



# **Issues of Compliance:** Considerations for the International Regime on Access and Benefit Sharing

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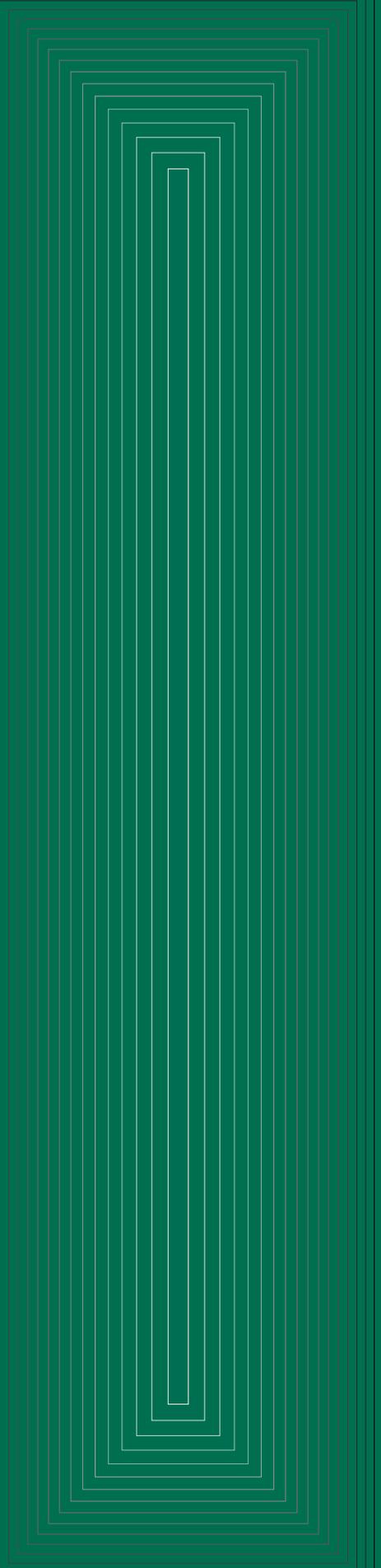
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## Foreword

The negotiations on finalizing the International Regime on Access to Genetic Resources and Benefit Sharing (IR-ABS) is entering its final and crucial stage now with a mandate from the Eighth Conference of Parties (COP) to the Convention on Biological Diversity (CBD) to complete negotiations before the Tenth COP of the CBD in 2010.

Based on the experience from the negotiations so far, a key element that is still receiving considerable attention from the negotiators is that of how to agree on the compliance measures with the IR-ABS. The expert meeting convened by the CBD Secretariat in January 2009 on the issue of addressing legal issue of compliance within the IR-ABS provided a good platform for sharing opinions and options to deal with compliance issues within the Regime.

With its long standing experience and technical expertise, UNEP Division of Environmental Law and Conventions (DELIC) has been supporting several multilateral environmental agreements (MEAs) in understanding, interpreting and implementing legal measures to effectively realize the objectives of the MEAs. In line with this, DELIC prepared a compilation of experiences gathered on how different MEAs are focusing on compliance issues as early as 2007. In continuation of such work element, DELIC embarked on developing this paper to help negotiators working on finalizing the IR-ABS understand different dimensions of compliance issues and assess the experience of different MEAs in dealing with compliance.

The information, views and opinions expressed in this paper are purely for purposes of enhancing the understanding of various compliance regimes and is in no way presented to prejudice the ongoing negotiations under the IR-ABS.

It is hoped that this paper will help, in whatever limited way it can, to finalise the much expected IR-ABS in the months to come so that CBD COP 10 will see the final adoption of the Regime in an appropriate form. UNEP is standing committed to help Parties to CBD and all other stakeholders in the implementation of the Regime when it is finalized and decided upon.

Authors

Nairobi, 2010

# Issues of compliance: Considerations for the international regime on access and benefit sharing<sup>1</sup>

*Multilateral environmental agreements (MEAs), with the exception of a few like the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer and the Kyoto Protocol, have included relatively soft compliance measures such as monitoring, information gathering and reporting.*

## I. Introduction

The formal sources of international law include general principles of international law, international custom and all multilateral agreements between States, whether regional or global and whether they are referred to as treaties, conventions or otherwise. Multilateral agreements create rights and obligations for the Parties to those agreements as they themselves are involved in decision-making with regard to the development and implementation of the agreements. The fulfilment by the parties of their obligations under multilateral agreements is key to ensuring the effectiveness of international environmental law in general and the common interest of all the contracting states to a specific agreement in particular. Unfortunately, States' compliance with multilateral agreements is one of the main problems in the implementation of international law at the international and national levels.<sup>2</sup> State sovereignty has always played and continues to play a key role in how States behave in respect of multilateral agreements<sup>3</sup>. Implementation by the Parties to multilateral agreements will be promoted and encouraged by the legitimacy<sup>4</sup> of the agreements, consisting of a sound treaty-making process, well-defined obligations, transparent compliance mechanisms with foreseeable consequences for Parties' and benefits of compliance that outweigh the costs of non-compliance.<sup>5</sup> Nevertheless it happens that contracting States do not fulfil their obligations, due to either a lack of human, technical or financial resources and capabilities or even political will.<sup>6</sup>

