the Montreal Protocol are some of the MEAs that have embraced compliance review process.<sup>180</sup>

Compliance review is both a legal and political process. Legally, compliance review helps Parties determine compliance levels, taking into consideration the relevant provisions of the MEA as well as the relevant principles of international law. Politically, the compliance review process generally submits to the mandates of the Conferences or Meetings of the Parties, thus giving Parties the opportunity to forge ways for enhancing compliance through negotiations and adoption of decisions aimed at addressing the emerging compliance questions and challenges. Legally and politically, the compliance review process is conducted within the confines of the rules and principles of natural justice. In this regard, while most MEAs have in place various regimes of dispute resolution procedures that have never or are rarely used, compliance review is an effective alternative: a diplomatic, practical and non-judicial channel for addressing compliance disputes, thus helping Parties to settle their disputes without seeking recourse to confrontational measures.<sup>181</sup>

Following the review process, compliance review institutions provide practical, non-judicial alternatives for achieving compliance, often taking into consideration the historical, capacity and technical reasons for non-compliance. The downside to compliance review is that it is politically sensitive and, given the nature of the international environmental governance process, Parties are more likely to prefer facilitative and cooperative compliance review processes than strict review processes, which are perceived to be inquisitive or intrusive in nature.

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<sup>178</sup> Raustiala, 'Reporting and Review Institutions', *supra* note 50, at 12.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

## 5.2 Compliance and non-compliance procedures

Compliance and non-compliance procedures are facilitative, cooperative, and non-judicial, institutionally based compliance regimes aimed at enhancing compliance by addressing the underlying difficulties and challenges therewith. The institutions include Conferences and Meetings of the Parties; subsidiary bodies such as Standing Committees, Implementation or Compliance Committees as well as the scientific and technical bodies of the environmental agreements.

Most MEAs, including CITES,<sup>182</sup> the Cartagena Biosafety Protocol,<sup>183</sup> the Ramsar Wetlands Convention, the Basel Waste Convention, the Kyoto Protocol, the Minamata Mercury Convention,<sup>184</sup> and the Montreal Protocol have in place functional compliance and non-compliance institutions, such as a Compliance Committee or Non-Compliance Committee (NCP) or an Implementation Committee.

The institutions are mandated to either consider and address various compliance related questions, suggestions and problems, with the aim of taking a final decision for action (as, for instance, is the case under the Kyoto Protocol's Compliance Committee); or consider the questions, suggestions and problems and make recommendations to the Conference or Meeting of the Parties, which is mandated to adopt a final resolution or decision on compliance issues (as, for instance, is the practice under the Montreal Protocol's Implementation Committee). Such questions, suggestions or compliance problems are usually brought to the attention of the compliance or non-compliance administering body by the Secretariat, the Party experiencing compliance difficulties, or other Parties with the aim of encouraging and increasing compliance levels.

In the case of some MEAs, such as the Ramsar Wetlands Convention, CITES and the Kyoto Protocol, third parties, including non-governmental organizations, are mandated to perform monitoring or verification roles, and can submit their compliance questions and suggestions to the relevant environmental agreement's compliance or non-compliance procedure.

All MEA compliance and non-compliance procedures rely on the submitted national data and reports, the implementation or compliance review reports, reports of the Secretariat, or the details contained in a request submitted by a Party facing compliance difficulties or a suggestion from another Party or a group of Parties or a third party. The non-governmental organizations must be accredited to the relevant MEA's governing bodies' processes and have substantial interest and experience in the issue being submitted for consideration.

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<sup>182</sup> Rules of Procedure of the CITES Standing Committee, available at <<https://cites.org/sites/default/files/eng/com/sc/E-SC65-Rules.pdf>> (visited 16 February 2017).

<sup>183</sup> Cartagena Biosafety Protocol Compliance Committee, available at <[https://bch.cbd.int/protocol/cpb\\_art34\\_cc.shtml](https://bch.cbd.int/protocol/cpb_art34_cc.shtml)> (visited 28 April 2017).

<sup>184</sup> Article 15 of the Minamata Mercury Convention (Implementation and Compliance Committee).

Whereas the Kyoto Protocol Compliance Committee can make a final decision based on the information it receives and its own deliberations, the committees responsible for most environmental agreements' compliance and non-compliance procedures are only mandated to make recommendations to the Conferences or Meetings of the Parties for a final decision or resolution. Recommendations of the Conferences or Meetings of the Parties may include an indicative list of incentives or disincentives, taking into consideration the circumstances, cause, type, degree and frequency of non-compliance or any other measures as the Parties may agree. Although, for the most part, not intended to be legally binding, the majority consensual nature of the final decision or resolution of a Conference or Meeting of the Parties, including the accompanying consequences for non-compliance, against a non-compliant Party has been determined to have a far reaching impact in encouraging compliance.<sup>185</sup> An analysis of the law-making powers or the binding nature of decisions or resolutions adopted by Conferences or Meetings of the Parties is beyond the scope of the present paper.

### 5.3 Non-compliance response measures

Non-compliance response measures can be classified into two categories: *positive economic compliance incentives*, such as technical and financial assistance to enhance compliance; and *negative enforcement oriented non-compliance disincentives*, including penalties and sanctions such as suspension of rights and privileges and stricter requirements on performance review information.<sup>186</sup> The form of incentives provided to enhance and encourage compliance is referred to as 'non-compliance response assistance'. Non-compliance response assistance is different from implementation assistance, which is assistance provided to enable a Party to implement an MEA or carry out any other international obligation. Implementation assistance is provided in the early stages of implementation, while non-compliance assistance is provided only once the levels, difficulties, and causes of non-compliance have been determined through a compliance or non-compliance procedure.

#### 5.3.1 Positive economic compliance incentives

Most MEAs have in place basic positive measures to respond to compliance challenges or non-compliance cases. The positive measures, as stated above, can be in the form of technical assistance and financial assistance, and are largely used to encourage synergies and cooperation amongst the Parties themselves as well as across the different classes and clusters of MEAs, thus reducing fragmentation and addressing various cross-cutting compliance challenges.

Most MEAs have successfully established or subscribed to various bilateral or multilateral trust funds or financial mechanisms for funding and promoting compliance. For

<sup>185</sup> Louise Kathleen Camenzuli, 'The development of international environmental law at the Multilateral Environmental Agreements' Conference of the Parties and its validity' (IUCN, 2007), available at <[https://www.iucn.org/downloads/cel10\\_camenzuli.pdf](https://www.iucn.org/downloads/cel10_camenzuli.pdf)> (visited 30 August 2017) at 15-16.

<sup>186</sup> UNEP, *Compliance Mechanisms under, supra* note 74, at 11.

instance, the Vienna Ozone Convention and its Montreal Protocol provide financial assistance to their Parties through the Ozone Multilateral Fund and the GEF. The GEF was established on the eve of the 1992 Rio Earth Summit to provide funding for tackling environmental issues, to reduce poverty and to strengthen governance.<sup>187</sup>

The chemicals and waste related agreements, specifically the Stockholm POPs Convention<sup>188</sup> and the Minamata Mercury Convention,<sup>189</sup> provide financial assistance to their Parties through the GEF. The Basel Waste Convention<sup>190</sup> and the Rotterdam PIC Convention have also benefited from sustainable funding from the GEF as a result of synergies between the Basel, Rotterdam and Stockholm Conventions.<sup>191</sup>

Biodiversity-related conventions, such as the Biodiversity Convention<sup>192</sup> and its Nagoya Protocol on Access and Benefit Sharing<sup>193</sup> and the Cartagena Biosafety Protocol,<sup>194</sup> the Convention to Combat Desertification,<sup>195</sup> and the Ramsar Wetlands Convention,<sup>196</sup> provide financial assistance to their Parties through the GEF as a means of promoting compliance.<sup>197</sup> Through the Global Partnership on Wildlife Conservation and Crime Prevention for Sustainable Development project,<sup>198</sup> CITES has also received financial assistance from the GEF.<sup>199</sup> At COP-16, CITES began exploring the necessity, feasibility and legal implications of having the GEF as the Convention's financial mechanism.<sup>200</sup>

The GEF is also the funding mechanism for the Convention on Climate Change,<sup>201</sup>

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<sup>187</sup> The Global Environment Facility (GEF), 'About us', available at <<https://www.thegef.org/about-us>> (visited 28 April 2017).

<sup>188</sup> Article 14 of the Stockholm POPs Convention.

<sup>189</sup> Article 13 of the Minamata Mercury Convention.

<sup>190</sup> Article 14 of the Basel Convention.

<sup>191</sup> Synergies among the Basel, Rotterdam and Stockholm Conventions, 'Global Environment Facility', available at <<http://synergies.pops.int/Partners/IGOs/GEF/tabid/4091/language/en-US/Default.aspx>> (visited 30 June 2017).

<sup>192</sup> Article 21 of the Biodiversity Convention. See also CBD Decisions I/2 ('Financial resources and mechanism', 1994) and III/8 ('Memorandum of understanding between the Conference of the Parties to the Convention on Biological Diversity and the Council of the Global Environment Facility', 1996).

<sup>193</sup> Article 25 of the Nagoya Protocol on Access and Benefit Sharing.

<sup>194</sup> Article 28 of the Cartagena Biosafety Protocol.

<sup>195</sup> Convention to Combat Desertification.

<sup>196</sup> Ramsar Wetlands Convention Recommendation 5.4 ('The relationship between the Ramsar Convention, the Global Environment Facility, and the Convention on Biological Diversity', 1993).

<sup>197</sup> GEF Conventions available at <<http://www.thegef.org/partners/conventions>> (visited 28 April 2017).

<sup>198</sup> See <<https://www.thegef.org/project/global-partnership-wildlife-conservation-and-crime-prevention-sustainable-development>> (visited 6 July 2017).

<sup>199</sup> 'CITES Secretariat welcomes GEF funding to fight illegal trade in wildlife', CITES press release of 4 June 2015, available at <[https://cites.org/eng/gef\\_wildlife\\_prog\\_2015](https://cites.org/eng/gef_wildlife_prog_2015)> (visited 28 April 2017).

<sup>200</sup> 'Access to Global Environment Facility funding', CITES Dec. 16.2 (2013) and 'Access to other sources of funding', Decs 16.3 to 16.8 (2013).

<sup>201</sup> Article 11 of the Convention on Climate Change and Dec. 12/CP.2 ('Memorandum of Understanding between the Conference of the Parties and the Council of the Global Environment Facility', 1996) and Decision 12/CP.3 ('Annex to the Memorandum of Understanding on the determination of funding necessary and available for the implementation of the Convention', 1997).

the Kyoto Protocol<sup>202</sup> and the Paris Agreement.<sup>203</sup>

In addition, various MEAs have established or subscribed to self-tailored funding mechanisms so as to enhance compliance through financial and technical assistance. For instance, the Ramsar Wetlands Convention Small Grants Fund;<sup>204</sup> the Migratory Species Convention Small Grants Programme (SGP);<sup>205</sup> the World Heritage Fund for the World Heritage Convention;<sup>206</sup> the Nagoya Protocol Implementation Fund (NPIF);<sup>207</sup> the Basel Waste Convention Technical Cooperation Trust Fund;<sup>208</sup> the Convention to Combat Desertification Global Mechanism;<sup>209</sup> and the Green Climate Fund (GCF);<sup>210</sup> the Least Developed Countries Fund (LDCF);<sup>211</sup> the Special Climate Change Fund (SCCF);<sup>212</sup> and the Kyoto Adaptation Fund (AF),<sup>213</sup> established under the Convention on Climate Change, its Kyoto Protocol and the Paris Agreement.

Technical assistance measures and mechanisms are largely non-financial, although there are financial implications in the provision of such assistance. Technical assistance measures and mechanisms include capacity-building mechanisms in the form of training, workshops and manuals, which address issues relating to human resource capacity and know-how; and technology transfers and exchange of information mechanisms.

Most MEAs have in place one or more procedure for transferring technical assistance to Parties facing compliance challenges. For example, technical scientific assistance and technology transfer is provided to CITES Parties through the CITES National Legislation Project.<sup>214</sup> The Biodiversity Convention and its Cartagena Biosafety Protocol, and the Nagoya Protocol on Access and Benefit Sharing, facilitate transfer and exchange of technology and information between Parties through

<sup>202</sup> Article 11 of the Kyoto Protocol.

<sup>203</sup> Article 9 of the Paris Agreement.

<sup>204</sup> Ramsar Small Grants Fund, <<http://www.ramsar.org/activity/small-grants-fund>> (visited 28 April 2017).

<sup>205</sup> Migratory Species Convention Small Grants Programme, <<http://www.cms.int/en/activities/small-grants/about>> (visited 28 April 2017).

<sup>206</sup> Article 15 of the World Heritage Convention.

<sup>207</sup> Nagoya Protocol Implementation Fund (NPIF), <[https://www.thegef.org/sites/default/files/documents/NPIF\\_brochure\\_-\\_English.pdf](https://www.thegef.org/sites/default/files/documents/NPIF_brochure_-_English.pdf)> (visited 22 February 2017).

<sup>208</sup> Basel Convention Trust Fund to Assist Developing Countries and other Countries in Need of Technical Assistance, <[http://www.basel.int/TheConvention/FinanceBudget/TechnicalCooperationTrustFund\(BD\)/ContributionsStatus/2017/tabid/5549/Default.aspx](http://www.basel.int/TheConvention/FinanceBudget/TechnicalCooperationTrustFund(BD)/ContributionsStatus/2017/tabid/5549/Default.aspx)> (visited 22 February 2017).

<sup>209</sup> Convention to Combat Desertification Global Mechanism, available at <<http://www2.unccd.int/about-us/global-mechanism>> (visited 22 February 2017).

<sup>210</sup> 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', UNFCCC Dec. 1/CP.16 (2010).

<sup>211</sup> 'Guidance to an entity entrusted with the operation of the financial mechanism of the Convention, for the operation of the least developed countries fund', UNFCCC Dec. 27/CP.7 (2001).

<sup>212</sup> 'Funding under the Convention', UNFCCC Dec. 7/CP.7 (2001).

<sup>213</sup> 'Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (the Doha Amendment)', Kyoto Protocol Dec. 1/CMP.8 (2012).

<sup>214</sup> See <[https://www.cites.org/legislation/National\\_Legislation\\_Project](https://www.cites.org/legislation/National_Legislation_Project)> (visited 6 July 2017).

the National Biodiversity Strategies and Action Plans (NBSAPs)<sup>215</sup> and the Aichi Biodiversity Targets<sup>216</sup> processes as well as the Clearing-House Mechanism.<sup>217</sup> The Nagoya Protocol on Access and Benefit Sharing further transfers technology and assistance to countries through the GEF National Implementation Project,<sup>218</sup> as well as the Global Project for Supporting the ratification and Entry into Force of the Nagoya Protocol.<sup>219</sup> The Convention on Climate Change, the Kyoto Protocol, the Paris Agreement, the Basel Waste Convention, the Rotterdam PIC Convention, the Stockholm POPs Convention, and the Minamata Mercury Convention provide information and guidance on conducting technology needs assessments, and embracing technologies through National Action Plans (NAPs).

Other forms of technical assistance include capacity-building initiatives such as training programs and courses offered by each MEA to its Parties and stakeholders. In addition, Parties can now enhance their compliance capacity through online training modules for almost all MEAs on the United Nations Information Portal on Multilateral Environmental Agreements (InforMEA).<sup>220</sup> In addition, CITES Parties can enhance and sustain compliance levels through the technical and capacity-building incentives provided by the African Elephant Fund (AEF) for implementing the African Elephant Action Plan (AEAP).<sup>221</sup>

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<sup>215</sup> National Biodiversity Strategies and Action Plans (NBSAPs) are the principal instruments for implementing the Convention at the national level. Article 6 of the Biodiversity Convention:

Each Contracting Party shall, in accordance with its particular conditions and capabilities: (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

<sup>216</sup> Under Decision X/2, the tenth meeting of the Conference of the Parties to the Biodiversity Convention, in October 2010, adopted the Strategic Plan for Biodiversity 2011-2020, including Aichi Biodiversity Targets. The Strategic Plan for Biodiversity is a ten-year framework for action by all countries and stakeholders to achieve the three objectives of the Convention, and it comprises of 20 measurable targets to be met by the year 2020. See CBD, '<<https://www.cbd.int/doc/strategic-plan/2011-2020/Aichi-Targets-EN.pdf>>' (visited 28 August 2017).

<sup>217</sup> Article 18(3) of the CBD states that: 'the Conference of the Parties shall determine how to establish a clearing-house mechanism to promote and facilitate technical and scientific cooperation.' Pursuant to Decision X/15 ('Scientific and technical cooperation and the clearing-house mechanism', 2010), a clearing-house mechanism has been established to contribute to the implementation of the Biodiversity Convention and its Strategic Plan for Biodiversity 2011-2020, through effective information services and other appropriate means in order to promote and facilitate scientific and technical cooperation, knowledge sharing and information exchange, and to establish a fully operational network of Parties and partners. See CBD, 'Clearing-House Mechanism', available at <<https://www.cbd.int/chm/>> (visited 28 August 2017).

<sup>218</sup> See <<https://www.thegef.org/project/strengthening-national-capacities-implementation-nagoya-protocol-access-genetic-resources>> (visited 6 July 2017).

<sup>219</sup> See <<https://www.thegef.org/project/global-support-entry-force-nagoya-protocol-access-and-benefit-sharing>> (visited 28 August 2017).

<sup>220</sup> See <<https://www.informea.org/en>> (visited 28 April 2017).

<sup>221</sup> The African Elephant Fund, <<http://www.africanelephantfund.org/>>.

Finally, the transfer and exchange of information and know-how occur through joint preparatory meetings for the Conferences and Meetings of the Parties; websites, databases, and portals, which are usually operated by environmental agreements' Secretariats and Partners; and capacity-building and training for relevant stakeholders, including law and compliance enforcement agencies, judiciaries, parliamentarians, prosecutors, private sector, civil society, private sectors and academics.

### 5.3.2 Negative enforcement oriented non-compliance disincentives

Where non-compliance levels have exceedingly persisted, disincentives and negative sanctions are invoked as a possible last resort to compel compliance. In this regard, a Conference or Meeting of the Parties, based on the recommendations resulting from the compliance or non-compliance monitoring body, may impose additional, stringent and customized obligations on a non-compliant Party. These obligations may include directions that the Party provide additional 'non-compliance response information' which is systematically subjected to further verification and review. However, not all environmental agreements provide for the submission of additional information as a negative non-compliance response measure.

Other disincentives to non-compliance include the imposition of warnings and penalties, imposition of additional obligations, and suspension of privileges and rights. Various MEAs provide for disincentives as follows:

- *Trade sanctions* – Montreal Protocol, the Kyoto Protocol, CITES, and the Whaling Convention.
- *Warnings* – CITES, the Basel Waste Convention, the Cartagena Biosafety Protocol, the Montreal Protocol, and the Whaling Convention. Early warning of potential non-compliance, by the facilitative branch, is also possible under the Kyoto Protocol compliance mechanisms, pursuant to decision 27/CMP.1.
- *Suspension of rights and privileges* – CITES, the World Heritage Convention, the Montreal Protocol, and the Kyoto Protocol.
- *Liabilities* – the Kyoto Protocol, the Basel Waste Convention, and the Cartagena Biosafety Protocol.
- *Reparations* – the Basel Waste Convention.

## 5.4 Dispute resolution procedures

Most MEAs have adopted dispute resolution procedures.<sup>222</sup> The procedures are 'managerial' and 'sanction-oriented' measures modeled on the provision of the Charter of the United Nations that 'all Members States shall settle their international disputes by peaceful means in such a manner that international peace and security, and

<sup>222</sup> Konrad von Moltke, *Whither MEAs?: The Role of International Environmental Management in the Trade and Environment Agenda* (The International Institute for Sustainable Development (IISD), 2001), available at <[https://www.iisd.org/pdf/trade\\_whither\\_meas.pdf](https://www.iisd.org/pdf/trade_whither_meas.pdf)> (visited 30 April 2017) at 44.



justice, is not endangered'.<sup>223</sup> While this is the case, creating a binding or widely accepted MEA dispute settlement procedure is difficult because all MEAs are consent and compromise based instruments, which are meant to serve the interests of the Parties with minimal coercion.<sup>224</sup>

Dispute resolution procedures can be mandatory or optional. They vary from one MEA to another. Even in clustered agreements, the existing procedures have not acquired an across-the-board status. The mechanisms range from simple provisions for Parties to peacefully solve their disputes at the bilateral level to complex compulsory third-party dispute resolution procedures. The final dispute resolution measures in almost all MEAs are sanction-oriented measures. These measures are applied only when the dispute arises from a Party's lack of willingness to comply with its international commitments and it has been comprehensively determined that no other measure will be effective.

The existing MEAs' dispute resolution mechanisms consist of progressive steps, categorized as follows: *bilateral negotiation* (diplomatic and cooperative in nature); *mediation* (diplomatic and cooperative in nature); *conciliation* (can be voluntary or compulsory, but largely diplomatic and cooperative in nature); *arbitration* (voluntary, quasi-cohesive but legally binding); and *judicial settlement* (coercive and legally binding but can only be implemented as a last resort, and thus far has hardly been used by Parties). These procedures do not, however, have a uniform application across-the-board amongst all the MEAs. The application varies from one MEA to another, based on the specific provisions of the agreement and the nature of the dispute. For example, CITES and the Migratory Species Convention require Parties to settle their disputes through negotiation and, where negotiations fail, these Conventions make provision for the dispute to be voluntarily submitted to the Permanent Court of Arbitration.<sup>225</sup> The Law of the Sea Convention, on the other hand, has binding third-party dispute resolution procedures, including compulsory binding arbitration for specific disputes, such as disputes concerning the sea bed.<sup>226</sup> In this regard, the Conference or Meeting of the Parties may adopt procedures to govern the arbitration process.

Across all environmental agreements, the arbitration procedure is only invoked when bilateral negotiations fail. The conciliation procedure is also invoked when negotiation fails, but only if one of the parties to the dispute requests conciliation and the other party accepts the invitation. Parties rarely submit to binding judicial settlement because of its adversarial, coercive, binding and compelling nature. There is thus a widespread preference for the voluntary, less adversarial and cooperative procedures, which are often tied with other non-compliance response procedures.

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<sup>223</sup> Article 2(4) of the Charter of the United Nations, 26 June 1945, available at <<http://www.un.org/en/documents/charter/index.shtml>>

<sup>224</sup> Guzman, 'A Compliance Based', *supra* note 25, at 1932.

<sup>225</sup> Article XVIII of the CITES.

<sup>226</sup> Article 287 of the Law of the Sea Convention and Annex V on Conciliation and VII on Arbitration.

In addition, judicial settlement is expensive and time consuming, and when the judicial process is not well managed, it can damage the political and economic relationships between the concerned Parties and their partners.

Given that most MEAs manage and settle disputes within the existing compliance and non-compliance procedures, use of dispute resolution procedures, and disputes themselves, have been widely avoided. In certain instances where a Party has persistently and willfully failed to comply with an MEA, the various cooperative, dispute-solving non-compliance procedures have proven effective. For example, across all MEAs, the exchange and transfer of information has enabled Parties to learn and borrow ideas for tackling non-compliance, thus avoiding possible disputes.

Furthermore, international environmental principles, including, *inter alia*, those articulated in the Stockholm Declaration<sup>227</sup> and the Rio Declaration on Environment and Development,<sup>228</sup> that require dissemination of prior information and notification;<sup>229</sup> taking of precautionary measures, including environmental impact assessment, to prevent and control transboundary environmental damage;<sup>230</sup> undertaking of consultations and obtaining of consent before conducting activities likely to cause harm to the environment;<sup>231</sup> transfer of financial and technological assistance;<sup>232</sup> recognition of polluters' liability and prevention of distortion of international trade and investment;<sup>233</sup> incorporation of environmental safeguards into development

<sup>227</sup> Para 6 of the Stockholm Declaration (Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), 11 *International Legal Materials* (1972) 1416): 'To defend and improve the human environment for present and future generations has become an imperative goal for mankind- a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.'

<sup>228</sup> Principle 26 of the Rio Declaration (UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876): 'States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.'

<sup>229</sup> Rio Declaration, Principle 18: 'States shall immediately notify other States of any emergencies that are likely to produce sudden harmful effects on the environment of those States.'

<sup>230</sup> Rio Declaration, Principle 15: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' See also Principle 2: 'States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'

<sup>231</sup> Rio Declaration, Principle 19: 'States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.'

<sup>232</sup> Stockholm Declaration, Principle 9: 'Environmental deficiencies generated by the conditions of under-development...pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.'

<sup>233</sup> Rio Declaration, Principle 16: '...promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.'

planning;<sup>234</sup> respect for basic human rights;<sup>235</sup> compensation for the victims of pollution;<sup>236</sup> bilateral and multilateral cooperation in the control, prevention, reduction and elimination of adverse environmental effects;<sup>237</sup> and elimination and control of the use of certain weapons in times of conflict and warfare<sup>238</sup> have also contributed to minimizing environmental disputes and conflicts.

Finally, emerging MEA practices – such as synergies and cooperation, the development of individual and bilateral procedures for handling disputes, and the enhancement of managerial approaches to non-compliance – have resulted in fewer disputes and rare reliance on institution-based coercive dispute resolution processes.

## 6 Issue linkage, synergies and cooperation in MEA compliance mechanisms

Many outcomes of international processes – such as the 1992 United Nations Conference on Environment and Development (Earth Summit); the 2002 World Summit on Sustainable Development (WSSD); the 2012 United Nations Conference on Sustainable Development (Rio+20); and the 2015 UN Sustainable Development Summit – have contributed significantly to the enhancement of MEA compliance regimes. Especially notable is the fact that, over the past few decades, the ‘pursuit of environmental protection’ has become a central concern in the global pursuit of

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<sup>234</sup> Stockholm Declaration, Principle 12:

Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance.

See also Rio Declaration, Principle 4: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’

<sup>235</sup> Stockholm Declaration, Principle 16: ‘Demographic policies which are without prejudice to basic human rights and which are deemed appropriate by Governments concerned should be applied in those regions where the rate of population growth or excessive population concentrations are likely to have adverse effects on the environment of the human environment and impede development.’

<sup>236</sup> Stockholm Declaration, Principle 22: ‘States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.’

<sup>237</sup> Stockholm Declaration, Principle 24: ‘International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects.’ See also Rio Declaration, Principle 14: ‘States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.’

<sup>238</sup> Stockholm Declaration, Principle 26: ‘Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.’ See also Rio Declaration, Principle 24: ‘States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.’

sustainable development. The human and natural environment is indisputably tied to other global objectives, such as peace, security and human wellbeing. Interlinkages between these issues can be established within the confines of various MEAs. Most MEA institutions and mechanisms are quickly and effectively identifying and incorporating contemporary environmental opportunities and challenges in their priorities and programmes of work.<sup>239</sup> These opportunities and challenges include the 2030 Agenda for Sustainable Development and the Sustainable Development Goals; human rights; international and cross-border movement of regulated substances; and the proliferation of MEAs. Exploiting these opportunities and addressing these challenges at various levels has the potential to encourage and enhance compliance with MEAs in a mutually beneficial manner.

### 6.1 MEA compliance mechanisms, the 2030 Agenda for Sustainable Development and the Sustainable Development Goals

The 2030 Agenda for Sustainable Development and the Sustainable Development Goals (SDGs), adopted in September 2015, recognize the environmental dimension as one of the three pillars of sustainable development. The SDGs are universal, indivisible and interlinked. The role of MEAs in achieving the 2030 Agenda and the Sustainable Development Goals is indisputable.<sup>240</sup> Delivering on the environmental dimension of the 2030 Agenda and the SDGs has a direct linkage to compliance with the various MEAs and *vice versa*.

MEAs play a critical role in the overall framework of environmental laws and conventions – they complement various national, bilateral and regional instruments, establish mandates linking their general objectives to sustainable development, and establish a wholesome global process for addressing environmental issues at various levels.<sup>241</sup> There are direct and indirect linkages to MEAs in the 17 SDGs and the respective 232 indicators for tracking implementation.<sup>242</sup>

Compliance with MEAs would create multiple opportunities for achieving all the SDGs in a mutually beneficial manner. For example, achieving SDG 1 on ending poverty requires Parties to ‘by 2030, build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters.’

<sup>239</sup> M. Shamsul Haque, ‘Environmental Discourse and Sustainable Development: Linkages and Limitations’, 5 *Ethics and the Environment* (2000) 3-21 at 9.

<sup>240</sup> UNEP, *Enhancing cooperation among the seven biodiversity related agreements and conventions at the national level using national biodiversity strategies and action plans* (2016), available at <<https://wedocs.unep.org/rest/bitstreams/35153/retrieve>> (visited 28 April 2017) at 8. See also Balakrishna Pisupati, *Biodiversity Governance: Lessons for International Environmental Governance* (National Biodiversity Authority, Chennai, India 2002).

<sup>241</sup> UNEP, *Sourcebook of opportunities*, *supra* note 130, at 8.

<sup>242</sup> Revised list of global Sustainable Development Goal indicators adopted at the 48th session of the United Nations Statistical Commission (March 2017), available at <<https://unstats.un.org/sdgs/indicators/Official%20Revised%20List%20of%20global%20SDG%20indicators.pdf>> (visited 30 April 2017).

On a plain view, delivery on SDG 1 has a strong linkage to compliance with the Climate Change and Ozone Conventions.

For MEAs having linkages to human health and well-being to have an impact, Parties should promote SDG 3 on healthy lives and well-being and by 2030 ‘substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination’ (Target 3.9). This is closely linked to how Parties produce and consume (Goal 12) and also reduce resource degradation, pollution, and waste, including through education, inclusive economies and gender mainstreaming (SDGs 1, 2, 4, 5, 8).

The provision of clean water and sanitation (Goal 6) has a direct linkage with compliance with fresh water and marine related MEAs. Clean household energy (Goal 7 on access to affordable, reliable, sustainable and modern energy) can cut indoor pollution, while sustainable transport, waste management, buildings and industry (Goal 11 on inclusive, safe, resilient and sustainable cities and settlements) will lead to healthy cities and the protection of biodiversity resources within cities.

To achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, Parties must act in accordance with agreed international frameworks (Goal 12), and significantly reduce the release of chemicals and wastes into the air, water and soil in order to minimize their adverse impacts on human health and the environment. Compliance with the chemicals and waste MEAs would clearly make an important contribution in this regard.

In addition, effective compliance with MEAs could result in measures aimed at mitigating climate change and its impacts (Goal 13). The impact of marine litter (Goal 15) on ecosystem and human health cannot be underestimated, and the impact of MEAs in ensuring the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services – in particular forests, wetlands, mountains and drylands – is well recorded in SDG Target 15.1. Goal 16, on the provision of access to justice for all and the building of effective, accountable and inclusive institutions at all levels, is essential for sustainable development and transparency in compliance processes and environmental governance in general. Goal 17 is an enabler for achieving all SDGs and focuses on means of implementation, such as finance, technology, capacity development, global partnerships and policy coherence.

## **6.2 MEA compliance mechanisms and human rights**

Major global human rights treaties were drafted and adopted long before environmental conservation processes and MEAs had gained momentum as international issues and mechanisms. In 1972, Principle 1 of the Stockholm Declaration of the UN Conference on the Human Environment marked the advent of recognizing

linkages between human well-being and the environment by declaring that: ‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being...’. In this regard, all human beings bear a solemn responsibility to protect and improve the environment for the benefit of present and future generations, including through compliance with the existing environmental policies, instruments and legal regimes. By 2030, the world is determined to ensure that all human beings can fulfill their potential in dignity and equality and in a healthy environment.<sup>243</sup> Whereas the right to a safe and healthy environment is not a *de facto* universal human right, human health is presently a central pillar in the enjoyment and realization of all human rights, and structures for the realization of these rights can be found in various international instruments. The notable instruments include, *inter alia*, the 1966 International Covenant on Economic, Social and Cultural Rights;<sup>244</sup> the 1989 Convention on the Rights of the Child;<sup>245</sup> the 1981 African Charter on Human and Peoples Rights;<sup>246</sup> and the 1988 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.<sup>247</sup>

While few MEAs make *explicit* reference to human rights (examples of those that do include the Paris Agreement and the preamble to the Basel Waste Convention), most MEAs (including the Basel Waste Convention, Cartagena Biosafety Protocol, Minamata Mercury Convention, Rotterdam PIC Convention, Stockholm POPs Convention, Vienna Ozone Convention, Convention on Climate Change, Kyoto Protocol, and Montreal Protocol) nevertheless recognize the linkages between a healthy environment and the enjoyment of fundamental human rights, including rights to health and wellbeing, food, water and sanitation. Human Rights Council Resolution 31/8 (2016) on human rights and the environment,<sup>248</sup> *inter alia*, calls upon states to ‘respect, protect and fulfil human rights, including in actions relating to environmental challenges; and implement fully their obligations to respect and ensure human rights without distinction of any kind, including in the application of environmental laws and policies’.<sup>249</sup> The recognition by MEAs and other international instruments of the importance of a healthy environment for human wellbeing and development is a good starting point for understanding and enhancing the development and respect for human rights within the multilateral environmental

<sup>243</sup> UNGA Res. 70/1.

<sup>244</sup> International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 *United Nations Treaty Series* 3.

<sup>245</sup> Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 28 *International Legal Materials* 1456.

<sup>246</sup> African Charter on Human and People’s Rights, Nairobi, 27 June 1981, in force 21 October 1986, 21 *International Legal Materials* 58.

<sup>247</sup> Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988, in force 16 November 1999, 28 *International Legal Materials* 156.

<sup>248</sup> Human Rights Council Res. 31/8 of 23 March 2016, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/084/79/PDF/G1608479.pdf?OpenElement>> (visited 28 August 2017).

<sup>249</sup> *Ibid.* at 2.

system. Most MEAs recognize, and often describe, the effect of environmental harm on human beings or the impact of human activities on the environment. They also place obligations upon Parties to prevent such harm.

Whereas the preference for addressing human rights in isolation from environmental issues or *vice versa* has long been dominant, the first report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment concluded that injecting and mainstreaming human rights issues into environmental issues and *vice versa* would be mutually beneficial to a broad range of human rights or environmental issues.<sup>250</sup> This paper surmises that interlinkages would also enhance the compliance regimes of both environmental and human rights agreements. Were this approach to be taken, compliance mechanisms designed to protect human rights would help to supplement compliance mechanisms for environmental agreements.<sup>251</sup>

A number of MEAs and policies have incorporated and endorsed procedural environmental rights, and some have included provisions or procedures regarding civil liability and compensation for damage caused by environmental degradation, particularly in the context of environmental pollution.<sup>252</sup> All MEAs and most related international resolutions and declarations elucidate certain aspects of the nexus between human rights and the environment. The Rio Declaration,<sup>253</sup> for instance, emphasizes the need to integrate the environment into development in order to achieve sustainable development and allow for the full enjoyment of a healthy and productive life in harmony with nature. MEAs have also illustrated an understanding that the rights to access to information and public participation in decision-making proceedings, and access to review procedures and remedies are closely linked. When people are able to learn about, and participate in, the decisions that affect them, they can help to ensure that those decisions contribute to compliance with MEAs and human rights agreements for a sustainable environment.<sup>254</sup>

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<sup>250</sup> Human Rights Council, 'Preliminary Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox', Twenty-second session, December 2012, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/189/72/PDF/G1218972.pdf?OpenElement>> (visited 28 August 2017) at 4-5.

<sup>251</sup> Human Rights Council, Special Rapporteur on human rights and the environment (the former Independent Expert on human rights and the environment), available at <<http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>> (visited 1 June 2017).

<sup>252</sup> Basel Protocol on Liability and Compensation; Principle 10 of the Rio Declaration on Environment and Development (1992); Article 21 of the Legal Principles for Environmental Protection and Sustainable Development Adopted by the World Commission on Environment and Development Experts Group on Environmental Law, available at <<http://www.un-documents.net/ocf-a1.htm>> (visited 10 September 2017); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <<http://www.unece.org/env/pp/>>; Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, London, 17 June 1999, in force 4 August 2005, <[http://www.unece.org/env/water/pwh\\_text/text\\_protocol.html](http://www.unece.org/env/water/pwh_text/text_protocol.html)> (visited 30 June 2017).

<sup>253</sup> Rio Declaration on Environment and Development.

<sup>254</sup> Special Rapporteur on human rights and the environment, *supra* note 251.

Compliance mechanisms under existing MEAs are limited in scope in comparison to compliance mechanisms in the international human rights regime. Most MEA compliance mechanisms only accept submissions from Parties about their own compliance and non-compliance or against another Party. Individual persons' or non-governmental organizations' complaints on non-compliance are not allowed under many environmental agreements. However, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Issues (Aarhus Convention)<sup>255</sup> allows the public to submit communications on non-compliance. In addition, the Aarhus Convention's Protocol on Pollutant Release and Transfer Registers (the Kyiv Protocol)<sup>256</sup> has effectively put Principle 10 of the Rio Declaration in practice.<sup>257</sup> The efforts to allow the public to bring non-compliance issues to the attention of the Aarhus Convention Compliance Committee have also been replicated in the Protocol on Water and Health to the Convention on the Protection and Use of the Transboundary Watercourses and International Lakes.<sup>258</sup> The cooperative approaches to compliance with environmental and human rights agreements can be an effective means of enhancing Parties' response to climate change, biodiversity loss and environmental pollution among other global environmental and human rights issues.

### 6.3 MEA compliance mechanisms, international trade, customs and border control

Some MEAs have included strong provisions concerning illegal trade and the international movement of unregulated substances. These include the Basel Waste Convention, the Cartagena Biosafety Protocol, CITES, the Montreal Protocol, the Rotterdam PIC Convention, and the Stockholm POPs Convention.<sup>259</sup> However, while compliance with MEAs, on the one hand, and trade-related agreements (for

<sup>255</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <<http://www.unece.org/env/pp/>>.

<sup>256</sup> Protocol on Pollutant Release and Transfer Registers to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Kiev, 21 May 2003, in force 8 October 2009, <[http://www.unece.org/fileadmin/DAM/env/pp/prtr/Protocol%20texts/PRTR\\_Protocol\\_e.pdf](http://www.unece.org/fileadmin/DAM/env/pp/prtr/Protocol%20texts/PRTR_Protocol_e.pdf)> (visited 6 July 2017).

<sup>257</sup> The United Nations Economic Commission for Europe (UNECE), <<https://www.unece.org/env/pp/welcome.html>> (visited 28 May 2017). Rio Declaration, Principle 10:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level...each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

<sup>258</sup> Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, London, 17 June 1999, in force 4 August 2005, <[http://www.unece.org/env/water/pwh\\_text/text\\_protocol.html](http://www.unece.org/env/water/pwh_text/text_protocol.html)> (visited 30 June 2017).

<sup>259</sup> The Green Customs Initiative, *The Green Customs Guide to Multilateral Environmental Agreements* (UNEP, 2008), available at <[http://www.greencustoms.org/reports/guide/Green\\_Customs\\_Guide\\_new.pdf](http://www.greencustoms.org/reports/guide/Green_Customs_Guide_new.pdf)> (visited 1 June 2017) at 15-35.



instance, the General Agreement on Tariffs and Trade (GATT)<sup>260</sup> and Trade Facilitation Agreement (TFA)<sup>261</sup>, on the other, requires distinct and unique forms of expertise, common foundational compliance setbacks can be addressed by establishing compliance approaches that are mutually applicable to both trade and environmental agreements. For instance, compliance with trade agreements typically requires the involvement of trade experts, whereas MEAs require the involvement of environmental experts. Studies have shown that strong linkages between trade agreements and policies and environmental agreements can enhance compliance with both trade policies and environmental policies, and offers clear benefits in comparison to handling such issues separately.

In this regard, UN Environment and other international organizations, including INTERPOL and a number of MEAs, have signed a memorandum of understanding (MOU) with the World Customs Organization (WCO) Secretariat on cooperation, consultation and exchange of information in environment and customs matters.<sup>262</sup> Through the Green Customs Initiative,<sup>263</sup> the organizations seek to enhance and sustain compliance with MEAs through trade and border control processes. Given that most MEAs govern activities and issues with transboundary impacts, the role of national customs and border control officers in ensuring compliance cannot be disputed. Customs and border control officers play a central role in implementing international trade-related agreements.<sup>264</sup> They also detect and investigate issues concerning illegal trade, regulate legal trade, check the validity and legality of trade documents, combat fraud and check compliance with prohibition and restriction measures on the import and export of controlled substances.<sup>265</sup> Finally, they inform the public about import and export measures for ensuring compliance with MEAs.<sup>266</sup> This paper recommends that, at the national level, agencies and institutions mandated to track and ensure national compliance with MEAs should assist and closely involve customs and border control officers in their compliance processes. Such collaboration would contribute to the identification and understanding of the relationship between international customs, trade and MEAs, with the aim of combating challenges in compliance with MEAs, trade-related agreements, and related movement and prohibition and restriction measures.

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<sup>260</sup> The General Agreement on Tariffs and Trade, Marrakech, 15 April 1994, available at <[https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)>.

<sup>261</sup> Annex to the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, Agreement on Trade Facilitation, 27 November 2014, WTO Doc. WT/L/940, available at <[https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfatheagreement\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm)> (visited 10 September 2017).

<sup>262</sup> The Green Customs Initiative, *The Green Customs Guide*, *supra* note 223, at 11. The MOU is available at <[http://www.greencustoms.org/reports/workshop/WCO\\_MOU.pdf](http://www.greencustoms.org/reports/workshop/WCO_MOU.pdf)> (visited 6 July 2017).

<sup>263</sup> See <<http://www.greencustoms.org/index.htm>>.

<sup>264</sup> The Green Customs Initiative, *The Green Customs Guide*, *supra* note 259, at 7.

<sup>265</sup> *Ibid.* at 223.

<sup>266</sup> *Ibid.* at 10.

#### 6.4 MEA compliance mechanisms and clustering of MEAs into thematic clusters

Clustering MEAs into specific thematic and issue clusters is the most recent development aimed at addressing the compliance burden and reducing fragmentation in the international multilateral environmental system.<sup>267</sup> Clustering is the merging of institutional and organizational arrangements of various MEAs, without requiring elaborate changes in their legal or administrative arrangements, with the aim of increasing the efficiency and effectiveness of the clustered agreements.<sup>268</sup> The clustering process takes into consideration specific common group elements, issues, costs and benefits. Examples of clustering are seen amongst the biodiversity and ecosystems-related agreements; atmosphere and climate agreements; trade-related agreements; chemicals and waste agreements; oceans and seas related agreements; and water-related agreements. The advantages of clustering MEAs as a means to enhancing compliance include enhanced policy coherence at all relevant levels, improved efficiency and effectiveness of compliance mechanisms, and reduction in unnecessary overlap and duplication. Other benefits include enhanced incentives for promoting compliance, and coordination and cooperation on compliance issues among the clustered MEAs.

#### 6.5 MEA compliance mechanisms and MEA institutional coherence and synergies

Some MEAs have developed or begun to develop coordinated and synergistic approaches to enhancing compliance and compliance mechanisms, including through the establishment of common Secretariats (as has been done, for example, under the Basel, Rotterdam and Stockholm (BRS) Conventions). Others have established common institutional procedures and mechanisms for ensuring compliance through common and harmonized national reporting mechanisms and provision of financial and technical assistance to Parties facing compliance difficulties (as is the case under the biodiversity-related conventions, chemicals-related conventions, and climate change MEAs). In addition, some MEAs have sought to enhance their compliance mechanisms by strengthening institutional coherence and jointly supporting Parties in capacity-building activities and the provision of other forms of technical assistance – for example, through the Biodiversity Liaison Group (BLG)

<sup>267</sup> Sebastian Oberthür, *Clustering of Multilateral Environmental Agreements: Potentials and Limitations* (United Nations University Institute of Advanced Studies, 2002), available at <<http://archive.unu.edu/interlinkages/docs/IEG/Oberthur.pdf>> (visited 3 May 2017) at 8. See also Konrad von Moltke, *On Clustering International Environmental Agreements* (International Institute for Sustainable Development, 2001), available at <<https://www.peacepalacelibrary.nl/ebooks/files/333288181.pdf>> (visited 3 May 2017) at 5.

<sup>268</sup> Oberthür, *Clustering Environmental Agreements*, *supra* note 267, at 5.

of Biodiversity-related Conventions<sup>269</sup> and the Joint Liaison Group (JLG) of the Rio Conventions.<sup>270</sup>

Within the UN system, Environmental Management Systems (EMS) are implemented by various bodies, funds, programmes and specialized agencies that have been established with specific mandates and limited jurisdiction.<sup>271</sup> Through the UN System Wide Framework of Strategies on the Environment (SWFS),<sup>272</sup> the Environment Management Group<sup>273</sup> promotes synergies, coordination, information exchange and joint action for handling of environmental and environment-related matters within the UN agencies and MEAs. For instance, through the Environmental Sustainability Issue Management Group<sup>274</sup> and the Inter-agency Issue Management Group on Tackling E-waste,<sup>275</sup> the EMG seeks to enhance compliance with multidimensional sustainable development obligations and promote action on e-waste across the UN system. Such synergistic institutional approaches to issues can positively contribute to a range of measures and advantages that are key to monitoring and enhancing the effectiveness of individual as well as the shared compliance mechanisms, incentives and disincentives, including those of the participating MEAs.

<sup>269</sup> Established in 2004 to enhance coherence and cooperation in the implementation of the Biodiversity Convention (Decisions VII/26 ('Cooperation with other conventions and international organizations and initiatives', 2004), VIII/16 ('Cooperation with other conventions and international organizations and initiatives', 2006), IX/27 ('Cooperation among multilateral environmental agreements and other organizations', 2008) and X/20 ('Cooperation with other conventions and international organizations and initiatives', 2010)); CITES (Res. 10.4 (rev. COP14) ('Cooperation and synergy with the Convention on Biological Diversity, 1997/2007); the Migratory Species Convention (Res. 8.11 ('Cooperation with other Conventions', 2005) and 9.6 ('Cooperation with other bodies', 2008)); the Ramsar Wetlands Convention (Res. IX.5 ('Synergies with other international organizations dealing with biological diversity; including collaboration on, and harmonization of, national reporting among biodiversity-related conventions and agreements', 2005); X.1 ('The Ramsar Strategic Plan 2009-2015', 2008) and X.11 ('Partnerships and synergies with Multilateral Environmental Agreements and other institutions', 2008)); the World Heritage Convention (Dec. 30 COM 6 ('Report of the World Heritage Centre on its Activities and on the Implementation of the Decisions of the World Heritage Committee', 2006) and 33 COM 5C ('World Heritage Convention and main multilateral environmental agreements', 2009); and the ITPGR-FA (Res. 8/2011 ('Cooperation with CBD')).

<sup>270</sup> Established in 2011 as an informal forum for exchanging information, exploring opportunities for synergistic activities and increasing coordination between the Convention to Combat Desertification (Dec. 12/COP.6 ('Review of activities for the promotion and strengthening of relationships with other relevant conventions and relevant international organizations, institutions and agencies', 2003)); the Biodiversity Convention (Dec. VI/20 ('Cooperation with other organizations, initiatives and conventions', 2002)); and the Convention on Climate Change (Dec. 13/CP.8 ('Cooperation with other conventions', 2002)).

<sup>271</sup> UN System-Wide Framework of Strategies on the Environment (SWFS), <<https://unemg.org/consultative-processes/un-system-wide-strategy>> (visited 28 May 2017).

<sup>272</sup> See <<https://unemg.org/consultative-processes/un-system-wide-strategy>> (visited 6 July 2017).

<sup>273</sup> The Environment Management Group (EMG) was established in 2001, pursuant to the UNGA Res. 53/242 of 10 August 1999 ('Report of the Secretary-General on environment and human settlements'). The mandate of the EMG is to, *inter alia*, provide an effective, coordinated and flexible United Nations system response to and to facilitate joint action aimed at finding solutions to important and newly emerging specific issues of environmental and human settlements concern in the context of the 2030 Agenda for Sustainable Development. See Updated / Revised Terms of Reference of the Environment Management Group, available at <[https://unemg.org/images/emgdocs/SOMMeetings/2017/07\\_Reference\\_doc\\_EMG\\_ToR.pdf](https://unemg.org/images/emgdocs/SOMMeetings/2017/07_Reference_doc_EMG_ToR.pdf)> (visited 28 May 2017).

<sup>274</sup> See <<https://unemg.org/issue-management-groups/environmental-management>> (visited 6 July 2017).

<sup>275</sup> See <<https://unemg.org/issue-management-groups/sound-management-of-chemicals-and-waste-2>> (visited 6 July 2017).

## 7 Crosscutting challenges and way forward in MEA compliance mechanisms

### 7.1 Challenges and notable problems

No one major MEA compliance regime has ever functioned without challenges and problems. This is a common presumption, and indeed an accurate one given the nature of the compromises that Parties make before the final adoption of an MEA, and even in the subsequent Meetings and Conferences of the Parties. Such compromises have resulted in the failure by Parties to some of these MEAs to adopt compliance mechanisms, especially because Parties are usually more focused on reaching consensus on the more substantive provisions of the agreement within a limited time-frame. In such a case, commencement of negotiations for a compliance mechanism would derail the whole MEA negotiation process or negotiations on the core issue and obligations. A notable challenge is that Meetings and Conferences of the Parties usually last a mere one to two weeks, whereas setting an agenda for a compliance mechanism, negotiating its substantive details, adopting it and making it binding for collective action is a progression that can take decades. In instances where negotiations for an MEA last for several years, if preparatory meetings are used properly, it is possible to agree on all elements, including on compliance mechanisms, during a final one-week or two-week session. Thus, while one- or two-week sessions of the Meetings and Conferences of the Parties have been the pinnacle of negotiations for compliance mechanisms, they are not the only time when compliance issues can be negotiated.

By failing to adopt a compliance mechanism at the negotiation stage of the MEA, Parties later spend more time trying to negotiate and agree on a compliance mechanism instead of beginning to monitor compliance in the early stages of implementing the agreement. Ad hoc measures have not been especially effective and negotiations towards the establishment of a concrete compliance mechanism are usually pushed from one meeting to the next, as is presently the case under the Rotterdam PIC Convention and Stockholm POPs Convention, among other agreements. Without proper coordination during the intersessional periods, the process of negotiating a compliance mechanism can last for many years.

Furthermore, once a compliance mechanism has been adopted, Parties have noted the numerous challenges they face or are likely to face in fulfilling their obligations. The most recurrent and cross-cutting compliance challenges include lack of or inadequate national capacity to comply; limited financial, human and technical resources; lack of environmental awareness among decision-makers, including parliamentarians, enforcement agents such as judges, prosecutors and police, and among the general public. Other challenges include the proliferation of emerging national priority issues, such as diseases and epidemics like HIV/AIDS, Severe Acute

Respiratory Syndrome (SARS), Ebola and Zika; geopolitical risks such as poverty, inequality and human rights violations, terrorism, civil wars, refugees and forced migrants, and illegal trade in arms and drugs; natural hazards and disaster risks such as earthquakes, tsunamis, tropical cyclones, floods and famine; and economic and trade issues, including the fear that strict compliance with an MEA will negatively impact trade and other economic policies and cause investors to turn away from the country.<sup>276</sup> In this regard, even at the local and national levels, the private sector and other relevant stakeholders – including non-governmental organizations, scientists, business and industry, farmers, indigenous people, women and youth – may not be willing to take economic or political risks or simply commit ‘economic suicide’ by making meaningful contributions to, and assisting to enhance, MEA compliance processes. In low-income countries, compliance with environmental obligations is still a low priority issue compared to other high demanding social, economic, political and development issues.