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1 The views and opinions expressed in this document are those of the authors and do not represent those of the United Nations Environment Programme (UNEP).

2 Alexandre Kiss, "Reporting Obligations and Assessment of Reports", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 229.

3 See UNEP/CBD/BS/COP-MOP/3/1.

4 Jutta Brunnee, "Enforcement Mechanisms in International Law and International Environmental Law", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 8.

5 Beyerlin, Stoll & Wolfrum, "Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia", 2006,

6 *Ibid*, 2006 p. 9; "A Dialogue between Practitioners and Academia", 2006, Martinus Nijhof Publishers, p. IX.

According to the United Nations Environment Programme (UNEP) Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements (Guideline 9 a, UNEP 2002), compliance is the fulfilment by the contracting parties to a multilateral agreement of their obligations under the agreement, any amendments to the agreement and decisions by the Parties to the agreement on its implementation. Assessed at the international level, compliance is first of all ensured by the implementation of international obligations at the national level through the adoption or adaptation of appropriate domestic measures, for instance the enactment of legislation, the formulation of policies or the allocation of resources (Guidelines 18-33, UNEP 2002). States may wish to include provisions establishing a non-compliance mechanism in a treaty with a view to assisting Parties to comply and addressing individual cases of non-compliance (Guideline 14 d, UNEP 2002). In doing so, the Parties to an agreement must take into account the importance of tailoring compliance provisions and mechanisms to the agreement's specific obligations and basing them on clear criteria for successful implementation and enforcement of the agreement. Defining non-compliance is often a matter of protracted discussion among Parties. The point is well illustrated by the continuing discussions to define more clearly the compliance mechanism and its implementation under the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.

*Compliance is not a binary issue and that non-compliance therefore should not be defined as the total absence of fulfilment; rather it is often a question of degrees of non-observance.*

One of the key moments for us to reflect on the experiences related to development and implementation of compliance measures within the context of environmental law as a part of MEAs is now, when Parties to the Convention on Biological Diversity (CBD) are finalising the negotiations of an international Protocol on Access and Benefit Sharing (ABS). Current discussions on ABS has a primary focus on how Parties could define the compliance measures under the Protocol that will be presented to CBD COP 10 meeting in 2010. Key negotiations are revolving around how the provider and user countries of genetic resources will not only agree on issues of prior informed consent (PIC) but also agree mutually on terms and conditions of providing access and sharing the benefits from the use of the genetic resources. However, currently, critical discussions relate to what kind of compliance mechanism should oversee the principles of ABS and the elements of

the ABS Protocol. With provider countries focusing on how to reduce and stop misappropriation of genetic resources and user countries seeking clarity on terms and conditions of access and benefit sharing, Parties negotiating the international regime on ABS as a Protocol under the CBD need some refresher on how compliance issues have been discussed, decided and implemented across different MEAs and trade agreements in order to learn from such processes and experiences in developing appropriate measures under the ABS Protocol to CBD.

With a view to provide with the negotiators, of ABS regime under CBD, an overview of issues related to compliance from a legal perspective and based on experiences from different instruments, this paper that attempts to provide an overview of issues related to compliance in the context of environmental law, steps and approaches in developing compliance measures, structure and form of some of the existing compliance mechanisms, experiences from different MEAs on how compliance is being addressed. The last section of this paper attempts to provide some perspectives to negotiators on compliance issues within the current ABS Protocol discussions under the CBD.