Finally, lack of clear practices with respect to transparency and public participation, coupled with the democratic and political situation of a country, can negatively impact the levels of coordination and cooperation among decision-makers, the general citizenry and other stakeholders in ensuring compliance with a country’s international environmental obligations. In the existing MEA regimes, it is well established that transparency, sufficiency of information and effective public participation at all levels are vital components of any effective compliance regime.<sup>277</sup>

## 7.2 The way forward

Many environmental agreements have one or more mechanisms in place for monitoring and ensuring compliance. However, under some environmental agreements, Parties are reluctant to agree on a compliance regime. Negotiations for a compliance regime are often postponed for consideration under a specific protocol or at a specific meeting. Agreement on the compliance regime is usually not guaranteed.

It is generally agreed that states join an MEA regime because they approve of the aims of the agreement and are willing to comply. However, other factors, such as the financial and technical capacities of some Parties (especially poorer Parties), are in some instances not taken into consideration during the adoption of a compliance mechanism. This results in high non-compliance levels due to lack of resources to meet even the most pressing compliance priorities, such as national reporting.<sup>278</sup> While many developed countries have agreed to support compliance efforts in developing countries, this support is usually not consistent, and the end results are

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<sup>276</sup> Madison Condon, ‘The Integration of Environmental Law Into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments’, 33 *Virginia Environmental Law Journal* (2005) 102-152 at 106.

<sup>277</sup> von Moltke, *Whither MEAs?*, *supra* note 222, at 39.

<sup>278</sup> *Ibid.* at 47.

problematic in many ways. Also, where financial support is assured before a Party can comply with its obligations, chances of a Party failing to maximize on its national capacity are very high, especially where transparency and accountability mechanisms are not well established.

Reporting non-compliance can be in the best interest of the non-compliant Party.<sup>279</sup> In almost all MEAs, Parties and institutions have established mechanisms and incentives for supporting non-compliant Parties where non-compliance is as a result of lack of national capacity. This approach has reduced the use of disincentives, and in turn has increased international cooperation and coordination in sharing of costs and benefits for the implementation of MEAs. It cannot be disputed that collective approaches to compliance are more effective than unilateral approaches.

Other lessons learnt throughout this paper include the following: access to adequate and reliable data is key to effective compliance; MEA institutions and organs, including secretariats, Conferences and Meetings of the Parties, committees and other specialized bodies, play an essential role in achieving compliance; adequate, timely and predictable management tools are key to transparency, reporting, verification and monitoring, dispute resolution and capacity building; and in any compliance effort, the benefits of cooperation are higher than the benefits of confrontation.

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<sup>279</sup> 'Chapter 8 – Compliance and Dispute Settlement', University of Houston Law Center Climate change course 2017, available at <<https://www.law.uh.edu/faculty/thester/courses/Climate-Change-2013/Compliance%20%20Dispute%20Settlement.pdf>> (visited 8 May 2017) at 1.

**Annex: Comparative Tables on Multilateral Environmental Agreements' Compliance Mechanisms<sup>280 281</sup>**

**Table 1: Overview of MEA compliance frameworks/mechanisms**

Convention	Compliance Committees	National Performance Information	Multilateral Non-Compliance Procedures	Non-Compliance Response Measures	Dispute Resolution Procedures
Ramsar Wetlands Convention		✓	✓	✓	
World Heritage Convention	✓	✓	✓	✓	✓
CITES	✓	✓	✓	✓	✓
Migratory Species Convention		✓	✓		✓
Biodiversity Convention	✓	✓			✓
Cartagena Biosafety Protocol	✓	✓	✓	✓	✓
Convention to Combat Desertification		✓	Pending		✓
Food and Agriculture Treaty	✓	✓	✓		✓
Basel Waste Convention	✓	✓	✓	✓	✓
Rotterdam PIC Convention <sup>281</sup>			Pending		✓

<sup>280</sup> UNEP, *Compliance Mechanisms under, supra* note 74, at 104-120. (Tables updated by authors on 30 August 2017).

<sup>281</sup> Consultations on the establishment of a compliance mechanism for the Rotterdam PIC Convention, which began at the seventh meeting of the Conference of the Parties, continued at the eighth meeting of the Conference of the Parties in May 2017. Given the lack of consensus at the meeting, the Conference of the Parties decided to defer further consideration of compliance to its ninth meeting in Geneva from 29 April to 10 May 2019.

Convention	Compliance Committees	National Performance Information	Multilateral Non-Compliance Procedures	Non-Compliance Response Measures	Dispute Resolution Procedures
Stockholm POPs Convention <sup>282</sup>		✓	Pending		✓
Vienna Ozone Convention		✓			✓
Montreal Protocol	✓	✓	✓	✓	✓
Minamata Mercury Convention <sup>283</sup>	✓	✓	✓	✓	✓
Convention on Climate Change		✓			✓
Kyoto Protocol	✓	✓	✓	✓	✓
Paris Agreement	✓	✓	✓	✓	✓

**Table 1: Overview of MEA compliance frameworks/ mechanisms<sup>282 283</sup>**

<sup>282</sup> Consultations on the establishment of a compliance mechanism for the Stockholm POPs Convention, which had been discussed at all previous meetings the Conference of the Parties, continued at the eighth meeting of the Conference of the Parties in May 2017. Given the lack of consensus at the meeting, the Conference of the Parties decided to defer further consideration of compliance to its ninth meeting in Geneva from 29 April to 10 May 2019.

<sup>283</sup> Minamata Mercury Convention entered into force on 16 August 2017. The first meeting of the Conference of the Parties to the Convention (COP1) took place from 24 to 29 September 2017. Part of the agenda of the Conference included consideration of the composition of the Implementation and Compliance Committee as referred to in paragraph 3 of Art. 15 of the Convention.



**Table 2: National Performance Information**

Convention	Review format	National performance review				Non-compliance response measures		
	Template	Guidelines	Reporting	3rd Party Verification	3rd Party Monitoring	Reporting	3rd Party Verification	3rd Party Monitoring
Ramsar Wetlands Convention	✓		✓		✓			✓
World Heritage		✓	✓		✓			✓
CITES	✓		✓	✓	✓		✓	
Migratory Species Convention		✓	✓					
Biodiversity Convention		✓	✓					
Cartagena Biosafety Protocol		✓	✓			✓		
Convention to Combat Desertification		Pending	✓					
Food and Agriculture Treaty		✓	✓	✓				
Basel Waste Convention	✓	✓	✓	✓	✓			
Rotterdam PIC Convention								
Stockholm POPs Convention		✓	✓					
Vienna Ozone Convention		✓	✓					

Convention	Review format	National performance review				Non-compliance response measures		
		Template	Guidelines	Reporting	3rd Party Verification	3rd Party Monitoring	Reporting	3rd Party Verification
Montreal Protocol		✓	✓					
Minamata Mercury Convention <sup>284</sup>		Pending	✓					
Convention on Climate Change	✓	✓	✓	✓				
Kyoto Protocol	✓	✓	✓	✓	✓	✓		
Paris Agreement		✓	✓					

**Information** <sup>284</sup>

<sup>284</sup> *Ibid.*

**Table 3: Multilateral non-compliance response procedures**

Convention	Procedure		Trigger body			Decision-making body	
	Established	Pending	Any Party	Secretariat	Other	COP	Committee
Ramsar Wetlands Convention	✓			✓		✓	
World Heritage	✓		✓	✓		✓	
CITES	✓		✓	✓	✓	✓	✓
Migratory Species Convention	✓		✓	✓		✓	
Biodiversity Convention							
Cartagena Biosafety Protocol	✓		✓			✓	✓
Convention to Combat Desertification		✓					
Food and Agriculture Treaty	✓						
Basel Waste Convention	✓		✓	✓	✓	✓	✓
Rotterdam PIC Convention		✓					
Stockholm POPs Convention		✓					
Vienna Ozone Convention							
Montreal Protocol	✓		✓	✓		✓	✓
Minamata Mercury Convention	✓		✓	✓		✓	✓
Convention on Climate Change							
Kyoto Protocol	✓		✓		✓	✓	✓
Paris Agreement		✓					

**Table 4: Non-compliance penalties and sanctions**

Convention	Warning	Suspension of privileges	Trade sanctions	Liability
Ramsar Wetlands Convention				
World Heritage		Exclusion of membership from World Heritage Committee		
CITES	✓	Secretariat takes control of issuing permits	Suspension of trade in CITES-listed species and imposition of conditions	
Migratory Species Convention				
Biodiversity Convention				
Cartagena Biosafety Protocol	✓			Protocol on Liability and Redress
Convention to Combat Desertification				
Food and Agriculture Treaty				
Basel Waste Convention	✓			Re-import illegal exports Liability Protocol
Rotterdam PIC Convention				
Stockholm POPs Convention				
Vienna Ozone Convention				
Montreal Protocol	✓	Suspension of rights in institutional arrangements, financial mechanism and transfer of technology	Suspension of trade, production and consumption rights	

Convention	Warning	Suspension of privileges	Trade sanctions	Liability
Minamata Mercury Convention <sup>285</sup>				
Convention on Climate Change				
Kyoto Protocol	✓	Suspension of eligibility to participate in the market-based mechanisms under Articles 6, 12 and 17 of the Kyoto Protocol.		Carry-over of obligations
Paris Agreement				

Table 4: Non-compliance penalties and sanctions <sup>285</sup>

<sup>285</sup> Minamata Mercury Convention entered into force on 16 August 2017 and its compliance mechanisms are not yet fully enhanced or operationalized.

**Table 5: Dispute resolution procedures**

Convention	Negotiation		Conciliation		Binding arbitration	
	Voluntary	Compulsory	Voluntary	Compulsory	Voluntary	Compulsory
Ramsar Wetlands Convention						
World Heritage						
CITES		✓			✓	
Migratory Species Convention		✓			✓	
Biodiversity Convention		✓		✓	✓	
Cartagena Biosafety Protocol		✓		✓	✓	
Convention to Combat Desertification		✓		✓	✓	
Food and Agriculture Treaty		✓		✓	✓	
Basel Waste Convention		✓	✓		✓	
Rotterdam PIC Convention		✓		✓	✓	
Stockholm POPs Convention		✓		✓	✓	
Vienna Ozone Convention		✓		✓	✓	
Montreal Protocol		✓		✓	✓	
Minamata Mercury Convention		✓		✓	✓	
Convention on Climate Change		✓		✓	✓	
Kyoto Protocol		✓		✓	✓	
Paris Agreement		✓		✓	✓	



# **PART III**

**EFFECTIVENESS OF AND COMPLIANCE  
WITH SPECIFIC MEAs**





# EFFECTIVENESS OF CITES: ANALYSIS IN RELATION TO NATIONAL IMPLEMENTING LEGISLATION

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## **1 Introduction**

Effectiveness is a vague concept, and defining effectiveness in relation to multilateral environmental agreements (MEAs) is an even more difficult task. Indeed, prominent academics have struggled with the concept for decades,<sup>2</sup> and the effectiveness of MEAs is said to reflect different things to different experts and theorists.<sup>3</sup> However,

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<sup>2</sup> Peter Sand, 'The Effectiveness of Multilateral Environmental Agreements: Theory and Practice' in the present Review; see also Oran R. Young, Mark A. Levy and Gail Osherenko, 'The Effectiveness of International Environmental Regimes' in Oran R. Young (ed.), *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioral Mechanisms* (MIT Press 1999) 1-32, at 3.

<sup>3</sup> *Ibid.* at 2

referring to the vast literature on the topic,<sup>4</sup> effectiveness could be simplified to mean ‘how well a treaty works’.<sup>5</sup> Further, it can be broken down into three concepts as described by Bodansky,<sup>6</sup> and highlighted by Sand,<sup>7</sup> as legal effectiveness, behavioral effectiveness and ecological effectiveness. With regard to these three concepts, legal effectiveness and behavioral effectiveness (which respectively address the questions: ‘how and to what extent do States actually meet their international commitments under an environmental treaty to which they have become parties?’ and ‘which are the measurable positive changes in the environmental policies and practices of States that are attributable to their participation in a treaty?’<sup>8</sup>) probably provide the most suitable definition for the purposes of this paper. Further elaboration of the concept of effectiveness lies outside the paper’s scope.

This paper focuses on the effectiveness of the Convention on International Trade in Endangered Species of Flora and Fauna (CITES)<sup>9</sup> in relation to the obligation to

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<sup>4</sup> Michael Bowman, ‘The Effectiveness of International Nature Conservation Agreements’ in Helle Tegner Anker and Ellen Margrethe Basse (eds), *Land Use and Nature Protection: Emerging Legal Aspects* (DJOF Publishing 2000) 105-151. See also Claude Imperiali (ed.), *L’effectivité du droit international de l’environnement: contrôle de la mise en oeuvre des conventions internationales* (Economica, 1998); Gabriela Küting, *Environment, Society and International Relations: Towards More Effective International Environmental Agreements* (Routledge, 2000); Kal Raustiala, ‘Compliance and Effectiveness in International Regulatory Cooperation’, 32 *Case Western Reserve Journal of International Law* (2000) 387-440; Michael A. Mehling, ‘Betwixt Scylla and Charybdis: The Concept of Effectiveness in International Environmental Law’, 13 *Finnish Yearbook of International Law* (2002) 129-182; Edward L. Miles, et al, *Environmental Regime Effectiveness: Confronting Theory with Evidence* (MIT Press, 2002); Jon Hovi, Detlef.F. Sprinz and Arild Underdal, ‘The Oslo-Potsdam Solution to Measuring Regime Effectiveness: Critique, Response, and the Road Ahead’, 3(3) *Global Environmental Politics* (2003) 74-96; W. Bradnee Chambers, ‘Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties’, 16 *Georgetown International Environmental Law Review* (2004) 501-532; Ivana Zovko, ‘International Law-Making for the Environment: A Question of Effectiveness’ in Marko Berglund (ed.), *International Environmental Lawmaking and Diplomacy Review 2005*, University of Joensuu – UNEP Course Series 3 (University of Joensuu, 2006) 109-128; Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge University Press, 2006); Tullio Treves, et al (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (T.M.C. Asser Press, 2009); Tobias Böhmelt and Ulrich H. Pilster, ‘International Environmental Regimes: Legalisation, Flexibility and Effectiveness’, 45 *Australian Journal of Political Science* (2010) 245-260; Helmut Breitmeier, Arild Underdal and Oran R. Young, ‘The Effectiveness of International Environmental Regimes: Comparing and Contrasting Findings from Quantitative Research’, 13 *International Studies Review* (2011) 579-605; Karin Baakman, *Testing Times: The Effectiveness of Five International Biodiversity-Related Conventions* (WolfLegal Publishers, 2011); Chenaz B. Seelarbokus, ‘International Environmental Agreements (IEAs): An Integrated Perspective on the Concept of Effectiveness’, 2 *International Journal of Environmental Protection and Policy* (2014) 76-95; Wendy Jackson and Ton Bührs, ‘International Environmental Regimes: Understanding Institutional and Ecological Effectiveness’, 18 *Journal of International Wildlife Law and Policy* (2015) 63-83.

<sup>5</sup> P.J. Simmons and Chantal de Jonge Oudraat (eds), *Managing Global Issues: Lessons Learned* (Carnegie Endowment for International Peace, 2001) 14; Durwood Zaelke, Donald Kaniaru and Eva Kružiková (eds), *Making Law Work: Environmental Compliance and Sustainable Development* (Cameron May, 2005); and Geir Ulfstein (ed.), *Making Treaties Work* (Cambridge University Press, 2010).

<sup>6</sup> Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2010) 253.

<sup>7</sup> Sand, ‘The Effectiveness of’, *supra* note 2.

<sup>8</sup> Bodansky, *The Art and Craft*, *supra* note 6, at 253.

<sup>9</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org>>.

introduce national CITES-implementing legislation. First, the paper briefly introduces the Convention and its aims, general obligations and institutional framework. Second, it provides an overview of the obligation to ensure domestic measures in relation to national legislation in the implementation of CITES. Next, the paper analyses how the Convention assesses effectiveness in relation to the obligation to adopt national implementing legislation and the role of National Legislation Project in assisting countries to fulfil this obligation. Lastly, the paper provides concluding remarks on how the National Legislation Project has improved the effectiveness of CITES and the lessons that the Project offers for other multilateral environmental agreements.

## 2 An Overview of CITES

Among the many MEAs that exist today, CITES aims to ensure that international trade in wild flora and fauna does not threaten their survival.<sup>10</sup> The treaty was the result of dialogues and discussions which began in 1960 and influenced the International Union for Conservation of Nature (IUCN)<sup>11</sup> to take action against unsustainable international wildlife trade, which was thought to be one of the primary causes of species extinction.<sup>12</sup> Following the adoption of a resolution<sup>13</sup> by the Eighth General Assembly of the IUCN in 1963, and consultations with the General Agreement of Tariffs and Trade (GATT)<sup>14</sup> in 1969, the United Nations Conference on the Human Environment (UNCHE) in 1972 recommended that ‘a plenipotentiary conference be convened as soon as possible, under appropriate governmental or intergovernmental auspices, to prepare and adopt a convention on export, import and transit of certain species of wild animals and plants’.<sup>15</sup> Over 80 states met to deliberate on the text of the treaty and, in 1973, 21 states signed the Convention. CITES entered into force in 1975 and currently has 183 Parties, including 182 states and the European Union.<sup>16</sup> The aim of this Convention is to conserve wildlife

<sup>10</sup> See <<http://www.cites.org>>; Pervaze A. Sheikh, and M. Lynne Corn, ‘The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)’ Congressional Research Service Report RL32751 (2016).

<sup>11</sup> See <<https://www.iucn.org/>>.

<sup>12</sup> Luis Felipe Toledo, Marianne V. Asmussen and Jon Paul Rodríguez, ‘Crime: track illegal trade in wildlife’ 483 *Nature* (March 2012) 36.

<sup>13</sup> The 1963 Resolution called for an International Convention regulating export, transit and import of rare and threatened wildlife and wildlife products, which led to a succession of drafts of the Convention by IUCN’s Environmental Law Programme. See IUCN, *Trade Measures In Multilateral Environmental Agreements* (2000), available at <<https://cites.org/common/prog/economics/iucn-trademeasuresin-CITES.pdf>> (visited 28 August 2017) at 12.

<sup>14</sup> The General Agreement on Tariffs and Trade, Marrakech, 15 April 1994, available at <[https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)>.

<sup>15</sup> United Nations Conference on the Human Environment, Action Plan for the Human Environment (available in Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev.1 (1972)), Recommendation 99.3.

<sup>16</sup> CITES, ‘List of Contracting Parties’, available at <<https://www.cites.org/eng/disc/parties/chronolo.php>> (visited 28 August 2017).

and prevent international trade from threatening species with extinction.<sup>17</sup> To this end, the Convention seeks to ensure that international trade in specimens belonging to CITES-listed species is consistent with their sustainable management and conservation.

The Convention comprises 25 articles, which describe its scope and operational framework. These articles provide for a cooperative system of international trade controls in respect of certain species of wild flora and fauna. CITES makes provision for varying degrees of protection for more than 35,000 species of animals and plants,<sup>18</sup> and the Convention's restrictions apply in respect of not only living specimens of these species, but also dead specimens and readily recognizable parts and derivatives thereof (for instance, dried herbs, oils and items of apparel).

CITES provides for a system of trade measures, giving different levels of protection to the species listed in the three appendices to the Convention.<sup>19</sup> The primary source used to determine which species need to be listed, and on which appendix, has been the IUCN Red Data Books (now: the Red List).<sup>20</sup> The species covered by the Convention are categorized into three appendices. Appendix I contains species that are threatened with extinction and are, or may be, affected by trade.<sup>21</sup> International trade in the species appearing on this Appendix is prohibited unless extraordinary circumstances prevail and, in particular, may not occur for primarily commercial purposes.<sup>22</sup> Although commercial trade in Appendix I species is prohibited,<sup>23</sup> such trade is allowed at controlled levels for those species listed in Appendix II<sup>24</sup> and Appendix III.<sup>25</sup> Appendix II includes species that are not yet threatened with extinction, but whose trade needs to be limited in order to prevent further decline.<sup>26</sup> International trade in species appearing in this Appendix must comply with the permitting requirements prescribed by the Convention.<sup>27</sup> Appendix III lists species that are subject to national regulation and in respect of which the cooperation of other states is needed to control trade.<sup>28</sup> Essentially, these different levels of trade controls are regulated by a permit system, which involves issuance of import and export permits by national authorities. In this regard, the Convention obliges the creation and designation of one or more national Management Authorities and Sci-

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<sup>17</sup> Preamble of CITES.

<sup>18</sup> See <<http://www.cites.org>>.

<sup>19</sup> Article II of CITES.

<sup>20</sup> Chris Huxley, 'CITES: The Vision' in Jon Hutton and Barnabas Dickson (eds), *Endangered Species Threatened Convention: the past, present and future of CITES, on International Trade in Endangered Species of Wild Fauna and Flora* (Earthscan, 2000) 3-12 at 7; See <<http://www.iucnredlist.org/>>.

<sup>21</sup> Article II(1) of CITES.

<sup>22</sup> See further Article II of CITES.

<sup>23</sup> Article III.

<sup>24</sup> Article IV.

<sup>25</sup> Article V.

<sup>26</sup> Article II(2).

<sup>27</sup> See further Art. IV of CITES.

<sup>28</sup> Article II(2).

entific Authorities,<sup>29</sup> which are designated to issue import and export permits as well as various forms of certification for particular specimens.<sup>30</sup>

Parties to CITES meet every two and a half years to review and provide guidance on implementation of the Convention, revise procedures, and review and amend the CITES Appendices.<sup>31</sup> The Convention also provides for a Secretariat,<sup>32</sup> which, *inter alia*, carries out the logistics of arranging the meetings of the Conference of Parties, distributes information required to implement the Convention, receives information on adverse effects to species listed in Appendices I or II, and notifies Parties of concern.<sup>33</sup> The institutional framework of the Convention further includes a Standing Committee, and two functional subsidiary or technical committees (the Animals Committee and Plants Committee).<sup>34</sup>

### 3 National CITES-implementing legislation

CITES is an international agreement, Parties to which are legally bound by the Convention's provisions.<sup>35</sup> Nevertheless, the Convention is generally not self-executing, with the result that national measures are needed for its implementation. There are many matters that need to be established by Parties at the national level, for which national implementing legislation is necessary in most cases. The Convention requires all Parties to take appropriate measures to enforce its provisions and to prohibit trade in specimens in violation thereof, including measures to penalize trade in, or possession of, such specimens, and to provide for the confiscation or return to the state of export of such specimens.<sup>36</sup>

CITES was one of the first MEAs to provide for an information system requiring Parties to self-report on trade levels, providing information on implementation and violations to the Convention.<sup>37</sup> The Convention also obliges Parties to take domestic measures, i.e. Parties are required to adopt their own national legislation<sup>38</sup> to ensure that CITES is implemented at the national level.

<sup>29</sup> Article IX.

<sup>30</sup> Article IX(1)-(2).

<sup>31</sup> Article XI.

<sup>32</sup> The Secretariat is provided by the Executive Director of the UN Environment, with the assistance of intergovernmental and non-governmental agencies and bodies located in Geneva; See also Art. XII(1) of the Convention.

<sup>33</sup> Article XIII of CITES.

<sup>34</sup> 'Establishment of Committees', CITES Res. Conf. 11.1 (Rev. CoP14) (2000).

<sup>35</sup> Article 26 of the Vienna Convention on the Law of Treaties (Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331), *pacta sunt servanda*: 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

<sup>36</sup> Article VIII of CITES.

<sup>37</sup> Rosalind Reeve, *The CITES Treaty and Compliance: Progress or Jeopardy?* (Chatham House, 2004) 2-3.

<sup>38</sup> De Klemm, *Guidelines for legislation*, *supra* note 36.

At its 8th meeting, in 1992, the CITES Conference of the Parties urged Parties to adopt appropriate measures to fully implement the Convention.<sup>39</sup> Among such measures, adequate national legislation is a vital prerequisite for the proper functioning of CITES and for compliance with its provisions. The four minimum requirements for adequate CITES-implementing legislation are broadly described in Resolution Conf. 8.4, namely, to ‘designate at least one Management Authority and one Scientific Authority; prohibit trade in specimens in violation of the Convention; penalize such trade; or confiscate specimens illegally traded or possessed.’<sup>40</sup>

Parties are obliged by CITES to prohibit trade that violates the Convention, and penalize offences. It is up to each Party to decide how they incorporate the CITES obligations into their national legislation, taking into account their particular needs and legal practices. In this regard, the Convention allows Parties to ‘adopt stricter domestic measures’ than those prescribed in the Convention.<sup>41</sup> National CITES-implementing legislation can also play an important role in implementing resolutions and decisions of the Convention’s Conference of the Parties, despite these not being legally binding.

Developing and enacting effective and enforceable national legislation is a long and complex process, given the administrative structures and distribution of mandates within each state’s institutions. Different states Parties to CITES – despite imposing similar legislative requirements in their implementation of the Convention – have different institutional set-ups, legal frameworks, national policies, cultures, species in trade, or types of trade. Creating national CITES-implementing legislation thus requires an in-depth analysis of the particular state’s institutional set-up, intergovernmental co-operation and current legislative framework, and the review of academic journals, judicial decisions and government documentation, so as to understand the broader contextual setting and to identify and analyze gaps in the existing laws.

Thus, appropriate and adequate national legislation is crucial for effective wildlife trade controls by the state authorities charged with implementing and enforcing CITES. In this regard, it is apparent that there is need to further discuss how the Convention seeks to ensure its effectiveness in relation to national implementing legislation.

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<sup>39</sup> ‘National laws for implementation of the Convention’, CITES Res. Conf. 8.4 (Rev.CoP15) (1992).

<sup>40</sup> *Ibid.* at para. 42.

<sup>41</sup> Article XIV.1 of CITES.

## 4 Assessing effectiveness

The theme of this paper being effectiveness, it is vital that the effectiveness of CITES in relation to compliance mechanisms,<sup>42</sup> including triggers concerning inadequate national legislation, be discussed.

The Convention has developed compliance mechanisms to address general non-compliance, improve self-reporting, and ensure that Parties enact national CITES-implementing legislation. The Convention's compliance mechanisms can be used to trigger suspensions of trade in CITES-listed species, and inadequate national legislation has, since 1999, been the most cited reason for such suspensions.<sup>43</sup>

The requirement that Parties enact national CITES-implementing legislation is extremely important for ensuring that trade in protected species is CITES-compliant, sustainable and traceable.<sup>44</sup> Therefore, the development and implementation of domestic legislation that complies with Parties' international commitments has been a major focus of CITES. The National Legislation Project (NLP) (discussed further below) was initiated in 1992 in an endeavour to ensure that this obligation is fulfilled by analyzing the national legislation of CITES Parties, identifying inadequate legislation, and giving Parties an opportunity to address this. In addition to the NLP, a legal capacity-building programme was also introduced in 2000, which included regional workshops to train national experts to develop laws in their respective countries. However, the progress with the Programme has been deemed to have fallen behind that of the NLP.<sup>45</sup>

Taking into account the status of individual states, and referring to the resolutions and decisions that have been adopted by the CITES Conference of the Parties (COP), the CITES Secretariat has developed a collaborative initiative to provide assistance to priority countries to enhance their legislation via the National Legislation Project. This includes the provision of targeted legal advice on the basic legislative requirements for CITES implementation, the compilation of the best examples of CITES-implementing legislation, drafting support, and the organization of training workshops. Moreover, the Secretariat has played a role in pressuring states to implement their CITES commitments through the enactment of appropriate national legislation. For example, in August 2001, the CITES Secretariat issued a notification to the Parties regarding the enactment of implementing legislation.<sup>46</sup> This notifica-

<sup>42</sup> 'CITES Compliance Procedures', CITES Res. Conf. 14.3 (2007).

<sup>43</sup> Peter Sand, 'Enforcing CITES: The Rise and Fall of Trade Sanctions', 22(3) *Review of European Community and International Environmental Law* (2014) 251-263 at 253-254.

<sup>44</sup> See CITES, 'National laws for implementing the Convention', available at <<https://cites.org/legislation>> (visited 28 August 2017).

<sup>45</sup> Reeve, 'The CITES Treaty', *supra* note 37, at 5.

<sup>46</sup> CITES Notification to the Parties No. 2001/059 concerning National Legislation Project, Implementation of Decision 11.19, available at <<https://cites.org/sites/default/files/eng/notif/2001/059.shtml>> (visited 28 August 2017).



tion highlighted that 76 states Parties had yet to implement appropriate domestic measures as required by the Convention. The notification further stressed that a failure to implement such measures was a violation of the Convention and would result in trade suspensions, whereby all Parties were to refuse from the date of the notification any import from and export or re-export to the member nation of CITES-listed species, until further notice.<sup>47</sup> Once a state Party implements the required domestic measures, the trade suspension is lifted.<sup>48</sup> By the time of the 12th COP, in 2002, a total of 15 countries and territories had been subjected to such a measure, 10 for generalized non-compliance and five for failing to enact implementing legislation.<sup>49</sup>

This trade suspension mechanism has not only been used in respect of Parties to the Convention, but has also been applied to non-Party states that have failed to issue the ‘comparable’ documentation<sup>50</sup> referred to in Article X. With the expansion of offenses triggering these trade sanctions, inadequate domestic legislation for implementing CITES has become the most common reason for the suspension of trade. The table below illustrates country-specific trade embargoes imposed since 1985. The table further shows that trade bans have been lifted in the case of those Parties that have responded to the trade suspensions, demonstrating that the trigger has been effective, and that a significant percentage of the Parties targeted with trade sanctions have been brought back to compliance. At the time of writing, only five Parties are subject to sanctions<sup>51</sup> for inadequate national legislation.

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<sup>47</sup> *Ibid.*

<sup>48</sup> On 11 March 2002, the Secretariat withdrew the recommendation for Vietnam because, on 22 January 2002, the Vietnamese government effected legislation that included the four requirements. See CITES Notification to the Parties No. 2002/016 concerning Vietnam, Withdrawal of the recommendation to suspend trade.

<sup>49</sup> CITES, ‘National laws for implementing the Convention’, available at <<https://cites.org/legislation>> (visited 24 September 2017).

<sup>50</sup> ‘Trade with States not Party to the Convention’, CITES Res. Conf. 9.5 (Rev. CoP15) (2010).

<sup>51</sup> CITES, ‘Countries currently subject to a recommendation to suspend trade’, available at <<https://www.cites.org/eng/resources/ref/suspend.php>> (visited 28 August 2017).

<b>Suspension of all commercial trade in CITES-listed Species (1985-2016)<sup>52</sup></b>	
<i>Country Targeted</i>	<i>Inadequate Legislation</i>
Equatorial Guinea	2004
Guyana	1999
Senegal	1999-2000
Vietnam	2002
Yemen	2002
Liberia	2004-to date
Rwanda	2004-2010
Somalia	2004- to date
Djibouti	2004- to date
Mauritania	2004- to date
Gambia	2004-2005
India	2004-2005
Guinea-Bissau	2004-to date
Mozambique	2004
Panama	2004
Sierra Leone	2004

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For Parties to sufficiently implement their CITES commitments, their national legislation must provide for (1) establishment of management and scientific authorities; (2) prohibition of trade in violation of CITES; (3) penalties for violations; and (4) protocols for confiscating illegally traded specimens.<sup>53</sup> Under the NLP, the legislation of the Parties has been placed in Category 1 (requirements fully met), Category 2 (requirements partly met), or Category 3 (requirements generally not met).<sup>54</sup> The COP sets deadlines for Parties in the latter two categories to enact adequate domestic CITES-implementing legislation against the threat of trade sanctions, while the Secretariat arranges for the provision of technical assistance to the willing

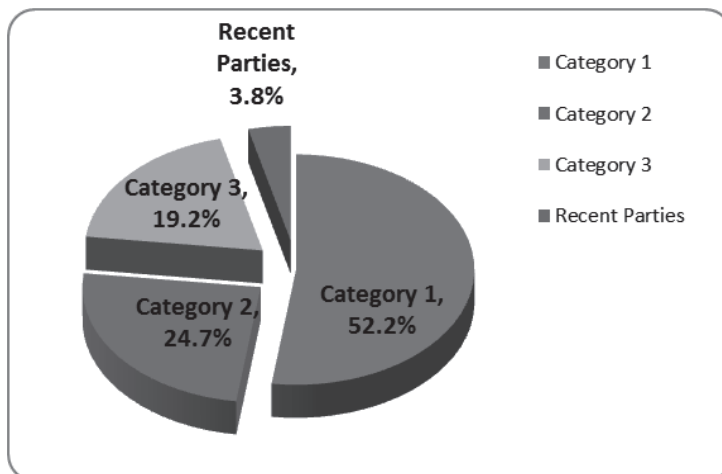
<sup>52</sup> Revised and updated from 'Table 1: Countries and territories subjected to recommended CITES trade suspensions' in Reeve, 'The CITES Treaty', *supra* note 37, at 12; and 'Table 1: Countries subjected to trade suspensions in CITES listed species, 1985–2000' in Rosalind Reeve, 'Verification mechanisms in CITES' in *Verification Yearbook* (Vertic, 2001), available at <[http://www.vertic.org/media/Archived\\_Publications/Yearbooks/2001/VY01\\_Reeve.pdf](http://www.vertic.org/media/Archived_Publications/Yearbooks/2001/VY01_Reeve.pdf)> (visited 25 September 2017) 137-156 at 146. Current CITES trade suspensions can be found at <<https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-22-A3-R1.pdf>> (visited 28 August 2017).

<sup>53</sup> *Ibid.*

<sup>54</sup> 'Interpretation and implementation matters. General compliance and enforcement. National laws for implementation of the Convention', CITES CoP17 Doc. 22 (2016), available at <<https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-22.pdf>> (visited 20 April 2017).

but non-compliant Parties to help them develop their legislation appropriately.<sup>55</sup> It should be noted that non-compliant Parties (those in Categories 2 and 3) are given deadlines to put in place adequate national legislation (mostly with assistance from NLP), but are not subjected to trade sanctions until those deadlines have passed and the matter has been reviewed by the Standing Committee. The National Legislation Project revealed that about 75 per cent of the Parties reviewed between 1992 and 1999 did not have the full range of national legislative and administrative measures needed to implement CITES. The following graph illustrates the status of legislative progress for implementing CITES, which has improved as a result of the NLP. Fifty-two per cent of the Parties reviewed in 2016 have fully met the four requirements listed above, 24 per cent of the Parties have met some of these requirements, and 19 per cent of the Parties have not met the requirements. It is also arguably an indication of the success of the NLP that only five Parties are currently subject to trade sanctions due to inadequate legislation.<sup>56</sup>

Status of legislative progress for implementing CITES (as at September 2016).<sup>57</sup>



This exemplar process of CITES is a compliance and technical assistance process, with the two-fold objective of identifying those Parties whose domestic measures do not provide government officials with the authority to implement the Convention effectively, and providing assistance to these Parties in strengthening their legislation.<sup>58</sup> CITES is unique among MEAs in its use of trade restrictions against Parties solely on

<sup>55</sup> David Brown and Erin Swails, *The Convention on International Trade in Endangered Species (CITES)*, Odi comparative case study 3 (2005), available at <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4474.pdf>> (visited 16 May 2017).

<sup>56</sup> <<https://www.cites.org/eng/resources/ref/suspend.php>> as of August 2017

<sup>57</sup> 'Status of legislative progress for implementing CITES (updated on 1 September 2016), CITES CoP17 Doc. 22, Annex 3 (Rev. 1) (2016), available at <<https://cites.org/sites/default/files/eng/cop/17/Working-Docs/E-CoP17-22-A3-R1.pdf>> (visited 20 April 2017).

<sup>58</sup> 'Format for legislative timetables. National laws for the implementation of the Convention', CITES Notification to the Parties No. 2016/066.

the grounds that they have inadequate implementing legislation.<sup>59</sup> However, drawing from the CITES experience, the Convention on Migratory Species (CMS),<sup>60</sup> in October 2017, established its own National Legislation Programme to support Parties in developing or improving their national legislation.<sup>61</sup> CITES' compliance procedures,<sup>62</sup> and its effective use of trade sanctions as a tool for bringing Parties into compliance, have also been considered under the CMS in the context of efforts to develop a compliance mechanism for the latter Convention.<sup>63</sup> A mechanism for reviewing specific implementation matters was recently established under the CMS, but is intended to take a 'supportive, non-adversarial and facilitative approach' towards implementation matters, and will not involve the use of trade sanctions.<sup>64</sup>

## 5 Conclusion

It is apparent that national legislation is a key component of the effective implementation of CITES, and is therefore relevant when it comes to assessing the extent to which state Parties meet their commitments to the Convention, i.e. legal effectiveness of the Convention as discussed above. The primary issue in relation to the effectiveness of the Convention, according to some,<sup>65</sup> is the lack of implementing legislation. Of the procedures that have evolved to deal with non-compliance, the National Legislation Project has been very effective given that, through the Project, Parties have received assistance, and have been given sufficient periods within which to develop or improve their laws. When trade sanctions have been imposed, these have been lifted once Parties have become compliant with the Convention.

Moreover, the fact that the 'CITES Experience of compliance mechanism in relation to implementing national legislation'<sup>66</sup> has been compared to, taken note of, and is in the process of being replicated into other MEAs, such as the CMS, is evidence that the 'CITES Experience' offers lessons for other regimes for improving their effectiveness.

<sup>59</sup> 'Interpretation and implementation of the Convention. National laws for implementation of the Convention. National legislation project', CITES Doc. 11. 21.1 (2000).

<sup>60</sup> Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <<http://www.cms.int>>.

<sup>61</sup> 'Establishment of a review mechanism and a national legislation programme', UNEP/CMS/COP12/CRP31 (2017).

<sup>62</sup> See CITES Res. Conf. 14.3.

<sup>63</sup> 'Enhancing the effectiveness of the Convention through a process to review implementation' 11th Meeting of the CMS COP, UN Doc. UNEP/CMS/COP11/Doc.18.3/Rev.1 (2014).

<sup>64</sup> 'Establishment of a review mechanism and a national legislation programme', UNEP/CMS/COP12/CRP31 (2017).

<sup>65</sup> Corn and Sheikh, 'The Convention on International', *supra* note 10, at 13.

<sup>66</sup> 'Enhancing the effectiveness of the Convention through a process to review implementation', 11th Meeting of the CMS COP, UN Doc. UNEP/CMS/COP11/Doc.18.3/Rev.1 (2014); 1st Meeting of the Working Group on the Development of a Review Process under the Convention on Migratory Species, meeting report, UN Doc. UNEP/CMS/Rev.Proc.1/Doc.02 (2016).



# COMPLIANCE UNDER BIODIVERSITY-RELATED CONVENTIONS: THE CASE OF THE CONVENTION ON BIOLOGICAL DIVERSITY

*Elisa Morgera*<sup>1</sup>

## 1 Introduction

The group of multilateral environmental agreements (MEAs) that concern biodiversity<sup>2</sup> is varied in terms of normative and compliance approaches, due to the diverse history and scope of application of each instrument.<sup>3</sup> The best-studied compliance regime among these agreements is that of the Convention on International Trade in Endangered Species (CITES), which has developed gradually, without an explicit legal basis in the treaty itself. The CITES compliance regime initially focused on national-level implementation (the control of individual shipments by national authorities of member countries), and more recently it has relied on international

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<sup>2</sup> Including, at the global level, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org>>; Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <<http://www.cms.int>>; Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>; International Plant Protection Convention, Rome, 6 December 1951, into force 3 April 1952, 150 *United Nations Treaty Series* 67; International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, in force 29 June 2004, <<http://www.planttreaty.org/>>; Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <<http://www.ramsar.org>>; and Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <<http://whc.unesco.org>>.

<sup>3</sup> Antonio Cardesa-Salzmann, 'Monitoring and Compliance Mechanisms' in Elisa Morgera and Jona Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (Edward Elgar, 2017) 455-467.

monitoring and support.<sup>4</sup> As a result, the compliance regime under CITES currently counts on a multiplicity of processes, with the possibility to impose trade sanctions on Parties.<sup>5</sup> This paper focuses instead on the less well-studied case of the Convention on Biological Diversity, to illustrate the various attempts made under that agreement to develop a compliance system and the reasons for the limited success of these attempts so far. The contribution then looks at a highly innovative compliance mechanism developed under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Resulting from their Utilization to the Convention on Biological Diversity (the Nagoya Protocol),<sup>6</sup> which provides insights into the relevance of biodiversity-related conventions from a human rights perspective.

## 2 The CBD approach to compliance

Compared to earlier biodiversity-related conventions, the CBD has a wider subject-matter scope, based on its comprehensive concept of ‘biodiversity’ as ‘the variability among living organisms’, including ‘diversity within species, between species and of ecosystems’.<sup>7</sup> The CBD is also characterized by broad objectives: in addition to the conservation of biodiversity, the CBD aims to ensure the sustainable use of biodiversity components, as well as the equitable sharing of the benefits arising out of the utilization of genetic resources.<sup>8</sup> As a result, the CBD’s provisions are framed in open-ended terms, allowing a variety of flexible approaches for implementation at the national and local level. For instance, CBD Article 6(2) requires Parties to ‘integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies’. This obligation could be implemented by creating a multi-sectoral ministerial body at the national level to ensure biodiversity mainstreaming in relevant sectors, a duty for administrators in the fisheries and agricultural ministries to consult with biodiversity authorities on certain issues, or joint planning processes. The Convention has developed a multitude of sub-processes for the further refinement of its provisions, through the development of thematic and cross-cutting programmes of work.<sup>9</sup> The CBD programmes of work include guidelines for national implementation, often recommending reforms of national laws, policies, or administrative

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<sup>4</sup> Morgera *et al.*, ‘Implementation Challenges and Compliance in Multilateral Environmental Negotiations’ in Pamela Chasek and Lynn Wagner (eds), *The Roads from Rio: Lessons Learned from Twenty Years of Multilateral Environmental Negotiations* (Routledge, 2012) 222-250.

<sup>5</sup> Based on CITES Art. XI, coupled with majority-voting decision-making. See CITES, ‘Countries currently subject to a recommendation to suspend trade’, available at <<https://cites.org/eng/resources/ref/suspend.php>> (visited 9 August 2017). See also the paper by Peter Sand in the current *Review*.

<sup>6</sup> Nagoya, 29 October 2010, in force 16 October 2014, <<http://www.cbd.int/abs/>>.

<sup>7</sup> Article 2 of the CBD.

<sup>8</sup> Article 1 of the CBD.

<sup>9</sup> Elisa Morgera and Elsa Tsioumani, ‘Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity’, 21 *Yearbook of International Environmental Law* (2011) 3-40.

practices.<sup>10</sup> The work programmes also identify tasks for furthering implementation at the international level (for instance, assigning tasks to the CBD Conference of the Parties (COP) and subsidiary bodies with a view to further refining CBD provisions or concepts), as well as opportunities for collaboration between the CBD and other international instruments or processes. So, to return to the example above, in 2016 the CBD COP distilled specific guidance on how to mainstream biodiversity in specific sectors (agriculture, fisheries, forestry and tourism),<sup>11</sup> building on some of the practices put in place at the national level, as well as clarifying key concepts on the basis of guidelines developed under the CBD and other relevant international processes.

The CBD guidelines and principles are specifically aimed at influencing the conduct of CBD Parties, non-Party governments, inter-governmental organizations, as well as private companies and indigenous and local communities.<sup>12</sup> Continued normative activity at the international level has appeared necessary under the CBD in light of new and emerging threats to biodiversity, including those that can derive from other international processes. The CBD regime has provided timely and specialized contributions to the international community in a remarkably participatory way – particularly insofar as indigenous and local communities are concerned.<sup>13</sup> Such contributions – including on ocean fertilization, biofuels, and geo-engineering – have resulted in deeper understanding of the threats to biodiversity, of the linkages between biodiversity and other global environmental issues, and of the possible responses. In addition, the CBD COP has found inter-governmental consensus on instruments that push forward broader agendas related to a rights-based approach to environmental policy, such as the CBD Akwé: Kon Guidelines on environmental

<sup>10</sup> The CBD COP has established seven thematic work programs, namely on agricultural biodiversity, dry and sub-humid lands biodiversity, forest biodiversity, inland waters biodiversity, island biodiversity, marine and coastal biodiversity, and mountain biodiversity; and five crosscutting work programs on incentive measures, the Global Taxonomy Initiative, protected areas, Article 8(j) (traditional knowledge), and technology transfer and cooperation. Work has also been undertaken on a series of other crosscutting issues, including climate change and biodiversity, the ecosystem approach, and sustainable use of biodiversity. See <<http://www.cbd.int/programmes/>>.

<sup>11</sup> CBD Dec. XIII/ (2016).

<sup>12</sup> Addis Ababa Principles and Guidelines on Sustainable Use ('Sustainable Use (Article 10)', CBD Dec. VII/12 (2004)); Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place, or Which Are Likely to Impact on Sacred Sites, and Lands, and Waters Traditionally Occupied or Used by Indigenous People and Local Communities ('Article 8(j) and Related Provisions', CBD Dec. VII/16 (2004)); Guiding principles on invasive alien species ('Alien Species That Threaten Ecosystems, Habitats or Species', CBD Dec. VI/23 (2002)).

<sup>13</sup> The CBD regime certainly affords many more opportunities for stakeholder participation in international decision making than other processes, such as the negotiations on marine biodiversity under the aegis of the UN General Assembly (for anecdotal evidence, see 'Highlights of the Fourth Meeting of the Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction', 25(69) *Earth Negotiations Bulletin* (ENB) (2 June 2011)).



and socio-cultural impact assessments,<sup>14</sup> which are frequently referenced by other international processes, including in the area of international human rights and indigenous peoples.<sup>15</sup>

The CBD COP is principally mandated to keep under review the implementation of the Convention, including by undertaking ‘any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation’.<sup>16</sup> It has, however, mainly evolved into a prolific norm-creating body across all areas covered by the CBD and on issues that are directly or indirectly related to biodiversity.<sup>17</sup> The Subsidiary Body on Scientific, Technical, and Technological Advice (SBSTTA),<sup>18</sup> in turn, is mandated to provide ‘timely advice’ to the COP on the implementation of the Convention. While it was expected to focus on scientific and technical advice, the SBSTTA has been criticized for the political nature of its debates and has often been seen as a pre-COP exercise in which scientists have limited input.<sup>19</sup>

The CBD COP does not review individual national reports but, rather, offers conclusions on the basis of the CBD Secretariat’s syntheses of these reports.<sup>20</sup> This examination tends to focus on the mere *submission* of the report and on a *quantitative* analysis of legislative developments (for instance, the percentage of Parties with biodiversity-related legislation in place) rather than on a *qualitative* analysis of the content of the national reports, including the quality and comprehensiveness of national legislation and impacts of state measures on biodiversity and achievement of the CBD objectives. On the basis of this kind of analysis done by the Secretariat and the expert groups established by the COP for that purpose, the SBSTTA engag-

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<sup>14</sup> ‘Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities’, CBD Dec. VII/16 (2004).

<sup>15</sup> IACtHR, *Case of the Saramaka People v. Suriname*, Judgment (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs), 12 August 2008, para. 41 and fn 23; Special Rapporteur Anaya, ‘Report on the situation of human rights and fundamental freedoms of indigenous people’, UN Doc. A/HRC/15/37 (2010) para. 73, and ‘Progress report on the study on indigenous peoples and the right to participate in decision-making. Report of the Expert Mechanism on the Rights of Indigenous Peoples’, UN Doc. A/HRC/15/35 (2010) para. 37; International Convention on the Elimination of All Forms of Racial Discrimination/Committee on the Elimination of Racial Discrimination (CERD), ‘Concluding observations on the combined thirteenth to fifteenth periodic reports of Suriname’, UN Doc. CERD/C/SUR/CO/13-15 (2015) para. 26; and ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’, UN Doc A/HRC/34/49 (2017) para 72(b).

<sup>16</sup> Article 23(4) of the CBD.

<sup>17</sup> Article 23 of the CBD. As an indication of the exponential normative activity of the COP, it is noted that the number of decisions adopted by the COP raised from 12 at COP-1 to 47 at COP-10 (see <<http://www.cbd.int/decisions/>>).

<sup>18</sup> Article 25 of the CBD.

<sup>19</sup> Sam Johnston, ‘The Convention on Biological Diversity: The Next Phase’, 6 *Review of European, Comparative & International Environmental Law* (1997) 219-230 at 225.

<sup>20</sup> Yibin Xiang and Sandra Meehan, ‘Financial Cooperation, Rio Conventions and Common Concerns’, 14 *Review of European, Comparative & International Environmental Law* (2005) 212-224 at 218.

es in the analysis of national reports,<sup>21</sup> as well as in the so-called ‘in-depth reviews’ of the implementation of the CBD work programmes. The CBD ‘in-depth reviews’ of areas of activities to implement the Convention have only occasionally, and to varying extents, assessed implementation through national legislation, resulting in ‘light-touch’ identification of good practice, rather than a systematic ‘naming, shaming or praising’ approach that has been used by many other MEAs.<sup>22</sup> On the other hand, implementation at the national level is particularly significant given that ‘the Convention is dealing with the management of an essentially domestic resource.’<sup>23</sup> Overall, therefore, these efforts have not reached the heart of national implementation. They merely provided an indication of trends and some best practices, but have not served to identify specific countries in need of assistance.<sup>24</sup>

A Working Group on Review of Implementation of the Convention (WGRI) was thus created to examine the implementation of the Convention,<sup>25</sup> in the absence of a mechanism to monitor national-level compliance. The WGRI, however, did not necessarily provide a radical shift in terms of monitoring compliance by Parties, as it mostly focused on streamlining the processes within the CBD and ensuring cooperation between the CBD and other international or national non-state actors. The WGRI did, however, focus attention on national biodiversity strategies and action plans (NBSAPs),<sup>26</sup> which may be considered a key tool for CBD implementation at the national level. A 2010 comprehensive assessment of NBSAPs indicated that, while they generated concrete results in many countries, they did not succeed in attenuating the main drivers of biodiversity loss. Nor did they contribute to mainstreaming biodiversity in a broader development policy context.<sup>27</sup> A series of regional and subregional workshops on NBSAPs, held during 2008-2010, proved to be of significant assistance in guiding the drafting and reviewing of national legislation and implementation in general, highlighting participants’ views that the CBD should focus more on implementation, moving away from policy development in the form of the negotiation, adoption and revision of decisions.<sup>28</sup>

<sup>21</sup> Articles 25-26 of the CBD.

<sup>22</sup> Morgera *et al.*, ‘Implementation Challenges and’, *supra* note 4.

<sup>23</sup> Johnston, ‘The Convention on Biological’, *supra* note 19, at 226-227.

<sup>24</sup> As opposed, for instance, to the Convention on Wetlands of International Importance. See comments by Jamie Pittock, ‘A Pale Reflection of Political Reality: Integration of Global Climate, Wetland and Biodiversity Agreements’, 1 *Climate Law* (2010) 343-373 at 363-364 (2010).

<sup>25</sup> The Strategic Plan: Future Evaluation of Progress’, CBD Dec. VII/30 (2004).

<sup>26</sup> In accordance with Art. 6 of the CBD, which states:

Each Contracting Party shall, in accordance with its particular conditions and capabilities: (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and (b) integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

<sup>27</sup> Christian and Tony Gross with Sam Johnston and Marjo Vierros, *Biodiversity Planning: an assessment of national biodiversity strategies and action plans* (United Nations University Institute of Advanced Studies, 2010), available at <[http://archive.ias.unu.edu/resource\\_centre/UNU-IAS\\_Biodiversity\\_Planning\\_NBSAPs\\_Assessment\\_final\\_web\\_Oct\\_2010.pdf](http://archive.ias.unu.edu/resource_centre/UNU-IAS_Biodiversity_Planning_NBSAPs_Assessment_final_web_Oct_2010.pdf)> (visited 11 August 2017).