## II. Compliance in the context of environmental law

The world is confronted with transboundary environmental issues such as climate change, biodiversity loss and pollution that must be dealt with through international cooperation<sup>7</sup> based on clearly defined principles and norms as well as diplomacy. The legal instrument commonly used in this respect is the multilateral environmental agreement, where several countries agree on a common set of goals, objectives and measures to deal with specific environmental issues. Compliance with multilateral environmental agreements is often a challenge for a number of reasons. Since issues of compliance are transboundary in nature they are often perceived differently by Parties and non-Parties. Also, capacities and resources needed to effectively implement the provisions of a multilateral environmental agreement, including compliance provisions, are often assessed after the discussions on the agreement are completed, which makes it difficult for Parties to take compliance seriously at the time the agreement is negotiated and enters into force. Lastly, in the absence of strong economic arguments and political will to comply with multilateral environmental agreements, Parties often spend time in developing compliance regimes but expend only limited energy on implementing them. The Montreal Protocol and CITES may be seen as exceptions to this last concern. In addition, the increasing number and complexity of multilateral environmental agreements makes compliance more difficult and might encourage non-compliance. Developing countries, which have large burdens and responsibilities but weak national capacities, face problems implementing some multilateral environmental agreements.<sup>8</sup> Compliance mechanisms must therefore be developed to facilitate compliance and address non-compliance. Although there is no single model of compliance procedure and each mechanism must take the characteristics of its specific agreement into account, such mechanisms

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<sup>7</sup> Ibid.

<sup>8</sup> Elizabeth Maruma Mrema, “Cross-cutting Issues Related to Ensuring Compliance with MEAs”, in *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhoff Publishers, p. 203.

*Collecting information about implementation of a multilateral environmental agreement and possible violations of the agreement is the only way to guarantee transparency and to assess the efficacy of the agreement.*

should favour a non-confrontational and facilitative approach if they are to be accepted by the Parties. Confrontational mechanisms have in general proved to be relatively ineffective and unpopular.<sup>9</sup> An additional issue that needs consideration when Parties begin to discuss compliance under a particular multilateral environmental agreement is that of the governance principles of the agreement itself, i.e., whether Parties can decide issues by consensus or by vote.

### III. Developing a compliance mechanism

Some basic issues of relevance to compliance, especially the development of compliance measures, are discussed in this section.

#### A. Information gathering

One of the pre-requisite in identifying non-compliance is securing information. Non-compliance can be detected and revealed by four actors: the non-compliant Party itself, the compliance body, the secretariat of the agreement at issue and another contracting Party regarding the non-compliant Party. The reliability, relevance and timeliness of information provided to a multilateral environmental agreement's compliance body are key to promoting effective compliance. This brings us to a major aspect of non-compliance procedures, namely, information gathering, analysis and use. Information on compliance with the agreement can come from the contracting Parties themselves, in accordance with their reporting obligations under the agreement; it can be obtained in the course of inspections and monitoring by the compliance body; and it can come to light as the result of the commencement of a non-compliance procedure. All of these, however, need to be accepted by those negotiating the agreement's compliance regime as procedures that can be used for dealing with non-compliance.

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<sup>9</sup> Jutta Brunnee, "Enforcement Mechanisms in International Law and International Environmental Law", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 14.

A well-referenced, authenticated information-sharing mechanism such as a clearing house is thus one of the first requirements for an effective compliance mechanism. Such a clearing house should be tailored to the multilateral environmental agreement in question and, as appropriate, provide for the collection of information, set out options for validation and/or authentication of such information and feature appropriate rules on confidentiality.

## **B. Reporting obligation**

The Parties to a multilateral environmental agreement may be required by the terms of the agreement to report information on their implementation of the agreement. This allows the Parties to demonstrate how effectively the agreement is being implemented and enforced. The rigour with which Party provides report of implementation of its mandates (often referred to as national reports) forms the core of the assessment of compliance and non-compliance. Preparation of the national report is a bottom-up form of fact-finding<sup>10</sup> as it can lead to the identification of non-compliance by a party itself and/or by a verification mechanism meant to testify to the accuracy of the data provided. The information produced concerns scientific data but also reassesses decisions made by national officials, other national stakeholders and Parties in default.<sup>11</sup> National reports should consist of accurate, up-to-date, complete, transparent and comparable information. Once collected the information in national reports must be analysed, interpreted and assessed in good time in order correctly to assess treaty compliance and to respond to deficits in an appropriate manner.<sup>12</sup>

States do not always comply with their reporting obligations.<sup>13</sup> Indeed, many States refuse to take part in the monitoring of compliance,

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10 Michael Bothe, "Ensuring Compliance with Multilateral Environmental Agreements – Systems of Inspections and External Monitoring", in *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 247.

11 Alexandre Kiss, "Reporting Obligations and Assessment of Reports", in *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 230.

12 Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary Approach", University of Joensuu Publications in Law, 2004, p. 49.

13 *Ibid* 2004, p. 48.

seeing it as an intrusion on their sovereignty.<sup>14</sup> When States do comply with their reporting obligations the information that they provide varies greatly and sometimes fails to reflect accurately the national situation. Possible reasons for this include a lack of capacity to gather, assess and provide credible information, lack of resources, unclear reporting formats that may not provide the opportunity for objective assessment, agreement by Parties that national reports will not constitute a basis for deciding on non-compliance issues and others. It is important, however, to understand that non-compliance with a reporting obligation is a treaty violation like any other.