<sup>28</sup> *Ibid.*

### 3 Developments post-2010

The Strategic Plan for Biodiversity 2011-2020<sup>29</sup> was meant to serve as the framework for the revision, updating, and implementation of NBSAPs.<sup>30</sup> A 2015 interim assessment of post-2010 NBSAPs, however, indicated that limited attention is paid to cross-cutting issues beyond the direct drivers of biodiversity loss, to legal preparedness and to resource mobilization for biodiversity.<sup>31</sup> A renewed and quality-focused effort in monitoring the development of national legislative frameworks and the coherent application of the three objectives of the Convention has in effect been missing,<sup>32</sup> which is in stark contrast with the proactive approach, for instance, of the CITES National Legislation Project,<sup>33</sup> which enables the Secretariat to analyze the Parties' national legislation, determine whether it is sufficient to adequately implement CITES and provide targeted support to enhance national laws.

The Strategic Plan for Biodiversity 2011-2020<sup>34</sup> thus explicitly tasked the COP to consider in 2012 the possible development of additional mechanisms to facilitate compliance with the Convention and the plan or the need to strengthen the SBSTTA or the WGRI to this end.<sup>35</sup> This signaled CBD Parties' increasing awareness of a gap in the CBD regime with regard to international monitoring of compliance, but it did not yet provide a clear indication of the response that will be devised to address it. In 2014, the COP decided to establish a new Subsidiary Body on Implementation (SBI)<sup>36</sup> to replace WGRI. The SBI is tasked with, *inter alia*, reviewing relevant information on progress in the implementation of the Convention, including in the provision of support for CBD implementation, as well as CBD COP decisions, and information on progress in the achievement of targets established under the Convention. In addition, the SBI is expected to identify obstacles encountered in implementing the Convention and any strategic plans adopted under it, and develop recommendations to overcome such obstacles. It is further intended that the SBI will review the impacts and effectiveness of existing processes under the Convention and identify ways to increase efficiencies, such as an integrated approach to the implementation of the Convention and its Protocols, including in areas such as resource mobilization, guidance to the financial mechanism, capacity-building, national reporting, and technical and scientific cooperation.<sup>37</sup>

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<sup>29</sup> 'The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets', CBD Decision X/2 (2011).

<sup>30</sup> *Ibid.* at para. 15.

<sup>31</sup> Balakrishna Pisupati and Christian Prip, *Interim Assessment of Revised National Biodiversity Strategies and Action Plans (NBSAPs)* (UNEP-WCMC and Fridtjof Nansen institute, 2015), available at <<https://www.cbd.int/doc/nbsap/Interim-Assessment-of-NBSAPs.pdf>> (visited 11 August 2017).

<sup>32</sup> 'National laws for implementation of the Convention', CITES Res. Conf. 8.4 (Rev. COP15) (1992).

<sup>33</sup> See <[https://www.cites.org/legislation/National\\_Legislation\\_Project](https://www.cites.org/legislation/National_Legislation_Project)>.

<sup>34</sup> CBD Dec. X/2.

<sup>35</sup> *Ibid.* at paras 14-15.

<sup>36</sup> 'Improving the efficiency of structures and processes of the Convention: Subsidiary Body on Implementation', CBD Dec XII/26 (2014).

<sup>37</sup> *Ibid.* at Annex.

While the SBI has only started its operations, its first meeting in 2016 already presented an interesting innovation in terms of compliance: it discussed a voluntary peer-review mechanism<sup>38</sup> to help Parties to improve their individual and collective capacities to more effectively implement the Convention. The peer-review mechanism aimed at: assessing the development and implementation of NBSAPs; providing opportunities for peer learning for Parties directly involved and other Parties; and creating greater transparency and accountability for NBSAP development and implementation to the public and other Parties. The review was meant to develop recommendations for developing/updating NBSAPs, or for improving the implementation of NBSAPs and other relevant instruments, including through integration of biodiversity into broader policy frameworks.<sup>39</sup> The methodology was tested in 2015 in two pilot countries (India and Ethiopia) and the peer-review teams comprised expert group members from India, Norway and Switzerland and from China, Norway and Viet Nam, respectively.<sup>40</sup> Following a desk-based study and in-country visit, the findings were discussed at the SBI and feedback was provided by both the review team and by the reviewed country. Among the issues raised in this pilot round of feedback was the need for sufficient time for review teams to understand the system and processes in the target country, and to identify interviewees, allowing experts to familiarize themselves with the country's governance system and considering the country's special circumstances, as well as sharing of observations for factual verification, with a view to avoiding out-of-context observations.<sup>41</sup> This feedback exposed a certain uneasiness about the process, which was subsequently reflected in the CBD COP decision to further test and develop the peer-review methodology, for consideration at the second meeting of the SBI in 2018, in light also of additional views provided by Parties and observers, including indigenous peoples and local communities.<sup>42</sup>

<sup>38</sup> CBD, 'Voluntary Peer-Review Mechanism for National Biodiversity Strategies and Action Plans', UN Doc UNEP/CBD/SBI/1/10/ADD1 (2016); see also CBD, 'Report of the Informal Working Group on the Development of a Methodology for Voluntary Peer-Review of the Implementation of the Convention on Biological Diversity' UN Doc UNEP/CBD/SBI/1/INF/27 (2015) and 'Improving the efficiency of structures and processes under the Convention: other matters', CBD Dec. XII/29 (2012) para. 3.

<sup>39</sup> CBD, 'A Methodology for Voluntary Peer Review of the Revision and Implementation of National Biodiversity Strategies and Action Plans', UN Doc. UNEP/CBD/SBI/1/INF/30 (2016), Appendix 1.

<sup>40</sup> CBD, 'Report of the Testing of the Provisional Methodology for the Voluntary Peer Review of the Review and Implementation of National Biodiversity Strategy and Action Plans in Ethiopia', UN Doc UNEP/CBD/SBI/1/INF/31 (2016).

<sup>41</sup> See ENB Summary of the First Meeting of the Subsidiary Body on Implementation (25 April – 6 May 2016), available at <<http://www.iisd.ca/vol09/enb09664e.html>> (visited 11 August 2017).

<sup>42</sup> 'Modus operandi of the Subsidiary Body on Implementation and mechanisms to support review of implementation', CBD Dec. XIII/25 (2016) paras 2–4.

## 4 Compliance under the Nagoya Protocol

Implementation challenges dominated the negotiations of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, adopted under the CBD in October 2010. CBD Parties already anticipated difficulties with regard to the drafting of national legislation and measures to implement requirements regarding the organizational and decision-making structures needed to grant prior informed consent; building the capacity of national institutes and indigenous and local communities to negotiate mutually agreed terms; and enforcing national legislation, particularly through building the ability of selected authorities to monitor genetic resources in the established checkpoints. Critical implementation issues were also expected to arise with regard to the extra-territorial application of provider countries' access and benefit-sharing (ABS) legislation: the Protocol requires Parties to take measures to ensure that genetic resources and associated traditional knowledge utilized within their jurisdiction have been accessed in accordance with the legislation and requirements of the Party that provided them.<sup>43</sup> Implementation of such provisions would require the establishment of some kind of mechanism in countries with users in their jurisdiction (potentially all) to ensure they receive information on, and that they recognize, the legislation of the countries that have provided the genetic resources or traditional knowledge.<sup>44</sup>

As a result, the Nagoya Protocol (as opposed to the Convention) clearly provided for the creation of a compliance mechanism.<sup>45</sup> Article 30 indicates that the aim of the compliance procedures and mechanisms will be two-fold: on the one hand, to promote compliance and, on the other hand, to address cases of non-compliance. It further provides some indication as to the nature of these procedures and mechanisms ('cooperative and non-adversarial') and the relevant powers, by pointing to the possibility to offer advice or assistance, and clearly distinguishing them from dispute settlement procedures.<sup>46</sup> To a certain extent, the compliance procedures and mechanisms to be established under the Protocol were expected to share features

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<sup>43</sup> Articles 15 and 16 of the Nagoya Protocol.

<sup>44</sup> Morgera *et al.*, 'Implementation Challenges and', *supra* note 4.

<sup>45</sup> For an account of negotiation process, see Melissa Lewis and Katileena Lohtander-Buckbee, 'Compliance Negotiations within the Intergovernmental Committee for the Nagoya Protocol' in Tuula Honkonen, Melissa Lewis and Ed Couzens (eds), *International Environmental Law making Diplomacy Review 2013*, University of Eastern Finland – UNEP Course Series 13 ((University of Eastern Finland, 2014) 109-135.

<sup>46</sup> The Nagoya Protocol does not contain a provision on dispute settlement, but CBD Art. 27 on dispute settlement is applicable in this context (pursuant to CBD Art. 27(5), which reads: 'The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.').

that have become commonplace across multilateral environmental agreements.<sup>47</sup> On the other hand, some distinctive features of the Protocol led Parties to consider innovative approaches to multilateral compliance procedures and mechanisms. This is the case of the Nagoya Protocol's provisions on traditional knowledge and genetic resources held by indigenous peoples and local communities,<sup>48</sup> which ultimately call upon states to protect the interests of these communities located in their territories, as well as of these communities in other states.<sup>49</sup>

Intergovernmental negotiations preparing for the Protocol's entry into force provided some indications of the possible options to adequately gear multilateral mechanisms and procedures to deal with compliance with the indigenous and local community-related obligations of Parties. A source of inspiration was the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('Aarhus Convention'),<sup>50</sup> whose compliance mechanism can be triggered<sup>51</sup> by stakeholders<sup>52</sup> and includes NGOs as members of the Compliance Committee. Interestingly, however, these innovative characteristics of

<sup>47</sup> See, for instance, Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 2009) at 211-213 and 237-250; Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring Compliance With Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia* (Martinus Nijhoff Publishers, 2006); Tullio Treves *et al.*, eds, *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (Asser Press, 2009); and André Nollkaemper, 'Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order', 13 *Yearbook of International Environmental Law* (2003) 165-186.

<sup>48</sup> Elisa Morgera, Elsa Tsioumani and Matthias Buck, *Unraveling The Nagoya Protocol: A Commentary of the Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Martinus Nijhoff, 2014) on Articles 5-7.

<sup>49</sup> This argument was first put forward in Elisa Morgera, 'Bilateralism at the Service of Community Interests?', Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law' (2012) 23 *European Journal of International Law* 743-767 at 745, and inspired by Ellen Hey, 'Global Environmental Law and Global Institutions: A System Lacking "Good Process"' in Pierik Roland and Werner Wouter (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge University Press, 2010), 45-72.

<sup>50</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <<http://www.unece.org/env/pp/>>.

<sup>51</sup> As proposed by Switzerland: 'Summary of the First Meeting of the Intergovernmental Committee for the Nagoya Protocol', 9/551 *ENB* (2011) 9.

<sup>52</sup> This characteristic is also present in other UNECE instruments: Protocol on Pollutant Release and Transfer Registers to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Kiev, 21 May 2003, in force 8 October 2009, <[http://www.unece.org/fileadmin/DAM/env/pp/prtr/Protocol%20texts/PRTR\\_Protocol\\_e.pdf](http://www.unece.org/fileadmin/DAM/env/pp/prtr/Protocol%20texts/PRTR_Protocol_e.pdf)> (visited 6 July 2017), Art. 12 (which makes reference to 'members of the public') and 'Review of Compliance', Dec. I/2, UN Doc. ECE/MP.PRTR/2010/2/Add.1 (2011), para. 18; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki 17 March 1992, in force 6 October 1996, 31 *International Legal Materials* (1992) 1312, and 'Support to implementation and compliance', Dec. VI/1, UN Doc. ECE/MP.WAT/37/Add.2 (2012), Annex II; Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999, in force 4 August 2005, <[http://www.unece.org/env/water/pwh\\_text/text\\_protocol.html](http://www.unece.org/env/water/pwh_text/text_protocol.html)> (visited 30 June 2017), Art. 15 and 'Review of compliance', Dec. I/2, UN Doc. ECE/MP.WH/2/Add.3 (2007), para. 16. See also Svitlana Kravchenko, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements', 18 *Colorado Journal International Environmental Law and Policy* (2007) 1-50.

the Aarhus Compliance Committee are balanced out by the fact that the Committee's decisions are subject to consensus approval by the Convention's governing body – thereby implicitly giving a 'veto power' to the Party whose compliance issues are at stake.<sup>53</sup> With regard to inspiration from other MEAs, a measure of caution has been called for by a commentator, who emphasizes the need for careful scrutiny of whether the characteristics of other compliance mechanisms may be effectively utilized to address ABS-related compliance issues that will likely involve requests for benefit-sharing in the context of commercial relationships.<sup>54</sup> Others noted that international treaties other than MEAs, such as those addressing human rights, could be taken into account in devising the compliance mechanism for the Protocol.<sup>55</sup>

Another innovative idea that emerged during the negotiations towards the Protocol, but that did not make it into the agreed text, was to establish an international ombudsperson to support developing countries and indigenous and local communities in identifying breaches of rights and to provide independent technical and legal support in ensuring the effective redress of such breaches.<sup>56</sup> If established, such an innovative feature in the MEA landscape<sup>57</sup> would essentially constitute an international institution able to work on the ground directly with indigenous and local communities, while enabling these communities to have immediate access to an international avenue to address alleged disrespect of the rights protected under the Protocol.<sup>58</sup> While the final text of the Protocol does not make reference to an international ombudsperson, there is nothing to prevent Parties from establishing such a body in the future through a decision by the Protocol's governing body.<sup>59</sup> And indeed, the intergovernmental discussions preparing for the Protocol's entry into force have witnessed the resurfacing of this idea, as an intermediate layer in

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<sup>53</sup> Veit Koester, 'Aarhus Convention/MOP-4: The Compliance Mechanism – Outcomes and a Stocktaking', 41 *Environmental Policy and Law* (2011) at 197-198.

<sup>54</sup> Tomme Rosanne Young, 'An International Cooperation Perspective on the Implementation of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and National Implementation* (Brill/Martinus Nijhoff, 2013) 451.

<sup>55</sup> 'Cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance', ICNP Recommendation 1/4, para. 1, in ICNP, 'Report of the first meeting', UN Doc. UNEP/CBD/ICNP/1/8 (2011), Annex, where there is an open-ended reference to 'taking into account the experience and lessons learned from other relevant multilateral agreements'.

<sup>56</sup> See Montreal I Draft, draft article 14 bis. 'Summary of the Resumed Ninth Meeting of the Working Group on ABS', ENB 9/527, 11 and 15.

<sup>57</sup> In the human rights context, an ombudsman is a *national* institution that contributes to the enjoyment and protection of human rights. In particular,

the traditional model of an ombudsman has been an independent institution that is established by and answerable to parliament, with the power to consider complaints and conduct investigations on its own initiative, and to make recommendations to government rather than to adopt binding decisions. (...) there are two main models of ombudsman (though some ombudsmen are hybrid between the two): the classical ombudsman and the human rights ombudsman.

See Andrew Byrnes and Catherine Renshaw, 'Within the State', in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran *International Human Rights Law* (Oxford University Press, 2010) 498-517 at 514-5.

<sup>58</sup> Morgera and Tsioumani, 'Yesterday, Today, and Tomorrow', *supra* note 9 at 20.

<sup>59</sup> Article 26(4)(a) of the Nagoya Protocol.

the multilateral compliance mechanisms and procedures where the Party concerned and its relevant communities could initially address implementation challenges with some international facilitation, but without the immediate involvement of a future compliance committee.<sup>60</sup>

Eventually, however, although the procedures for the Compliance Committee, adopted in 2014, included a number of innovative provisions on the participation of, and feedback from, representatives of indigenous peoples, these did not go as far as the proposals just discussed. The Compliance Committee's composition includes two observers from indigenous and local communities, who enjoy full participation but have no voting rights. In addition, indigenous peoples and local communities may submit information on alleged non-compliance by Parties to the Protocol's Secretariat, which will decide whether to trigger the compliance procedures. The Secretariat, before triggering the procedure, needs to try to solve the issue among that indigenous people/local community and state concerned. Furthermore, in examining the cases brought to its attention, the Committee may seek, receive and consider information from relevant sources, including from affected communities (provided that the reliability of the information should be ensured); seek advice from independent experts, including, in particular where communities are directly affected, from a community expert; and undertake, upon invitation of the Party concerned, information-gathering in the territory of that Party. In addition, the Compliance Committee will consider the need for and modalities to provide advice and assistance to indigenous peoples and local communities to address cases of non-compliance.<sup>61</sup>

In terms of possible outcomes of the compliance procedure, the Compliance Committee may: offer advice or assistance to the Party concerned, as appropriate; request or assist, as appropriate, the Party to develop a compliance action plan identifying appropriate steps, an agreed timeframe and indicators to assess satisfactory implementation; or invite the Party to submit progress reports. In addition, the COP/MOP, upon recommendations of the Committee, may: facilitate, as appropriate, access to financial and technical assistance, technology transfer, training and other capacity-building measures; or issue a written caution, statement of concern or declaration of non-compliance to the Party concerned. Both types of response are quite common among MEAs. There is also the possibility for the COP/MOP to decide on any other measure, as appropriate, bearing in mind the need for serious measures in cases of grave or repeated non-compliance.

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<sup>60</sup> ICNP Recommendation 2/7, Annex, F bis, which read: '[The Committee shall establish the office of an ABS ombudsman to provide assistance to developing countries and indigenous and local communities to identify instances of non-compliance and make submissions to the Committee.]' (brackets in the original). See also, 'Summary of the Second Meeting of the Intergovernmental Committee for the Nagoya Protocol', *ENB 9/57912*.

<sup>61</sup> 'Cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and to address cases of non-Compliance', CBD Dec. NP-1/4 (2014).



## 5 Concluding remarks: other international avenues for ensuring compliance with the CBD?

While the developments related to compliance under the Convention on Biological Diversity remain tentative, the recently established Compliance Committee under the Nagoya Protocol establishes a precedent among multilateral environmental agreements for its innovative features providing certain opening to indigenous peoples and local communities as beneficiaries of its obligations. In addition, there are some indications that compliance with the provisions of the CBD in as far as indigenous peoples are concerned could be assured through other international processes.

For instance, regional human rights tribunals may ascertain whether countries comply with CBD provisions and guidelines that also contribute to the protection of the human rights of indigenous peoples, although these procedures can take a significantly longer amount of time to come to a conclusion. A clear case can be found in the context of the Inter-American Court on Human Rights (IACtHR). Its 2015 *Kaliña and Lokono* decision is particularly explicit about states' obligations to seek compatible approaches to the protection of indigenous peoples' rights to a dignified life and to cultural identity in relation to international environmental obligations and the protection of the natural resources on their traditional territories,<sup>62</sup> noting that consensus guidance adopted under the CBD<sup>63</sup> is mutually supportive of indigenous and tribal peoples' international rights.<sup>64</sup>

In addition, processes related to business responsibility to respect human rights also provide opportunities to look into compliance with CBD guidance by private entities. For instance, the National Contact Point (NCP) established under the OECD Guidelines for Multinational Enterprises in the UK found that a mining company operating in India did not respect the rights and freedoms of indigenous peoples in a manner consistent with India's commitments under the CBD. Specifically, the NCP used the CBD Akwé: Kon Guidelines to interpret the OECD Guidelines' provisions on consultations on environmental impacts,<sup>65</sup> to determine that the company did not employ the local language or means of communication other than written form for consultations with communities with a very high rate of illiteracy. It also found that the environmental impact assessment that had been carried out, although including an analysis of the 'socio-economic environment' of the study area, did not

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<sup>62</sup> IACtHR, *Case of Kaliña and Lokono Peoples v Suriname*, Judgment (Merits, Reparations and Costs), 25 November 2015, paras 181 and 193.

<sup>63</sup> *Ibid.*, paras 177 and 214 fn 247.

<sup>64</sup> *Ibid.* para. 174, quoting *in extenso* the 2015 expert opinion of Special Rapporteur Tauli-Corpuz, according to which 'CBD and its authorized interpretation by the COP defend fully the rights of indigenous peoples in relation to protected areas and require that these are established and managed in full compliance with States' international obligations'.

<sup>65</sup> UK NCP, Final Statement on the Complaint from Survival International against Vedanta Resources plc, 25 September 2009, available at <<http://www.berr.gov.uk/files/file53117.doc>> (visited 16 August 2017) paras 44-46.

address the impact of the mine on the community.<sup>66</sup> The NCP concluded that the company did not carry out adequate or timely consultations about the potential environmental impact of the construction of the mine on the community.<sup>67</sup> The NCP thus recommended that the company engage in consultations with the indigenous group on access to the project-affected area, ways to secure the group's traditional livelihood, and alternative arrangements (other than re-settlement) for the affected families according to the process outlined in the CBD Akwé: Kon Guidelines. Interestingly, the NCP also underlined that in carrying out a human rights impact assessment, as suggested by the UN Framework on Business and Human Rights, the Akwé: Kon Guidelines could be used as a point of reference, particularly for carrying out indigenous groups' impact assessments.<sup>68</sup> While this decision did not lead to a change in the conduct of the company,<sup>69</sup> it shows how other processes outside of the CBD architecture can look into compliance by non-state actors with CBD COP decisions, while relying on them to ensure coherent interpretation and application of different international sources.

From an international environmental law-making perspective, the experience of the CBD is instructive in at least three respects. First, it shows the difficulties of developing an international compliance mechanism for a treaty that is framed in broad terms with a view to allowing a variety of implementation approaches at the national and local level. The further development of the methodology of a peer-review mechanism under the CBD and any arising future practice may provide useful food for thought for other international environmental treaties that may need to retain significant room for manoeuvre at the national and local level. Second, the Compliance Mechanism under the Nagoya Protocol provides an innovative approach to 'make room' in the context of an inter-state compliance mechanism for non-state actors that are expected to benefit from specific international environmental obligations. The extent to which the guarded approach chosen for the Nagoya Protocol Compliance Mechanism will be able to effectively cater to the needs and vulnerabilities of indigenous peoples and local communities will also be a source of reflection for other international environmental treaties that are relevant from a human rights perspective. And, finally, the engagement with the CBD of other international processes indicates that environmental diplomats should reflect on the role of 'cross-compliance' – that is, the reliance by compliance mechanisms established outside the realm of environmental law on the obligations of, and guidance developed under, a certain multilateral environmental agreement.

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<sup>66</sup> *Ibid.* para. 57.

<sup>67</sup> *Ibid.* paras 65 and 67.

<sup>68</sup> *Ibid.* para. 79.

<sup>69</sup> Follow up to Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc (12 March 2010), available at <<https://www.oecd.org/corporate/mne/46085980.pdf>> (visited 16 August 2017).



# COMPLIANCE UNDER THE BASEL, ROTTERDAM AND STOCKHOLM CONVENTIONS

*Juliette Voinov Kohler<sup>1</sup>*

## 1 Introduction

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,<sup>2</sup> the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,<sup>3</sup> and the Stockholm Convention on Persistent Organic Pollutants<sup>4</sup> share the common objective of protecting human health and the environment from hazardous chemicals and wastes at all stages of their life cycle, from production to disposal.

The Basel, Rotterdam and Stockholm Conventions, like most multilateral environmental agreements (MEAs), provide for the adoption of procedures and mechanisms aimed at promoting the implementation<sup>5</sup> of and compliance<sup>6</sup> with the ob-

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<sup>2</sup> Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <<http://www.basel.int>>.

<sup>3</sup> Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <<http://www.pic.int>>.

<sup>4</sup> Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <<http://chm.pops.int/>>.

<sup>5</sup> For the purpose of this paper, 'implementation' refers to, *inter alia*, all relevant laws, regulations, policies, and other measures and initiatives that contracting Parties adopt and/or take to meet their obligations under a multilateral environmental agreement and its amendments, if any. This definition is taken from the UNEP Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (2006), available at <[http://www.acpmeas.info/publications/Manual\\_on\\_Compliance\\_with\\_and\\_Enforcement\\_of\\_MEAs.pdf](http://www.acpmeas.info/publications/Manual_on_Compliance_with_and_Enforcement_of_MEAs.pdf)> (visited 2 March 2017) at 59.

<sup>6</sup> For the purpose of this paper, 'compliance' refers to the extent of fulfilment by a State of its obligations under an MEA. This definition is taken from the UNEP Manual on Compliance, *supra* note 5, at 32.

ligations enshrined therein. Such procedures and mechanisms are usually seen by Parties as a necessary component of the agreement alongside a variety of approaches and tools available to ensure that the objectives of the agreement are reached. These approaches and tools include, *inter alia*, clear obligations, inclusive and accountable convention bodies, access to information on how Parties are implementing the convention, and access to technical assistance and financial resources to support implementation. Most recently, for instance, the effectiveness evaluation committee for the Stockholm Convention has concluded that '(a) compliance mechanism is urgently needed for the Stockholm Convention in order to support core transparency and accountability functions under the Convention as well as support the Conference of the Parties in assessing whether the Convention is effective in achieving the objective agreed to in Article 1'.<sup>7</sup>

This paper will examine the compliance regimes that have been, or are to be, established under the three Conventions. It will do so against the backdrop of the purpose and substantive provisions of each Convention, since compliance regimes are treaty-specific and are therefore, to some extent, tailored to the characteristics of each Convention. Accordingly, after the introduction, the second part of the paper will briefly introduce the Conventions, in particular those elements that are most relevant to compliance regimes. The third part will discuss the only compliance regime thus far established under one of the three Conventions (namely, the Basel Convention Implementation and Compliance Committee), and the activities of this regime. The fourth and last part will present an overview of the status of development of compliance regimes under the Rotterdam and Stockholm Conventions.

## 2 The Basel, Rotterdam and Stockholm Conventions

### 2.1 The Basel Convention

Adopted in 1989, the Basel Convention had 186 Parties on 1 October 2017. It is the oldest of the three global Conventions in the chemicals and waste cluster. Its scope is very broad and extends to both 'hazardous' wastes and 'other wastes' subject to transboundary movement. 'Hazardous wastes' are those listed in Annex I of the Convention, as further elaborated in Annexes VIII and IX of the Convention, as long as they exhibit hazardous characteristics – such as explosive, poisonous or ecotoxic – pursuant to Annex III of the Convention. Parties may also define additional wastes as 'hazardous' in their national legislation and, by notifying all other Parties

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<sup>7</sup> See 'Effectiveness evaluation of the Stockholm Convention on Persistent Organic Pollutants pursuant to Article 16: Executive summary of the report on the effectiveness evaluation of the Stockholm Convention on Persistent Organic Pollutants', UN Doc. UNEP/POPS/COP8/22/Add.1 (2016).

of such a definition, extend the scope of the wastes covered by the Convention.<sup>8</sup> ‘Other wastes’ are wastes listed in Annex II of the Convention and include household wastes.

The Convention is based on three pillars: the minimization of waste generation (Article 4), the environmentally sound management of wastes (Article 4), and the control of transboundary movements of wastes, including preventing and combating illegal traffic (Articles 6 and 9). Although measures to minimize waste generation and to ensure environmentally sound management are required to be taken within each Party, the Convention provides little specificity as to the kind of measures to be taken. The control of transboundary movements of wastes, on the other hand, will involve as many Parties as are involved in a given transboundary movement and is subject to specific conditions and grounded in a detailed prior informed consent procedure.

In addition, the Convention imposes specific obligations to communicate information to all other Parties through the Secretariat. For instance, Parties are to submit national reports on an annual basis, which provide information on domestic legal and institutional aspects as well as on the quantities and nature of wastes generated and moved across borders (Article 13(3)). In addition, Parties are to notify the Secretariat of a possible national definition of hazardous wastes (Article 3), of the entities designated to perform specific functions under the Convention (focal point and competent authority, Article 5), and of any prohibitions or restrictions on the import or export of wastes (Articles 4 and 13(2)).

It is worthwhile mentioning that although the Basel Convention does not provide for a financial mechanism, developing countries and countries with economies in transition are supported in implementing the Convention through, for instance, technical assistance by the Secretariat<sup>9</sup> and fourteen regional centres dedicated to this purpose.<sup>10</sup>

Lastly, the text of the Convention does not explicitly provide for the establishment of a compliance regime. However, the Conference of the Parties used its general prerogative to establish subsidiary bodies pursuant to Article 15(5)(e) to adopt, in 2002, terms of reference of the mechanism for promoting implementation and compliance and to establish the Implementation and Compliance Committee (ICC) to administer such mechanism.

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<sup>8</sup> See Basel Convention, ‘National Definitions of Hazardous Wastes’, available at <<http://basel.int/Countries/NationalDefinitions/NationalDefinitionsofHazardousWastes/tabid/1480/Default.aspx>> (visited 3 March 2017).

<sup>9</sup> See Synergies among the Basel, Rotterdam and Stockholm conventions, ‘Technical assistance: overview’, available at <<http://www.brsmeas.org/Implementation/TechnicalAssistance/tabid/2628/language/fr-CH/Default.aspx>> (visited 2 March 2017).

<sup>10</sup> See Basel Convention, ‘The Basel Convention Regional and Coordinating Centres’, available at <<http://basel.int/Partners/RegionalCentres/Overview/tabid/2334/Default.aspx>> (visited 2 March 2017).

## 2.2 The Rotterdam Convention

Adopted in 1998, the Rotterdam Convention had 159 Parties on 1 October 2017. The scope of the Convention extends to chemicals that are banned or severely restricted; and to severely hazardous pesticide formulations.

The Convention is based on two main pillars: the exchange of information on the characteristics of the chemicals covered by the Convention, and the establishment of a national decision-making process regarding the import of chemicals listed in Annex III. The Convention also details Parties' obligations towards the listing of chemicals in Annex III, with an obligation to notify the Secretariat of any final regulatory action taken to ban or severely restrict a chemical (Articles 5(1) and 5(2)), and the consequences of a listing in Annex III, namely the obligation to provide a response regarding the future import of such chemicals (Article 10). For chemicals that are banned or severely restricted by a Party but not listed in Annex III, that Party must, when exporting that chemical, provide an export notification to the importing Party (Article 12).

In addition to the information exchange obligations pursuant to Articles 5 and 10 mentioned above, which are to be realized by communicating information to all Parties through the Secretariat, the Convention requires Parties to notify the Secretariat of the entities that it has designated to perform specific functions under the Convention (the designated national authority pursuant to Article 4(1), and the official contact point).

It is worthwhile mentioning that although the Convention does not provide for a financial mechanism, developing countries and countries with economies in transition are supported in implementing the Convention through, *inter alia*, direct support from other Parties, pursuant to Article 12, or through technical assistance by the Secretariat.<sup>11</sup>

Article 17 provides a specific legal basis towards the establishment of the Convention's compliance procedures and mechanisms, which are to be adopted 'as soon as practicable'.

## 2.3 The Stockholm Convention

Adopted in 2001, the Stockholm Convention had 181 Parties on 1 October 2017. The scope of the Convention extends to persistent organic pollutants (POPs), namely chemicals that present characteristics of persistence, bio-accumulate, have a potential for long-range environmental transport and have adverse effects on human health and the environment.

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<sup>11</sup> See Synergies among the Basel, Rotterdam and Stockholm conventions, 'Technical assistance: overview', *supra* note 9.

The Convention is based on four main pillars: the elimination of POPs listed in Annex A; the restriction of POPs listed in Annex B; reducing or eliminating releases from unintentionally produced POPs listed in Annex C; and ensuring that stockpiles and wastes consisting of, containing or contaminated with POPs are managed safely and in an environmentally sound manner. For all intentionally produced POPs, the measures are to target the production and use of POPs as well as their import and export. Each Party also has the obligation to develop and endeavour to implement a plan for the implementation of its obligations under this Convention.

In addition, the Convention provides for specific obligations to communicate information to all other Parties through the Secretariat. For instance, Parties wishing to make use of the possibility to benefit from a production or use specific exemption must notify the Secretariat thereof. Parties also have an obligation to annually submit a report on the measures that they have taken to implement the provisions of the Convention and on the effectiveness of such measures in meeting the objectives of the Convention (Article 15). In addition, Parties are to notify the Secretariat of the entities designated to perform specific functions under the Convention (the national focal point pursuant to Article 9(3), and the official contact point) and to transmit their implementation plan to the Secretariat (Article 7).

Unlike the Basel and Rotterdam Conventions, the Stockholm Convention provides for a financial mechanism to support developing countries and countries with economies in transition in their implementation of the Convention.<sup>12</sup> In addition, technical assistance can be provided directly by Parties or by the Secretariat and regional centres dedicated to this purpose.<sup>13</sup>

Article 17 provides a specific legal basis towards the establishment of the Convention's compliance procedures and mechanisms, which are to be adopted 'as soon as practicable'.

### **3 The Basel Convention Implementation and Compliance Committee**

#### **3.1 Background**

The Basel Convention Implementation and Compliance Committee (ICC) was established in 2002 by decision BC-VI/12.<sup>14</sup> Its objectives are to assist Parties to comply with their obligations under the Convention, and to facilitate, promote, monitor

<sup>12</sup> See Stockholm Convention, 'Financial Mechanism: Overview', available at <<http://chm.pops.int/Implementation/FinancialMechanism/Overview/tabid/677/Default.aspx>> (visited 15 March 2017).

<sup>13</sup> See Synergies among the Basel, Rotterdam and Stockholm conventions, 'Technical assistance: overview', *supra* note 9.

<sup>14</sup> 'Illegal traffic in hazardous wastes and other wastes' (1998).



and aim to secure the implementation of and compliance with the obligations under the Convention. The ICC has a dual mandate: it reviews both general issues of implementation and compliance (for instance, reporting and legal frameworks), and specific submissions regarding individual Parties' difficulties to implement/comply with specific obligations.

In 2009, through decision BC-IX/2,<sup>15</sup> the Conference of the Parties established within the voluntary trust fund an implementation fund to assist any Party that is a developing country or a country with an economy in transition and is the subject of a submission to the ICC. Funding contributed to the implementation fund will be made available to those Parties whose compliance action plan has been approved by the Committee and with a view to assisting the Parties to undertake the activities listed in the plan towards restoring compliance. As of 1 January 2017, approximately USD 520,000 had been contributed to the implementation fund and made available to ten Parties concerned by a specific submission, three of which have restored compliance. Parties which have contributed to the implementation fund include Colombia, Japan, Norway and Switzerland.

In terms of governance, the ICC is composed of 15 members, who are nominated by Parties based on equitable geographical representation of the five regional groups of the United Nations, and are elected by the Conference of the Parties. Members are to serve objectively and in the best interest of the Convention and are to have expertise relating to the subject matter of the Convention in areas including scientific, technical, socio-economic and/or legal fields. The ICC elects its own officers based on equitable geographical representation of the five United Nations regional groups and is to meet at least once between each Conference of the Parties and in conjunction with meetings of other Convention bodies. The rules of procedure for the meetings of the Conference of the Parties<sup>16</sup> apply *mutatis mutandis*, but the terms of reference of the ICC<sup>17</sup> set out specific rules with respect to its decision-making on matters of substance: if consensus cannot be reached, a decision can be adopted through a two-thirds majority or eight members, whichever is greater, and the report and recommendations of the ICC will need to reflect the views of all ICC members. The meetings are held in public, unless the ICC is dealing with specific submissions, during which time the session will be closed unless the Party concerned and the ICC agree otherwise. In any event, the Party concerned by a submission will be invited to participate in its consideration by the ICC and may present its views or provide information at any time. In addition, under the compliance mechanism, a Party may also consider and use relevant and appropriate information provided by civil society on compliance difficulties.

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<sup>15</sup> 'Work programme for the Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention for the period 2009–2011' (2009).

<sup>16</sup> Available at <<http://www.basel.int/TheConvention/ConferenceoftheParties/RulesofProcedure/tabid/2281/Default.aspx>> (visited 30 January 2017).

<sup>17</sup> Available at <<http://www.basel.int/TheConvention/ImplementationComplianceCommittee/Mandate/tabid/2296/Default.aspx>> (visited 30 January 2017).

### 3.2 General issues of implementation and compliance

Paragraph 21 of the terms of reference of the ICC provides that ‘the Committee shall, as directed by the Conference of the Parties, review general issues of compliance and implementation under the Convention’. So far, the Conference of the Parties has mandated the ICC to address issues pertaining to the designation of a focal point and competent authorities, national reporting, legal frameworks, illegal traffic, insurance, bond and guarantee, and the control system for transboundary movements of wastes. Donors for these activities have traditionally been the European Union and more recently Japan.

The activities of the ICC have included:

- reviewing Parties’ difficulties in meeting specific obligations and identifying ways of addressing these;
- classifying compliance performance by Parties with the national reporting obligation;<sup>18</sup>
- collecting information from Parties/others, consultations with other subsidiary bodies under the Convention;
- reviewing existing guidance documents or developing new guidance documents; and
- making recommendations to the Conference of the Parties on other steps that could be taken to improve the implementation of and compliance with the Convention, for instance by recommending adjustments to the national reporting format and notification forms, or recommending that further work be undertaken by a different subsidiary body.<sup>19</sup>

### 3.3 Specific submissions

Submissions may be made to the ICC by a Party with respect to itself, by a Party with respect to another Party with whom it is directly involved under the Convention, or by the Secretariat under specific circumstances. The Secretariat may make a submission if it becomes aware of possible difficulties of any Party in complying with its obligations to transmit information pursuant to Article 3(1), Article 4(1), Article 5 and Article 13(2) and 13(3) of the Convention.

Paragraph 19 of the terms of reference of the ICC provides that the Committee shall ‘consider any submission made to it in accordance with paragraph 9 with a view to determining the facts and root causes of the matter of concern and, assist in its reso-

<sup>18</sup> See Basel Convention, ‘National reporting compliance performance’, available at <<http://www.basel.int/Implementation/LegalMatters/Compliance/GeneralIssuesActivities/Activities201617/Nationalreportingcompliance/tabid/5217/Default.aspx>> (visited 15 March 2017).

<sup>19</sup> See ‘Committee Administering the Mechanism for Promoting Implementation and Compliance’, UN Doc. UNEP/CHW.13/9 (2016).

lution'. The measures that may be decided by the Committee include the provision of advice, information and non-binding recommendations. For instance, the ICC may recommend that the Party facing compliance difficulties elaborate a voluntary compliance action plan. In addition, the ICC may recommend that the Conference of the Parties consider additional measures, namely the provision of further support (prioritization of technical assistance and capacity-building and access to financial resources); or issuing a cautionary statement (not further defined in the terms of reference of the ICC) and providing advice regarding future compliance.

So far, the ICC has considered three self-submissions from Central African Republic (resolved), Oman and Togo; and thirteen Secretariat submissions concerning Afghanistan (resolved), Bhutan, Cabo Verde, Eritrea, Guinea-Bissau, Liberia, Libya, Nicaragua (resolved), Palau (resolved), Somalia (resolved), Swaziland (resolved), Togo (resolved) and Turkmenistan. These submissions have pertained either to the lack of designation of country contacts under the Basel Convention, pursuant to Article 5, the lack of transmission of national reports pursuant to Article 13(3), or to the lack of adequate legal frameworks pursuant to Articles 4(4) and Article 9(5) of the Convention. Matters were resolved either through the provision by the Committee of advice and information, or pursuant to the implementation of a compliance action plan approved by the Committee and for which financial support from the implementation fund was provided.<sup>20</sup>

For implementation difficulties not directly linked to a specific obligation under the Basel Convention, the ICC has in the past invited the Party having made a submission to the Committee to make a project proposal to the UNEP Special Programme on Institutional Strengthening.<sup>21</sup>

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<sup>20</sup> See Basel Convention, 'Specific Submissions Activities', available at <<http://www.basel.int/Implementation/LegalMatters/Compliance/SpecificSubmissionsActivities/tabid/2310/Default.aspx>> (visited 15 March 2017).

<sup>21</sup> See, for instance, Decision CC-12/11 ('Submission regarding Togo and submission by Togo') and decision CC-12/4/Add.1 ('Submission by Central African Republic'). For more information on the Special Programme, see <<http://web.unep.org/chemicalsandwaste/special-programme>>. For information on the interface between the Committee and the Executive Board of the special programme, see the report on the review of the operation of the implementation fund in the light of the experience of the Committee and other developments, including with regard to the special programme to support institutional strengthening at the national level for implementation of the Basel, Rotterdam and Stockholm conventions, the Minamata Convention and the Strategic Approach to International Chemicals Management, available in 'Committee Administering the Mechanism for Promoting Implementation and Compliance: report on the review of the operation of the implementation fund', UN Doc. UNEP/CHW.13/INF/25 (2017).

## 4 Compliance under the Rotterdam and Stockholm Conventions

As mentioned above, the legal bases towards the establishment of compliance procedures and mechanisms on compliance are identical under the Rotterdam and Stockholm Conventions, and negotiations on this issue began at the first meetings of the respective Conferences of the Parties, and have continued at subsequent meetings. The matter will be considered again during the ninth meetings, which are to take place in May 2019.

### 4.1 Status of negotiations under the Rotterdam Convention

The text of the procedures and mechanisms on compliance came very close to being adopted during the seventh meeting of the Conference of the Parties to the Rotterdam Convention, in the spring of 2015. During the last plenary, a package proposal was submitted by the co-chairs of the contact group with the following elements:

- decision-making on matters of substance: four-fifths majority vote as a last resort;
- Committee trigger limited to Article 4(1), Article 5(1) and 5(2), and Article 10 of the Convention;
- some measures to be considered by the Conference of the Parties were left in brackets, namely the possibility of issuing statements of concern and making public cases of non-compliance; and
- a review of the procedures and mechanisms by the tenth meeting of the Conference of the Parties with respect to decision-making and the bracketed measures mentioned above.

In plenary, the objection by one Party, India, blocked the consensual adoption of the proposal because it did not incorporate his country's request that it provide for the establishment of a financial mechanism. By decision RC-7/6,<sup>22</sup> the matter was therefore deferred to the next meeting with the hope that Parties will at that time be in a position to reach consensus and adopt the procedures and mechanisms on compliance. During its eighth meeting, the Conference of the Parties was unable to get closer to an agreement and decided to defer further consideration of the matter to its ninth meeting to be held in 2019.<sup>23</sup>

<sup>22</sup> 'Procedures and mechanisms on compliance with the Rotterdam Convention' (2015).

<sup>23</sup> See 'Report of the Conference of the Parties to the Stockholm Convention on Persistent Organic Pollutants on the work of its eighth meeting', UN Doc. UNEP/POPS/COP8/32 (2017) paras 215-222.

## 4.2 Status of negotiations under the Stockholm Convention

Not much progress was made on compliance during the seventh meeting of the Conference of the Parties to the Stockholm Convention in the spring of 2015. At the outset, the outstanding issues included the objectives and scope of the procedures, the possibility of a third Party trigger (by the Secretariat or the Committee, and the scope of the obligations concerned by it) and the possibility of unpleasant measures by the Conference of the Parties, including whether these would be differentiated on the basis of a Party's level of development.

At the closing of the meeting, Parties had developed a second version of the draft procedures and mechanisms, adding several new outstanding issues pertaining, for instance, to decision-making on matters of substance and measures that could be adopted by the Committee. In decision SC-7/26,<sup>24</sup> the Conference of the Parties decided that both versions of the procedures and mechanisms would serve as the basis for further work during the eighth meeting of the Conference of the Parties.

When considering the matter during its eighth meeting, the Conference of the Parties also had before it the recommendation from the Effectiveness Evaluation Committee, whereby the adoption of a compliance regime is seen as critical to evaluating the effectiveness of the Convention.<sup>25</sup> However, the Conference of the Parties was unable to get closer to an agreement and decided to defer further consideration of the matter to its ninth meeting to be held in 2019.<sup>26</sup>

## 5 Conclusion

With its 15-year track record, the Basel Convention ICC is a testimony of the contributions that compliance procedures and mechanisms can make to achieving the objectives of a multilateral environmental agreement, both through a review of general issues of implementation and compliance and by enabling individual Parties to restore compliance with specific obligations.

It is hoped that Parties to the Rotterdam and Stockholm Conventions will bring negotiations close to success or to success during the 2019 meetings of the Conference of the Parties, thereby putting in place the last missing institutional pillar of the Conventions and completing the trio of compliance procedures and mechanisms in the chemicals and waste cluster.

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<sup>24</sup> 'Procedures and mechanisms on compliance with the Stockholm Convention' (2015). The two versions of the procedures and mechanisms on compliance are included as Annexes in the Decision.

<sup>25</sup> See *supra* note 7.

<sup>26</sup> See 'Report of the Conference of the Parties to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the work of its eighth meeting', UN Doc. UNEP/FAO/RC/COP.8/27 (2017) paras 138-149.

# **PART IV**

**INTERACTIVE NEGOTIATION SKILLS IN THE  
AREA OF MEA EFFECTIVENESS**



# THE JOENSUU NEGOTIATIONS – A MULTILATERAL SIMULATION EXERCISE: THE MINAMATA CONVENTION<sup>1</sup>

*Anne Daniel<sup>2</sup> and Tuula Honkonen<sup>3</sup>*

## 1 Overview

### 1.1 Introduction

Interaction, education and dissemination of knowledge are at the core of the University of Eastern Finland – UNEP Course on Multilateral Environmental Agreements (MEAs). During the 2016 Course, held in Joensuu on 21 November –1 December 2016, an international negotiation simulation was organized to introduce the participants to the real-life challenges facing negotiators of MEAs. Participants were placed in a fictional negotiation situation on international chemicals management, given individual instructions and a hypothetical, country-specific, negotiating mandate.

This paper sets out the elements and structure of the negotiation simulation exercise. The simulation materials were prepared by Tuula Honkonen and Anne Daniel, with the latter coordinating the simulation on the ground.

The scenario for the negotiation simulation focused on substantive, institutional and procedural issues in the context of the First Conference of the Parties (COP1)

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<sup>1</sup> This paper is partly drawn from the description of previous negotiation exercises on the Courses conducted by Cam Carruthers.

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of the Minamata Convention on Mercury.<sup>4</sup> The simulation was hypothetical but drew on issues at play in actual ongoing or future negotiations. The Minamata Convention was chosen as the backdrop for the exercise because it is a new MEA that provides interesting opportunities for devising an exercise that directly deals with effectiveness issues from different angles. The exercise also fell nicely with the anticipated entry into force of the Convention.

The exercise began with the first day plenary of COP-1. Four real issues under the Convention had been identified as requiring further negotiation, namely: the reporting format; the monitoring aspects of the effectiveness evaluation arrangements; the specific international programme of the financial mechanism; and the rules of procedure of the Implementation and Compliance Committee.<sup>5</sup> When participants convened in the plenary, the COP President, after hearing plenary discussion on the four topics, proposed to establish four contact groups with the aim of finalizing expert-level negotiations before the COP was to adopt the proposed decisions. In concrete terms, the COP President proposed to establish groups to produce agreed text on the following issues:

- A. reporting format;
- B. effectiveness of evaluation;
- C. the financial mechanism and resources; and
- D. the rules of procedure of the Implementation and Compliance Committee.

This paper contains key elements of the primary materials for the simulation exercise, including general instructions and supporting material. Individual instructions were provided separately to each negotiation simulation participant. The paper also provides a brief overview of a presentation that was delivered to participants on the problem of mercury and how it was addressed by the Minamata Convention, as well as a second presentation on negotiating basics, aimed at providing basic techniques and strategies to help facilitate the negotiations.

## **1.2 Importance of procedure and rules of procedure in MEA negotiations**

Under MEAs, rules of procedure are set up to govern activities in decision-making bodies, based on a provision in the MEA itself – which usually stipulates that Parties are to agree on such rules by consensus. The Conference of the Parties (or other similar body) serves as the supreme decision-making body of the agreement. A COP takes decisions to implement the agreement, and reviews and evaluates implementation of the agreement, including related decisions. In the case of the negotiation of a completely new MEA, such as the Minamata Convention, rules of procedure are important at two junctures. First, they were agreed at the first intergovernmental

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<sup>4</sup> Minamata Convention on Mercury, Geneva, 19 January 2013, not yet in force, <<http://www.mercury-convention.org/>>.

<sup>5</sup> All the issues have and continue to be discussed under the Minamata Convention in real life.

negotiation committee meeting (INC-1) as the rules governing the negotiations, and second, another set of rules were prepared prior to entry into force of the treaty as they must be adopted at the first Conference of the Parties to govern its activities going forward. Where a new legal instrument, such as a protocol, is being negotiated under the umbrella of an existing treaty, its governing body is responsible for establishing its own rules of procedure. However, generally the rules of procedure of the existing treaty are applied, unless the protocol's governing body decides otherwise.

Rules of procedure generally regulate the activities of decision-making bodies, including subjects such as membership, officers, conduct of business, decision-making, agendas, languages, amendments to the rules, and secretariat functions. Among other things, the rules reflect fundamental principles of transparency and procedural fairness, the latter of which is based largely on the principle of equality of sovereign states. Another principle reflected in the rules is that in international law, authority is ultimately derived from states. While the fundamental principles are common, each set of rules is adapted to its specific context. A good knowledge of the rules of procedure of the forum a negotiator works in is invaluable. Knowing the rules means knowing what one can do to advance or protect one's position, and how to do it.<sup>6</sup>

However, all too often negotiators in multilateral environmental fora have only a limited awareness of the rules that define the arena in which they operate. The rules and related issues may seem either mundane or arcane, and only incidental to the more compelling questions of substance. Negotiators are often more concerned with strategy or technical priorities. Some may not even be aware of the influence of the rules on the process, which can be subtle. However, even when no reference is made to the rules they have a profound influence on outcomes. A key example is decision-making: votes are generally avoided, but whether and how consensus is obtained on a given issue may depend to some degree on the understanding of how Parties would vote if they did vote. In forums where decisions are made by consensus, it substantially changes the dynamics of negotiations. Negotiators who fail to understand the underlying dynamics on such issues or the relevant decision rule can make serious strategic errors.

Indeed, ignorance of the rules can lead to major failures and frustrations with the process, especially since problems may be discovered after key decisions have been taken. It is difficult, if not practically impossible, to undo multilateral process decisions once taken. It is therefore important to consider strategic issues about deci-

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<sup>6</sup> For an analysis of the importance of the rules of procedure in a particular MEA see Joanna Deplete, *The Organization of Global Negotiations: Constructing the Climate Change Regime*, London: EarthScan, 2005, particularly pp. 80-102. For a discussion of those rules in the chemicals and waste context specifically, please see the *Training Manual for the Chairs of the Basel, Rotterdam and Stockholm Conventions*, (Basel, Rotterdam, and Stockholm Secretariat, 2014), available at <<http://www.brsmeas.org/Portals/4/download.aspx?d=UNEP-CHW-RC-POPS-WS-CHAIRS.01-TrainingManual.English.pdf>> (visited 23 February 2017).

sion-making processes and relevant rules early in any multilateral endeavour. Once a process is underway, it may result in a proliferation of sub-processes based on a set of interrelated decisions. While these processes are susceptible to congestion and inertia, it is also possible that they can move toward an unexpected direction or conclusion very quickly, with major outcomes in the balance.

This simulation was designed, in part, to open up certain procedural issues so that participants could strengthen their knowledge and understanding of the procedures and rules as tools for more effective and efficient negotiation of individual and common objectives. The idea was for participants to negotiate key convention infrastructure while they negotiated practical textual solutions. The premise was that the rules of procedure constitute a code which reflects the values and interests of Parties and informs the way negotiators work together to take decisions. The rules frame what happens, who can make it happen, when, where and how. The higher the level of common understanding and agreement of the rules in any given body, the more efficiently and effectively that body can operate and reach agreement to attain common objectives.

### **1.3 Simulation objectives**

This negotiation simulation exercise focused on negotiations under the Minamata Convention on Mercury. The general objectives were to promote among participants, through simulation experience:

- 1) understanding of the challenges and opportunities related to negotiating more specific infrastructure in a new MEA, both in general and in the specific context of the international mercury management regime;
- 2) understanding of the principles and practices of multilateral negotiations, and appreciation of the value and role of the rules of procedure;
- 3) familiarity with specific substantive and drafting issues; and
- 4) discussion and appreciation of different perspectives on substantive and institutional issues related to international cooperation on the management of mercury.

Within the exercise, the specific objective of the meeting was to produce an agreed text on the four issues set out in subsection 1.1 above.

A supplementary objective of the exercise was to produce discussion and results, including a paper in the annual Course *Review*, which may be of interest to international chemicals management policy stakeholders and experts, and participants in related multilateral fora. The theme also provides an opportunity for participants to gain understanding about evolving legal architectures in international environmental governance.

#### 1.4 Procedural scenario

The negotiation simulation scenario and the issues set out within it were hypothetical, but based on actual ongoing and anticipated future discussions. In the case of reporting, a portion of the text being discussed in the intergovernmental process was selected, and for the specific international programme, the full text subject to ongoing negotiations was used. However, for purposes of stimulating debate, more text was bracketed than was at the time outstanding for COP-1, due to successful intergovernmental negotiation committee meetings over the last couple of years. In the case of effectiveness evaluation, although it has been previously discussed, the text was entirely new, created based on decisions made on the same subject by the Stockholm Convention in anticipation of the need for such a text at COP-1.<sup>7</sup> The rules of procedure for the Implementation and Compliance Committee, which have not yet been drafted or discussed in the intergovernmental process, were provided here as an interesting governance issue for the group.

The scenario was set at the First COP of the Minamata Convention. After seven INC meetings, Parties were now convening at COP-1 of the Convention. The Conference was to adopt a set of decisions to further guide the work of the Convention and to develop the international mercury management regime further. Some of the draft decisions were on contentious issues for the Parties and therefore the texts needed further negotiation.

At the beginning of the exercise, the COP President, after discussion, proposed the establishment of a contact group to address each of the four key issues. The contact groups were to work on the remaining four draft decision texts that were still heavily bracketed, showing lack of consensus among the Parties. The stated aim of the groups was to produce an agreed text ready to be considered and adopted by the COP in its final plenary.

After the opening of the COP plenary on Day 1, the exercise continued in the contact groups. The groups negotiated until the end of the first day of the exercise, continued on the second day, before returning to the COP plenary for discussions and adoption of the draft decisions.

The COP had a President and Vice-President (also serving as a Rapporteur for COP plenaries). These were selected in advance by the organizers of the exercise. Chairs for the contact groups were agreed by the COP, selected in advance based on consultations, noting that in real life Chairs are identified in advance of meetings to facilitate preparation. The Parties were to follow established practice and seek to balance developed country and developing country representation in these elected positions.

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<sup>7</sup> Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <<http://chm.pops.int>>.

The negotiation texts which were provided to the participants are provided below in section 2. The draft texts addressed both substantive and procedural issues.

Four contact groups were envisaged for the four issue clusters which are set out in section 1.1 above.

### **1.5 Introduction to the exercise**

Some roles, including the President and Vice-President, played a resource function and were intended to be useful to participants. Those playing such roles were to serve all participants and work for a positive outcome in addition to their individual instructions. (They were encouraged to signal to the other Parties when they took up their partisan Party roles, e.g. ‘I’m taking off my President’s hat...’). It was explained to participants that this would not happen in real life, but was necessary given the limited number of participants.

Participants were to follow their interests and positions with respect to the issue assigned to their contact group. The groups were to narrow their focus as quickly as possible to identify issues to be addressed, and to dispose of issues expeditiously where possible. Participants were advised to work hard to achieve their objective of providing the final plenary with clean text.

It was stressed that participants needed to read the text of the treaty underlying the negotiations, i.e. the Minamata Convention, carefully. Everything that they agreed on was to be in line with the Convention text.

Participants were strongly urged to follow their instructions, and to elaborate interventions with a compelling rationale to advance their positions. Participants were also encouraged to take the initiative and be inventive and to intervene in contact groups and in plenary even if they had no specific instructions on a particular issue, but in a manner that was consistent with their instructions. Participants were highly encouraged to seek support from other participants for, and identify opposition to, their positions. To this end, participants were to consider developing joint drafting proposals and making interventions on behalf of more than one state. Where possible, it was pointed out as a good idea to make alliances and develop coordinated strategies to intervene in support of others, or to take the lead in other cases.

The simulation was designed to focus on both the negotiation process as well as the substantive issues, and it was designed to be difficult, with failure to reach agreement being a real possibility. Unavoidably, a random distribution of positions was likely to result in making some Parties appear more or less constructive, and indeed for simulation purposes all positions were designed to reflect differences that needed to be resolved. It was important to note that the positions in individual instructions were assigned randomly. They were entirely hypothetical and were not intended to reflect

specific positions of particular Parties or the views of organizations or individuals.

Individual delegates often face situations similar to this exercise, where they have little opportunity to prepare, but should still define objectives and develop a strategy. Informal diplomacy is where most progress toward agreement on concepts is made, while contact group and plenary discussion is often required for agreement on specific texts. Drafting often involves a fine balance between accommodation and clarity. In real life, decision-making on final text in plenary may appear to be simply '*pro-forma*' (merely a formal repetition of what has already been agreed), but there can be surprises. Decisions in the plenary are critical and can sometimes move very quickly, at times moving back and forth on an agenda, so that being prepared with an effective intervention at any moment is essential.

The President and Vice-President and the four contact group Chairs played important roles, setting up and managing the process – and managing time – to produce agreement. They were encouraged to consult broadly, including with Chairs and state representatives. The Presidents and Chairs were advised that key to success would be thoughtful organization of the work of the groups, including strategic management of how the smaller contact groups and the plenary sessions function and are linked.

Because of the small numbers in each of the four groups, there was no attempt to organize along UN regional lines, but participants were encouraged to work constructively with other delegates to find compromise solutions. For the same reason, as one person per group played the role of Chair, it was agreed that instead of having an additional person tied up in the role of Rapporteur, resource persons<sup>8</sup> would assist Chairs by playing the role of Secretariat and providing advice on procedural matters, as well as typing the ongoing negotiating text on the screen. They were also instructed to play the role of capital or head of delegation for those negotiators with positions requiring that they seek higher authority, and had the discretion to allow or refuse negotiating positions based on whether the negotiations needed further tension.

## 1.6 Introduction to the Minamata Convention and negotiation basics

Claudia ten Have of the Interim Secretariat of the Minamata Convention provided an overview of the Convention to provide context for negotiators regarding the four issues that would be the subject of the simulations. She outlined the underlying rationale for the treaty, based on the environmental and human health problems caused by mercury in the environment, and the process for negotiating the treaty. She noted the multiple anthropogenic sources of mercury in the environment, both

<sup>8</sup> Niko Urho (Finnish Ministry of the Environment), Claudia ten Have (Minamata Interim Secretariat), Barbara Ruis (UNEP) and Anne Daniel served as those resource persons.

as atmospheric emissions and as contaminant releases to water and land from artisanal and small-scale gold mining (ASGM) and coal-fired power plants, from industrial processes, and from many everyday products. The presentation next explained how mercury cycles in the environment, including through long-range transport. Ms. ten Have then outlined the main control provisions in the Convention: measures to address supply and trade; mercury-containing products; processes using mercury; artisanal and small-scale gold mining; atmospheric emissions; releases to land and water; storage; wastes; and contaminated sites. The presentation then focused on Convention support measures, such as financial and technical assistance, information-sharing, national implementation plans, compliance and effectiveness evaluation; and ended with an overview of administrative and operational matters.

Anne Daniel provided a short presentation on negotiating basics,<sup>9</sup> aimed in particular at participants who were new to UN negotiations. To set the stage for the negotiating simulation, which involved a plenary of the first COP to the Minamata Convention adopting an agenda as well as the texts finalized by each negotiating group, she highlighted the role of the Conference of the Parties in adopting the meeting's agenda as well as all decisions to be taken at the meeting; and in establishing and providing the mandate to contact groups for the negotiation of issues that cannot be resolved in plenary. A key message was that the rule of engagement in contact groups, particularly in the groups on the Specific International Programme and reporting (where the text was the product of previous negotiations), is that clean text is not revisited unless it is opened up to solve a problem in bracketed text. The presentation also included guidance on preparing for contact group negotiations; approaches to interventions; appropriate use of brackets; negotiators' common terminology for text (e.g. chapeau); a lexicon of compromise words; and appropriate comportment during negotiations.

## 2 Instructions<sup>10</sup>

### 2.1 Individual instructions

The core of the simulation is set out in **confidential** individual instructions. They show the positions of the party with regard to the issues being negotiated. It is to be noted that, generally, no rationale or strategy is provided (this must be developed by

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<sup>9</sup> Based on extensive UN negotiating and chairing experience, training delivered within the Government of Canada and externally, such as the Global Chairs Training for the Basel, Rotterdam and Stockholm Conventions, and the following documents: Cam Carruthers (ed.), *Multilateral Environmental Agreement Negotiator's Handbook*, University of Joensuu – UNEP Course Series 5 (2nd ed., University of Joensuu, 2007); *Training Manual for Chairs of Meetings of the Basel, Rotterdam and Stockholm Conventions* (Secretariats of the Basel, Rotterdam and Stockholm Conventions, 2014), available at <<http://www.brsmeas.org/Portals/4/download.aspx?d=UNEP-CHW-RC-POPS-WS-CHAIRS.01-TrainingManual.English.pdf>> (visited 6 March 2017).

<sup>10</sup> This section includes excerpts of the general instructions of the exercise with which the participants were provided.

each participant). In some cases, the instructions may seem internally inconsistent and even contradictory (this happens in real life, and is interesting to watch!). For further guidance in dealing with procedural and strategic issues, see the *MEA Negotiators' Handbook*.<sup>11</sup>

## 2.2 General instructions

At a minimum, please review the general and individual instructions and the negotiation texts (Section 3 below).

- 1) Each participant is assigned a role as a Lead Negotiator for a particular Party (this is a 'speaking role').<sup>12</sup> Additional **confidential** individual instructions will be provided to each participant.
- 2) Participants representing Parties have been sent with full credentials from their governments to participate in the COP, using their confidential individual instructions as a guide.<sup>13</sup>
  - a. Participants should do their best to achieve the objectives laid out in their instructions. You should develop a strategy and an integrated rationale to support your positions.
  - b. On any issues on which you do not have a position in your individual instructions, you should develop your own positions, with a view to securing agreement on the issues where you do have a position.
  - c. Do not share your confidential individual instructions with other participants.
  - d. You can work with your fellow negotiators and allies – within the scope of your individual instructions. If possible, consult with others before the session, to identify and coordinate with those who have similar instructions, and even prepare joint interventions. You should build alliances and try to support anyone with a similar position who is outnumbered. You should try to identify participants with opposing views, and influence them both in formal negotiations, as well as in informal settings.
  - e. Participants should, of course, always be respectful of each other's views and background.
- 3) Questions on procedure, etc. should be addressed primarily to the COP President and Vice-President or contact group Chairs, or to the resource persons of the exercise.
- 4) In the COP plenary and contact groups, the COP President/Vice-President/Chairs/Rapporteurs sit at the head of the room. Parties will be provided with

<sup>11</sup> *MEA Negotiators' Handbook*, available in English and French online at <[http://www.unep.org/dec/docs/MEAs\\_Negotiators\\_Handbook.pdf](http://www.unep.org/dec/docs/MEAs_Negotiators_Handbook.pdf)> and <[http://www.unep.org/dec/PDF/MEA\\_Negotiators\\_Handbook\\_French.pdf](http://www.unep.org/dec/PDF/MEA_Negotiators_Handbook_French.pdf)>.

<sup>12</sup> There are no intergovernmental or nongovernmental organization roles in this exercise.

<sup>13</sup> **Confidential** individual instructions have been developed without reference to actual country positions, and it is not necessary for this simulation that participants attempt to follow positions in the real negotiations.



- a ‘flag’ or country nameplate. To speak, raise your ‘flag’ and signal to the COP Vice-President/contact group Rapporteur keeping the speakers’ list.
- 5) The simulation will begin and end in the COP plenary. The first task for Parties is to agree on the establishment of four groups, and to elect a Chair and Rapporteur for each group. The usual practice is that developing country Parties and developed country Parties are equally represented. For the exercise, the selection should be based on informal consultations, and decided by consensus.
  - 6) If and when the COP plenary breaks into the four groups, please join the group identified in your individual instructions.
  - 7) The four groups must reach agreement on what to report back to the COP plenary.<sup>14</sup>
  - 8) The COP President and Vice-President and, once elected, the contact group Chairs, must play their role in the session of the body they manage, and in that body, refrain from openly taking positions. Due to the small numbers in the 4 groups, the President and Vice-President will be ‘taking their President/Chair hat off’ and functioning as delegates in the contact groups with positions. Back in plenary they will resume their neutral roles.
  - 9) Please use only the materials provided, as well as advice and information from other participants, and don’t be distracted by internet resources or use any precedent found there or elsewhere (even though this is often a good idea in real life!). Do frequently consult the provisions of the Minamata Convention on Mercury.
  - 10) The exercise will take place over a two-day period. Participants are encouraged to consult informally before the exercise for nominations to the official positions and in the evening of the first day to form alliances and broker solutions (as in real life).

### 2.3 Evaluation

Following the exercise, participants are requested to respond to the evaluation questions in the Course evaluation in relation to this exercise.

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<sup>14</sup> It is possible for the four groups to split up into smaller groups to work on text or to try to reach agreement on sensitive issues. Such smaller drafting groups should be run on an informal basis, with reference to participants by name, not country.

### **3 Key simulation documents**

The texts below were prepared with a view to reflecting current and future issues of an MEA that is expected to shortly enter into force. Detailed texts were prepared in order to provide for 1.5 days of negotiations.

The individual positions were prepared in revisions mode<sup>15</sup> to make it easier for delegates to focus on putting forward their positions, and working out compromises with others. For each issue, the exercise was designed with a view to having the range of positions reflected, with sufficient differing perspectives to make the exercise challenging. This simulation focused less on application of the rules of procedure and high stakes negotiating tactics and more on the typical work of contact group negotiation, which is typically a long, hard process that requires stamina and persistence, as well as diplomacy, to arrive at clean text for the plenary.

#### **3.1 Draft texts for negotiation**

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<sup>15</sup> Using the track changes function of the word processing software.

## Draft reporting format for the Minamata Convention on Mercury

### Reporting on measures to be taken to implement the provisions of the Convention, the effectiveness of such measures and the challenges encountered

#### Part A

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#### Part B

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#### Article 7: Artisanal and small-scale gold mining

[1.] [Is artisanal and small-scale gold mining and processing in the party's territory [significant][more than insignificant]? [Para 3]

- Yes
- No
- [Do not know (*please explain*)]

[If **no**, please proceed to Article 8 on Emissions.]

If **yes**, ] [H][h]as the party notified the secretariat that artisanal and small-scale gold mining within its territory is [significant][more than insignificant]?

- Yes
- No

[[2.] [Are there measures in place][Have steps been taken] to reduce, and where feasible, eliminate, the use of mercury and mercury compounds in, and the emissions and releases to the environment of mercury from artisanal and small-scale gold mining [that is more than insignificant][subject to Article 7][ within your territory]? [Para 2]

- Yes
- No

If **yes**, please provide information on measures.]

3. Has the party developed and implemented a national action plan and submitted it to the Secretariat? [Para 3(a) and 3(b)]

- Yes
- No
- In progress

4. [Attach your most recent review that must be completed per Article 7, paragraph 3 (c), unless it is not yet due.] [Has the party provided a review every three years of the progress made in meeting its obligations? [Para 3(c)]

- Yes
- No
- three year review not yet due]

[5. Has the party cooperated with other countries or relevant intergovernmental organizations or other entities to achieve the objective of this article?

- Yes
- No

If **yes**, please provide information.]

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**Article 10: Environmentally sound interim storage of mercury, other than waste mercury**

1. Has the party taken measures to [ensure][require] that the interim storage of non-waste mercury and mercury compounds intended for a use allowed [under the Convention] is undertaken in an environmentally sound manner? [Para 2]

- Yes
- No
- [Do not know (*please explain*)]

If **yes**, please indicate the measures taken to ensure that that such interim storage is undertaken in an environmentally sound manner and the effectiveness of those measures.

**Article 11: Mercury wastes**<sup>[16]</sup>

1. Have measures outlined in Article 11 paragraph 3 been implemented for a party's mercury waste? [Para 3]

- Yes
- No

If **yes**, please describe [relevant] measures [implemented] pursuant to paragraph 3, and please also describe the effectiveness of those measures:

[Are there [appropriate] facilities for managing mercury waste in the party's territory?

- Yes
- No
- [Do not know (*please explain*)]

If **yes**, please indicate the measures taken to ensure that mercury waste is managed in accordance with paragraph 3 of Article 11 and the effectiveness of those measures.]

<sup>16</sup> [Parties should take account of corresponding reporting under the Basel Convention]

### **Article 12: Contaminated sites**

1. Has the party endeavoured to develop [appropriate] strategies for identifying and assessing sites [in its territory] contaminated by mercury or mercury compounds [in its territory]? [Para 1]

- Yes
- No

Please elaborate

### **[Article 13: Financial resources and mechanism**

1. Has the party [undertaken to provide] [provided], within its capabilities, resources in respect of those national activities that are intended to implement the Convention[,] in accordance with its national policies, priorities, plans and programmes? [Para 1]

- Yes (*please specify*)
- No (*please specify why*)
- [Other (*please specify*)] [Please explain]

2. Has the party, within its capability, contributed to the mechanism for the provision of financial resources? [Para 12]  
[Supplemental information] (*Please tick one box only*)

- Yes (*please specify*)
- No (*please specify why*)
- [Other (*please provide information*)] [Please explain]

[3. Has the party provided financial resources to assist developing country parties and/or parties with economies in transition in the implementation of the Convention through other bilateral, regional and multilateral sources or channels? [Para 3]  
[Supplemental information] (*Please tick one box only*)

- Yes (*please specify*)
- No (*please specify why*)
- [Other (*please provide information*)] [please explain]

### **Article 14: Capacity-building, technical assistance and technology transfer**

1. Has the party cooperated to provide [within its capability] capacity-building or technical assistance, pursuant to Article 14, to [another party][developing country Parties][including the least developed and small island developing states][economies in transition] to the Convention? [Para 1]

- Yes (*Please specify*)
- No (*Please specify*)

2. Has the party received capacity-building or technical assistance pursuant to Article 14? [Para 1] [Supplemental information]

- Yes (*please specify*)
- No (*Please specify*)
- No. The party is a developed country ]

[If **yes**, has the party considered that they received capacity-building or technical assistance [and transfer of technology] sufficient [to implement][to strengthen their capacity to effectively implement] the provisions of the Convention? Please describe]

3. Has the party promoted and facilitated the development, transfer and diffusion of, and access to, up-to-date environmentally sound alternative technologies? [Para 3] (*Please tick one box only*)

- Yes (*please specify*)
- No (*please specify why*)
- [Other (*please provide information*)] [Please explain]

#### [Article 16: Health aspects

1. Have measures been taken to provide information to the public [in accordance with paragraph 1 of Article 16]? [Para 1]

- Yes
- No

If **yes**, describe the measures that have been taken.

If **yes**, what has been the effectiveness of the measures?]

#### Article 17: Information exchange

1. Has the party facilitated the exchange of [the kinds of] information [listed in Article 17, paragraph 1]? [Para 1]

- Yes
- No

[If **yes**, what was the subject of the information that was exchanged:

If **yes**, was the information exchanged:

(a) [Directly][ through the secretariat?]

- Yes
- No]

(b) In cooperation with other relevant organizations, including the secretariats of chemicals and wastes conventions?

- Yes
- No]

**Article 18: Public information, awareness and education**

1. Have measures been taken to [provide information] [promote and facilitate the provision] to the public [of the kinds of information listed in Article 18, paragraph 1]? [Para 1]

- Yes
- No

If **yes**, please indicate the measures that have been taken and the effectiveness of those measures?

**Article 19: Research, development and monitoring**

[1. Has the party undertaken any research, development and monitoring?] [Para 1]

- Yes
- No

If **yes**, please describe these actions [and any information on their effectiveness].

**[Article 20: Implementation plans**

1. Has the party developed an implementation plan for meeting its obligations under the Convention? [Para 1]

- Yes
- No

If **yes**, has the plan been submitted to the secretariat?

- Yes
- No]

**Part C: Comments regarding possible challenges in meeting the objectives of the Convention.** [Art 21, Para 1]

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**Part D: Comments regarding the reporting and possible improvements.**

[Supplemental information]

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## Draft decision on effectiveness evaluation

*The Conference of the Parties,*

*Recalling* article 22 of the Minamata Convention on Mercury [on][which addresses] effectiveness evaluation, and which requires that the effectiveness of the Convention be evaluated beginning no later than six years after the date of entry into force of the Convention and periodically thereafter at intervals to be decided by it,

*Recalling* also that article 22 prescribes that the evaluation shall be conducted on the basis of available scientific, environmental, technical, financial and economic information,

*Mindful* that article 22 [requires][provides] that the first Conference of the Parties [shall] initiate the establishment of arrangements for providing itself with comparable monitoring data on the presence and movement of mercury and mercury compounds in the environment as well as trends in levels of mercury and mercury compounds observed in biotic media and vulnerable populations,

*Aware* that the evaluation is to be conducted on the basis of available scientific, environmental, technical, financial and economic information, including national reports under article 21, monitoring information [pursuant to paragraph 2 of article 22], compliance information [pursuant to article 15] [and recommendations] and reports on [the operation of the] financial and technical assistance [and technology transfer] arrangements under the Convention,

*Recognizing* the need for a strategic and cost-effective approach, and building on [existing] human health and environmental monitoring programmes [to the extent possible], with the aim of providing appropriate and sufficient data for the effectiveness evaluation of the Convention,

Taking note of the document UNEP(DTIE)/Hg/COP1/12 which provides a compilation and analysis of [some of] the [key] means of obtaining monitoring data to be considered in the evaluation of the effectiveness of the Convention,

1. *[Agrees][Decides]* to initiate arrangements to provide itself with comparable monitoring data on the presence and movement of mercury and mercury compounds in the environment as well as trends in levels of mercury and mercury compounds observed in biotic media and vulnerable populations, on which to base its evaluation of the effectiveness of the Convention;
2. *[Further] Decides* that these arrangements will be [developed][initiated] through the [creation][establishment] of a[n] [ad hoc] technical expert group, whose terms of reference are set out in the annex to this decision,



3. *Also decides* that the technical expert group will meet [once][twice] before the Second Conference of the Parties, [subject to available resources],
4. *Requests* the Executive Secretary to organize the meeting[s] of the [ad hoc] technical expert group, [and to provide it with information on existing monitoring programmes and datasets,]
5. *Requests* the Secretariat [to update the information in note UNEP(DTIE)/Hg/COP1/12 by the Secretariat on existing human health and environment monitoring programmes, including other programmes that can contribute to the global monitoring plan, and on the basis of submissions by Parties[, governments and others], and] to prepare a report for the technical working group;
6. *Invites* relevant organizations [such as the World Health Organization and the World Meteorological Organization] to collaborate in the above arrangements with a view to making monitoring data available for evaluation of the effectiveness of the Convention;
7. *Requests* the Executive Secretary to develop a [proposal][strategy] for consideration of the Second Conference of the Parties on how it [may][should] obtain the other information required for the effectiveness evaluation, including the reports submitted under articles 21 and 15 of the Convention, reports submitted on capacity-building, [financial assistance,] technical assistance and technology transfer, including their timing so as to dovetail with the review in [six][eight] years;
8. *Further requests* the Executive Secretary to draft a framework for conducting the first effectiveness evaluation, taking into account the [frameworks][effectiveness evaluation experiences] under other chemicals and waste regimes, [particularly the Stockholm Convention,] and outlining how the information in paragraph 5 above, will be used in that framework;
9. *Agrees* that immediate actions for longterm funding arrangements, including capacitybuilding to implement the global monitoring plan, should be started, [taking into account gaps in information between regions and their capabilities to implement monitoring activities] to enable longterm evaluation of the Convention [in accordance with the provisions of its Article 13 on the financial mechanism];
10. *Decides* that the first evaluation shall begin [three][six] years after the date of entry into force of the Convention and be conducted periodically thereafter at [two][four][six] year intervals.

## Annex

1. The technical expert group will undertake:
  - (a) To develop criteria for evaluating [existing monitoring] programmes;
  - (b) To identify [existing] monitoring programmes that fulfil the criteria for contributing to the [production of] baseline data [production], taking into account the updating of the information contained in the note by the Secretariat on existing human health and environment monitoring programmes (UNEP(DTIE)/Hg/COP1/12);
  - (c) To prepare a[n] [analysis][report] on such programmes and others that may make useful contributions, [subject to enhancement of their capacities];
  - (d) To outline the global monitoring plan [along the lines of the principles and requirements contained in the present annex];
  - (e) To develop guidance for data comparability, taking into account the available guidance document produced by the secretariat;
  - (f) To develop an implementation plan [for the global monitoring plan] to fulfil the minimum requirements for the first evaluation, [including][to contain] the following measures:
    - (i) Using data from regional monitoring programmes and data provided by Parties;
    - (ii) Ensuring that data are comparable, [namely, by applying quality assurance and quality control (QA/QC) standards];
    - (iii) Summarizing and presenting the data on a regional basis, to be used as a [to the extent possible];
  - (g) [To coordinate and oversee implementation of the plan in accordance with the elements described [in (f) above]];
  - (h) To report [on] progress to the Conference of the Parties at its second meeting.
2. The expert group will consist of [fifteen][twenty-five] members. [Three][Five] members will be nominated by each of the five UN regions, based on expertise in matters related to the monitoring of mercury in the environment. Members will [represent Parties][serve in their personal capacities]. [Four][Six] observers will be selected by the secretariat representing academia, non-governmental organizations, industry [and other relevant sectors].

## **Draft decision on the specific international programme to support capacity-building and technical assistance**

*The Conference of the Parties,*

*Recalling* article 13 of the Minamata Convention on Mercury, which establishes a financial mechanism to [support][assist] developing-country Parties and Parties with economies in transition in implementing their obligations under the Convention, and that the mechanism[, pursuant to paragraph 6 of Article 13,] includes the Global Environment Facility Trust Fund and a specific international programme to support capacity-building and technical assistance,

*Also recalling* [paragraph 6 of resolution 2 on financial arrangements of the Final Act of the Conference of Plenipotentiaries][paragraph 9 of Article 13] of the Minamata Convention on Mercury, in which [the Conference requested the intergovernmental negotiating committee to develop a legally binding instrument on mercury “to develop for consideration by] the Conference of the Parties at its first meeting [is to decide on] [a proposal for] the hosting institution for the specific international programme, [which shall be an existing entity, and provide guidance to it, including on its duration] including any necessary arrangements with the hosting institution, [as well as guidance on the operation and duration of that programme”],

- [1. *Decides* that the hosting institution referred to in paragraph 9 of article 13 is provided by the United Nations [Environment][Development] Programme;
  - [2. *[Approves][Decides upon][Adopts]* the necessary hosting arrangements, as well as guidance on the operations and duration of that programme, set out in the appendix to the present decision;
  - [3. *[Requests][Invites]* the Executive Director of the United Nations [Environment][Development] Programme to establish a trust fund for the specific international programme;
  - [4. *[Requests][Invites]* the Executive Director of the United Nations [Environment][Development] Programme to [implement][follow][act in accordance with] the governance arrangements set out in the appendix to the present decision[.];]]
- [4 alt *Requests* the Executive Secretary of the Convention to develop a memorandum of understanding with the Executive Director of the United Nations [Environment][Development] Programme to reflect the governance arrangements set out in the appendix to the present decision.]

## **Hosting arrangements, guidance on the operations of and duration of the specific international programme**

### **A. Governance arrangements for the specific international programme**

1. The Executive Director of [UNEP][UNDP] will deliver administrative support to the programme, through the allocation of human and other resources, through the [United Nations Environment Programme][United Nations Development Programme] [Secretariat of the Minamata Convention].
2. [To facilitate the hosting arrangements, a memorandum of understanding will be developed between the Conference of the Parties to the Convention and the United Nations Environment Programme, clearly defining, among other issues, the[ir] roles and responsibilities, [[cost-effective] fees (administrative charges)], accountability framework and reporting requirements.] The [Conference of the Parties][ED] will establish [an executive board] [a specific international programme committee], which will oversee and implement its guidance, including decision-making on projects and project management.

### **B. Guidance on the specific international programme**

#### **1. Scope**

3. The specific international programme is to support capacity-building and technical assistance in accordance with paragraph 6 (b) of article 13.

#### **2. Eligibility**

4. Developing country Parties and Parties with economies in transition are eligible for resources under the financial mechanism in accordance with paragraph 5 of article 13 of the Convention. The specific international programme should also take full account of the specific needs and special circumstances of Parties that are small island developing States and least developed countries in [line][accordance] with paragraph 4 of article 13.
5. Non-Parties are not eligible to apply for funding but can participate in some activities undertaken by the specific international programme upon invitation by a Party, on a case-by-case basis[,when approved by the [executive board][specific international programme committee]].
6. In [presenting][applying for] projects, eligible Parties may consider the participation of implementing and executing agencies or other actors, such as non-gov-

ernmental organizations [and][or] the regional and subregional centres of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Stockholm Convention on Persistent Organic Pollutants.

### **3. Operations**

7. The specific international programme will be guided in its operations as follows. It should:
  - (a) Be country-driven, taking into consideration national priorities, country ownership and the [sustainable] implementation of the obligations under the Convention;
  - (b) [Ensure][Provide] [Achieve] complementarity and avoid duplication with other existing arrangements to provide capacity-building and technical support, in particular the Global Environment Facility and the Special Programme to support institutional strengthening at the national level for implementation of the Basel Convention, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention, the Minamata Convention and the Strategic Approach to International Chemicals Management, as well as [in general] other existing assistance frameworks;
  - (c) Build upon lessons learned and [accommodate [project] engagement] [engage] at the national and regional levels, including by encouraging South-South cooperation; and
  - (d) Be consistent with the integrated approach to financing the sound management of chemicals and waste, as relevant to the implementation of the Convention[, and encourage leveraging of financing from other sources].

### **4. Resources**

8. Resources for the specific international programme shall include [voluntary] financial and in-kind contributions and expertise. Contributions of resources are encouraged from a broad range of sources [reflecting the integrated approach to financing]. This includes all Parties to the Minamata Convention with the capacity to contribute, as well as other relevant stakeholders, including Governments, the private sector, foundations, non-governmental organizations, intergovernmental organizations, academia and other types of civil-society actors;
9. A resource mobilization strategy for the specific international programme should be developed by the secretariat [for approval at the [second][third] Conference of the Parties] [in consultation with][for approval of] the [executive board] [specific international programme committee] with a view to achieving the objective of the Convention and attracting a broad range of donors, building on lessons learned in other areas. It should include approaches whose purpose is to leverage resources, including in-kind resources, from non-State actors;

10. Other sources of resources for the specific international programme may be leveraged through its coordination with other relevant programmes and initiatives, including:
  - (a) Linkages with existing programmes and initiatives to seek co-benefits where possible;
  - (b) Promoting and leveraging partnerships and collaboration as appropriate, building on lessons learned from other conventions.

### **C. Duration**

11. The specific international programme will [provide funding][be open to receive voluntary contributions] [and applications for support] for [a fixed time period][ten years] [an unlimited period] [a period determined as part of the review of the financial mechanism in accordance with paragraph 11 of article 13][a period as determined as part of the first effectiveness evaluation pursuant to Article 22].

## **[Draft] rules of procedure of the Implementation and Compliance Committee [pursuant to Article 15 of the Convention]**

### **Rule 1: SCOPE**

1. These rules of procedure shall apply to any meeting of the Implementation and Compliance Committee and shall be read together with and in furtherance of [Article 15 of] the Convention.
2. The Rules of Procedure of the Conference of the Parties shall apply, mutatis mutandis to all matters not specifically dealt with under the present Rules.

### **Rule 2: USE OF TERMS**

3. For the purpose of these Rules of Procedure:

“Bureau” shall mean the Bureau of the Convention, established under Rule 22 of the rules of procedure of the Conference of the Parties.

“Committee” shall mean the Implementation and Compliance Committee established by the Convention in Art. 15.

“Party” means a Party to the Convention.

“Secretariat” means the Secretariat referred to in Article 24 of the Convention.

### **Rule 3: MEMBERS**

4. The term of office of a member of the Committee shall commence on 1 January of the calendar year immediately following his or her election and shall end on 31 December [two] [four] years thereafter.
5. If a member of the Committee resigns or is unable to complete his or her term of office or to perform his or her functions, the Bureau, on behalf of the Conference of the Parties, shall, in consultation with the [appropriate UN Region][Party who nominated the member], appoint a replacement to serve the remainder of the term of that member.
6. Each member of the Committee shall, with respect to any matter that is under consideration by the Committee, avoid [direct or indirect][real or apparent] conflicts of interest.

7. Where a member finds himself or herself faced with a [direct or indirect][real or apparent] conflict of interest, or is a citizen of a Contracting Party concerned [by a matter before the Committee], that member shall bring the issue to the attention of the Committee [immediately and][prior to the consideration of that particular matter. The concerned member shall not participate in the elaboration and adoption of any recommendation of the Committee in relation to that matter [, unless the Committee decides that no such conflict exists].
8. Each member of the Committee shall [represent a Party][serve in his or her individual capacity][serve in the best interests of the Convention], and shall take and agree to respect a written oath of service before assuming his or her service. The oath of service shall read as follows:

“I solemnly declare that I will perform my duties and exercise my [authority] [functions] as [a] member of the Implementation and Compliance Committee honorably, faithfully, impartially[,], [and] conscientiously [and in the best interests of the Convention].

I further solemnly declare that, subject to my responsibilities within the Implementation and Compliance Committee, I shall not disclose, even after the termination of my functions, any confidential information [and identified by such by a Party] coming to my knowledge by reason of my duties in the Implementation and Compliance Committee.

I shall disclose immediately to the Committee [and prior to its consideration] any interest in any matter under discussion before the Implementation and Compliance Committee which may constitute a [direct or indirect][real or perceived] conflict of interest [or which might be incompatible with the requirements of [independence and] objectivity expected of a member of the Implementation and Compliance Committee] and I shall refrain from participating in the work of the Implementation and Compliance Committee in relation to such matter.”
9. If the Committee considers that a material violation of the requirements [of independence and impartiality expected of a member of the Committee][regarding conflict of interest] has occurred, it may decide to suspend, or recommend to the COP to revoke, the membership of any member concerned, after having provided a reasonable opportunity for the member to be heard.
10. The Committee shall elect its Chair and a Vice-Chair for a term of two years. The Chairs will rotate among the UN regions every [two][four] years, provided that the Chair and the Vice-Chair shall not be from the same UN Region.
11. The Secretary of the Conference of the Parties shall act as secretary to the meetings of the Committee.



**Rule 4: AGENDA**

12. The provisional agenda of the Committee shall include items arising from its functions as specified in Article 15 of the Convention and other matters related thereto[, as developed by the Secretariat in consultation with the Chair and Vice-chair].
13. Notice of meetings shall be sent to the members at least six weeks before the opening of the meeting [along with the provisional agenda].
14. To the extent possible, the provisional agenda, together with official supporting documents, shall be distributed by the Secretariat to all members of the Committee at least three weeks before the opening of any meeting of the Committee.

**Rule 5: DISTRIBUTION AND CONSIDERATION OF [INFORMATION]  
[SUBMISSIONS]**

15. Members of the Committee shall be informed immediately by the Secretariat that a submission has been received.
16. A submission received shall be transmitted by the Secretariat to the members of the Committee as soon as possible but no later than ninety days of receipt of the submission.

**Rule 6: SUBMISSIONS BY THE CONFERENCE OF THE PARTIES OR  
PARTY**

17. Any submission by the Conference of the Parties or a Party with respect to its own compliance [or that of another Party] shall follow the format contained in the Annex to these rules of procedure.

**[Rule 6bis: PARTY SUBMISSIONS REGARDING ANOTHER PARTY**

18. Submissions may also be made by a Party about the compliance of another Party, including relevant information to substantiate their concern.]

**Rule 6ter: REVIEW OF NATIONAL REPORTS**

19. Submissions may also be made by the Secretariat, if, while acting pursuant to paragraph 2 of Article 24 of the Convention, it becomes aware that a Party may face difficulties in complying with its obligations under the Convention on the basis of the reports received pursuant to Article 21[, considering [all their] obligations under the Convention], provided that the matter has not been resolved within ninety days by consultation with the Party concerned.

20. Any submission made under this subparagraph shall be made in writing and shall set out the matter of concern, the relevant provisions of the Convention and the information substantiating the matter of concern.

### **Rule 7: PUBLICATION OF DOCUMENTS**

21. Subject to Rule 8 below, the provisional agenda, official documents and reports of meetings shall be made available to the public.

### **Rule 8: CONFIDENTIALITY**

22. The Committee and any person involved in its work shall ensure the confidentiality of information that has been provided to it following a submission [identified as such by the Party concerned].
23. Information that the Committee must keep confidential under paragraph 22 above shall not be made available to any Party[, except for, the Party that made a submission with respect to its own compliance].
24. Reports of the Committee shall not contain any information that the Committee must keep confidential under paragraph 22 above.
25. Save as otherwise provided for in this Rule, no information held by the Committee shall be kept confidential.

### **Rule 9: USE OF ELECTRONIC MEANS**

26. Electronic means of communication may be used by the members of the Committee for the purpose of:
- a) conducting informal consultations on issues under consideration; and
  - b) elaborating and taking decisions in writing using electronic means of communication.
27. The Committee may establish further rules on electronic means of communication, taking into account the provisions of Rule 8 above.

### **Rule 10: CONDUCT OF BUSINESS**

28. [Meetings will be open unless the Party whose compliance is in question requests that the meeting be closed][The Committee shall decide on whether it will meet in open or closed meetings.] Such decisions, including the reasoning thereof, shall be reflected in the reports of the Committee.

29. Subject to paragraph 30 below, any person invited by the Committee may attend its meetings.
30. [The Committee may, subject to the availability of financial resources and where the circumstances so require, invite to its meetings any expert or person with valuable knowledge to provide technical opinion, advice or information that may assist the effective consideration of a matter before it.]
31. Only members of the Committee and Secretariat officials may be present during elaboration and adoption of a decision or a recommendation by the Committee.

#### **Rule 11: PARTICIPATION IN PROCEEDINGS OF THE COMMITTEE**

32. A Party in respect of which a submission is made or which makes a submission with respect to its own compliance shall be invited to participate in the deliberations of the Committee [but not in the elaboration or adoption of a recommendation]. The Party concerned shall be given an opportunity to comment in writing on any recommendation of the Committee. Any such comments shall be forwarded with the report of the Committee to the Conference of the Parties.

#### **Rule 12: MAKING OF RECOMMENDATIONS**

33. The Committee shall make every effort to adopt its recommendations by consensus. If [that is not possible][all efforts at consensus have been exhausted and no consensus is reached], [such] recommendations shall [as a last resort] be [made][adopted] by [a] [three-quarters] majority-vote [of the members present and voting, based on a quorum of two-thirds of the members,] as specified in Article 15(6) of the Convention.

#### **Rule 13: LANGUAGES**

34. The working language of the Committee shall be English [or any other official United Nations language agreed by the Committee.]
35. The submissions from the Contracting Party concerned, the response and any related information, shall be made in any one of the six official languages of the United Nations. The Secretariat shall make arrangements to translate them into English if they are submitted in one of the languages of the United Nations other than English.
36. A representative of the Contracting Party concerned taking part in the proceedings of the Committee in accordance with section VI.8 of the Compliance

Procedures may speak in a language other than the working language of the Committee, subject to the availability of interpretation.

**Rule 14: EXPENSES**

37. Expenses incurred by members of Committee, when attending sessions of the Committee, and the costs for related activities shall be covered under the Core Administrative Budget as may be adopted by the Conference of the Parties [at its [Regular][ordinary] Sessions].

**Rule 15: AMENDMENTS TO THE RULES OF PROCEDURE**

38. Any amendment to these rules of procedure shall be adopted by [consensus][by a three-fourths majority vote] by the Committee and submitted to the Conference of the Parties for consideration and approval.
39. Any amendment of these rules of procedure [adopted by consensus]by the Committee shall be provisionally applied pending their approval by the Conference of the Parties.

**Rule 16: OVERRIDING AUTHORITY OF THE CONVENTION**

40. In the event of a conflict between any provision in these rules and any provision in the Convention, the provisions of the Convention shall prevail.

**Rule 17: [ENTRY INTO FORCE][APPLICATION]**

41. These Rules and any amendments thereto shall [come into force][be applied] upon their approval by the Conference of the Parties.

## 4 Review of the exercise

### 4.1 Introduction

The following is a brief summary of the proceedings and analysis based on the evaluation prepared by Veera Jerkku of the University of Eastern Finland, summarizing participants' feedback, informal feedback from participants during the simulation, as well as feedback shared among the organizers and resource persons.

There were 29 official participants in all, not including the facilitators and the other resource people who supported the simulation.<sup>17</sup> The participants were mainly from ministries or agencies responsible for environmental matters of their respective countries, although academic and non-governmental organizations were also represented.

### 4.2 General comments

Overall, the exercise was considered very successful by participants, with very high scores on the quality and relevance of the negotiating simulation. This type of interactive learning process was seen to be a valuable way to learn about international negotiations and gain insights into the complexity of multilateral environmental negotiations. Nevertheless, both participants and resource persons shared feedback on how the Course could be further improved.

### 4.3 Feed-back on the simulation objectives

#### 4.3.1 Understanding of the challenges and opportunities related to negotiating more specific infrastructure in a new MEA, both in general and in the specific context of the international mercury management regime

The design of the exercise allowed participants to learn about a recently-adopted MEA that is set to enter into force, both through the preparatory lecture on the Convention, as well as the negotiation of the specific text. The differences in the texts provided to participants the opportunity to understand the difference between text that had already been subject to negotiation, where clean text was not to be re-opened unless it solved a problem in bracketed text, and text which was being negotiated for the first time. Resource persons helped coach participants on how to handle interventions based on these differences.

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<sup>17</sup> The 29 participants included 16 women and 13 men from the following 24 countries: Argentina, Armenia, Bangladesh, Belgium, Brazil, Chile, Ecuador, Finland, Germany, Greece, Guatemala, India, Iran, Malaysia, the Maldives, New Zealand, Norway, Philippines, Solomon Islands, Sweden, Switzerland, Tanzania, Uganda, and the United Kingdom.

### **4.3.2 Understanding of the principles and practices of multilateral negotiations, and appreciation of the value and role of the rules of procedure**

Participants also noted that they were more aware of the legal issues, the treaty and the rules of procedure for future negotiations.

The process of negotiating was revealing to many participants, and for those who had never negotiated before, there came a key realization that negotiators become invested in achieving their positions – even in a situation that was known to be artificial. Chairs became driven to ensure that their group would achieve an outcome to report to the COP plenary at the end of the session, and all groups wanted to have their texts reported without brackets. This desire to produce an outcome for the meeting drove one group to negotiate outside the set hours in order to make more gains, and led others to negotiate through planned coffee breaks.

### **4.3.3 Familiarity with specific substantive and drafting issues**

Numerous participants commented on how the negotiating simulation had improved their negotiating, drafting and diplomatic skills, including carrying out in a practical way some of the lessons from the presentations of the previous ten days.

Nevertheless, a number of delegates suggested a longer lecture on negotiating skills to help prepare delegates for the negotiation which followed.

### **4.3.4 Discussion and appreciation of different perspectives on substantive and institutional issues related to international cooperation on chemicals management**

Participants prepared very thoroughly for their interventions under the plenary agenda items related to the subject of their brief, and this is an aspect that could be repeated and emphasized in future Courses, particularly when tied with contact group negotiations, in order to emphasize the difference between plenary and contact group interventions. It was noted that the simulation exercise provided an opportunity to learn how to achieve negotiating objectives and interact with other negotiators.

## **4.4 Specific issues**

### **4.4.1 Materials**

The organizers felt that it could be a useful improvement in future simulations to provide the schedule of negotiations in the general instructions for ease of reference by all negotiators. In addition, the provision of more detailed instructions on the conduct of the COP plenary would be useful so as to avoid relying on the initiative of COP President/Vice-President to lead participants through this portion based on their own more detailed preparations.

The length of the individual negotiating texts for each of the four groups appeared to be just right, in that all groups finished their negotiations with clean text, but not without difficulty.

#### **4.4.2 Roles and individual instructions**

For the first time, negotiators were given instructions in the detailed negotiating text in revisions mode, as would be expected for prepared Party negotiators. While they received general positions, as had been the case in previous Courses, the organizers felt that because of the complexity of the text being used in the simulations, this new approach would ease the burden of preparation and enable participants to focus on sharpening their text negotiating skills. It had an additional benefit of modelling a useful technique for preparing for negotiations. Participants seemed to benefit from having such text, but some noted that despite the overarching positions provided, more detailed rationales for the specific revisions would have made it easier to explain the rationale for their negotiating positions to negotiating partners. For future simulations, it is recommended that if detailed negotiating text is in play, negotiators be provided with a general position and revisions mode text, but with more detail as to the rationale behind specific proposed revisions.

Some scenarios included non-Party positions to illustrate what typically happens at a first COP, when key infrastructure of a treaty is under negotiation, but not every government has had an opportunity to implement and ratify the agreement. Not allowing careful consideration of the views of prospective Parties on such key issues can sometimes impact on their desire to subsequently ratify. The intention was to have a few negotiators have to explain this difficulty to the meeting and nevertheless try to influence discussions. However, given that each of the four groups was fairly small, with approximately six negotiators per group, and Chairs chosen from within the small group, all negotiators were told to act as if they were Parties, with the admonition that under the rules of procedure of a COP, only Parties are allowed to negotiate text.

For future simulations, if the focus is on contact group negotiations, with only a few roles, observers should be left out as they are not allowed to negotiate text. Other types of simulations would be more relevant to including observer roles, such as in the training of contact group chairs, or teaching observers on how to be effective in multilateral negotiations.

#### **4.4.3 Chairing and lead roles**

For the plenary, the general instructions provided an outline of how the plenary should proceed, along with some language in separate briefs for the COP President and Vice-President to use to get through the agenda and make necessary rulings. Delegates were advised that although at a COP a Vice-President would not be seated on the podium unless they were replacing the President for a session, to provide a role for an additional plenary chairing experience, the President and Vice-President acted like co-chairs. While the President and Vice-President took the initiative and

prepared in some detail for their opening and closing plenary – which both went very well and filled the time allotted – more structure should be provided in future simulations in order to guarantee such a good result.

The UNEP-UEF simulation exercises have traditionally asked one of the negotiators to take on the role of Chair of the plenary or contact groups in the simulations. Because the simulation was aimed at helping new negotiators develop negotiating skills, the organizers had asked themselves whether this was a lot to ask of a new negotiator. They also recognized that this approach had the disadvantage of inordinately reducing the number of negotiators in an already small group, and thus taking out of the carefully crafted simulation one negotiating position that might have been critical to the overall balance of positions. To address the first concern, it was decided to have one experienced resource person in each of the contact groups to act as both Secretariat and coach to the Chair and provide advice as the negotiations proceeded. The reduction in numbers meant more negotiating time for each negotiator, and any loss of negotiating perspective was balanced off by the instruction that all negotiators be creative in augmenting their instructions to create any necessary tension, as long as they were consistent with their overall negotiating position. These efforts seemed to work well in all groups, with the simulation, which was designed to last for 1.5 days, finishing right on time, although some groups had to use part of the coffee break before the final plenary to achieve consensus.

However, the organizers of the simulation for the next Course should consider whether this exercise would benefit from having the experienced resource persons do the chairing in order to provide a greater number of participants with a negotiating experience, and to give all negotiators a more realistic experience on how a meeting is chaired.

Experienced resource persons supported each of the negotiating groups, playing the Secretariat role of providing procedural advice and typing text on the screen, but also giving Chairs strategic advice on chairing – a role Secretariats do not usually play. Chairs found that these advisors played a helpful role in the process.

#### **4.4.4 Country names**

There was a conscious choice to avoid the use of real country names in order not to cause offence. Fictitious country names were thus utilized. While this avoided any political difficulties, particularly in realistic scenarios involving future negotiations, it also meant that participants needed more robust information about the features and characteristics of their Party in order to represent it more appropriately. They also had to make other negotiators aware of such details in order to be identified as a country with issues in common. This was a source of humour, as one country name in European Spanish had quite another meaning in Chilean Spanish, and ironically the person given that name was from Chile!

Another downside of the made-up names was that ambitious delegates were not in a position to do further research on their country's actual situation with respect to the mercury issue.



Individual participant names were put on the country name cards, based on recommendations from the past, and this proved successful as a means of remembering participant names as well as their Party names.

#### **4.4.5 Size of the negotiating groups**

There were four groups of six to seven negotiators, which were each reduced by one to have a Chair, with the result that the final groups consisted of only five to six negotiators. An option for future simulations would be to consider the possible benefits of having two negotiating groups, rather than four, which could offer participants a more realistic contact group experience with a broader range of positions. On the other hand, given the limited time of a day and a half for the simulation, the small numbers gave each negotiator an opportunity for a very active role, which helped replicate the intensity of real-life contact group negotiations.

#### **4.4.6 More time on negotiating basics and simulations**

In the written evaluations, a number of participants suggested that more time be spent on providing information about negotiating basics, and that more time could be spent in the negotiating simulation.

#### **4.4.7 Support to the simulation**

The staff and students of the University of Eastern Finland provided excellent support to the negotiating simulations. The plenary and four individual negotiating rooms with onscreen negotiating capacity were well-organized, and this experience in running the simulations was appreciated by all involved.

## **5 Concluding remarks**

Negotiation simulation exercises have been an important annual feature of the UEF – UNEP MEA Courses. They reflect the interactive nature of the Course, and provide a very useful learning experience and key tools for the participants to use in their working lives involving multilateral environmental negotiations and agreements. The feedback received from the participants of the 2016 Course showed that, in general, the exercise was highly valued in terms of both quality and relevance. The simulation allowed the participants to enhance their practical negotiation skills and to gain insight into how MEA negotiations are conducted. The present paper includes also suggestions to consider when planning negotiation exercises for the future Courses. Many participants indicated that they would have benefited from a longer lecture on negotiation skills preceding the exercise. Furthermore, the organizers of the exercise should carefully consider the pros and cons of the different options of organizing contact group chair and rapporteur roles as well as of devising the individual instructions.

The articles in the present Review are based on lectures given during the 13th University of Eastern Finland – UNEP Course on Multilateral Environmental Agreements, which was held from 21 November to 1 December 2016 in Joensuu, Finland. The special theme of the course was “Effectiveness of Multilateral Environmental Agreements”. The aim of the Course was to convey key tools and experiences in the area of international environmental law-making to present and future negotiators of multilateral environmental agreements. In addition, the Course served as a forum for fostering North-South co-operation and for taking stock of recent developments in the negotiation and implementation of multilateral environmental agreements and diplomatic practices in the field.

The lectures were delivered by experienced hands-on diplomats, government officials and members of academia. The Course is an event designed for experienced government officials engaged in international environmental negotiations. In addition, other stakeholders such as representatives of non-governmental organizations and the private sector may apply and be selected to attend the Course. Researchers and academics in the field are also eligible.

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