Reporting in an objective and clear manner offers many benefits to a multilateral environmental agreement. Apart from serving as a key source of information for dealing with compliance and non-compliance, it provides a source of information and experience that Parties can use to learn from each other, especially on difficult and emerging issues such as access to genetic resources and benefit sharing.

Although various studies show that reporting practices under multilateral environmental agreements are quite effective and efficient and have many positive aspects, the weakness of self-reporting is becoming increasingly evident to multilateral environmental agreement secretariats.<sup>15</sup> Alternative ways for gathering information and ensuring compliance are therefore sometimes needed.

### **C. Observation, inspection and monitoring**

Another way that information can be gathered under a multilateral environmental agreement is through compliance observation, verification, inspection and monitoring. In contrast with reporting, these methods are top-down forms of fact-finding<sup>16</sup> and require greater participation, understanding and good will on the part of Parties.

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Michael Bothe, "Ensuring Compliance with Multilateral Environmental Agreements – Systems of Inspections and External Monitoring", in *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 247.

<sup>17</sup> Ibid.

Inspections can be conducted by multilateral environmental agreement bodies in the case of monitoring or by designated observers or inspectors in the case of observation or inspection. Observation, on-site inspection and monitoring are a part of the control process of an agreement. Their aim is to detect possible breaches, to define whether non-compliance has occurred and, if so, to determine the required enforcement measures. They also help to prevent future violations by a non-compliant Party's concern for its reputation. In general, on-site inspections are executed by domestic authorities, treaty compliance bodies or independent consultants. Observers and inspectors are usually nominated by the States willing to participate in the monitoring programme, while breaches are dealt with by a central body and sanctions are left to the non-compliant Party itself. There are various kinds of inspections. They include routine inspections, where the time of inspection is regulated; short-notice inspections, conducted "when necessary" with little prior notice; challenge inspections, not necessarily on short notice; or inspections carried out at the invitation of the Party to be inspected, when the Party wishes to prove that no violation has occurred.<sup>17</sup>

Since inspections interfere in their domestic affairs, Parties sometimes consider them to be excessively intrusive and remain quite reluctant to expose themselves to them. Governments also fear the possible misuse of any information obtained. As a result only a few multilateral environmental agreement provide for on-site observation and inspection as means of information gathering and compliance control. These include the International Convention for the Regulation of Whaling, the Antarctic Treaty, CITES and the Convention on Wetlands of International Importance, Especially as Waterfowl Habitat. As a safeguard to States' sovereignty, Governments may in some cases have the right to refuse or postpone the participation of outside experts. Moreover, the powers of inspectors are usually limited in comparison to the powers of internal authorities.<sup>18</sup> Still, it has been predicted that on-site monitoring will become increasingly common as a feature of future multilateral environmental agreements.<sup>19</sup> Such monitoring can be expensive but may give a more detailed picture of compliance compared with national reports.

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

## **D. Initiating a non-compliance procedure**

There are several ways that a non-compliance procedure can be triggered, depending on the terms of the particular multilateral environmental agreement in question. A Party might initiate a procedure with regard to its own non-compliance itself, the so-called self-trigger. More controversially a Party might trigger a procedure in respect of another Party's compliance, the so-called party-to-party trigger; the right to trigger the non-compliance mechanism could be limited to Parties directly affected by the alleged non-compliance or could be extended to all Parties. Another possibility is for the secretariat to trigger the procedure by referring a case of possible non-compliance to the Parties.

The trigger is a politically sensitive subject, as it may introduce into the process a confrontational element, particularly in the case of the party-to-party trigger. It is worth noting that the party-to-party trigger enables Parties to put pressure on other Parties that do not comply with their obligations. The secretariat trigger, even if less confrontational, raises another issue concerning information gathering and the role of the secretariat in the enforcement of a multilateral environmental agreement. Although the transparency of Party performance plays a crucial role in building mutual trust and promoting compliance, information gathering remains an issue because it can be complex and confrontational in nature. Greater efforts will therefore be needed to find ways of encouraging Parties to take their reporting obligations seriously and to provide clear, measurable and assessable data and information.

## IV. Structure and form of compliance mechanisms

### A. Compliance or implementation committee

The compliance committee, responsible for the international enforcement of a given agreement and dealing with cases of non-compliance, raises an additional issue. More precisely, the composition of this committee may be problematic. Since this committee may have extensive powers, including making recommendations to the conference of the parties, investigating and judging non-compliance cases or even adopting actual response measures, its members should be independent qualified experts working objectively in their personal capacities on behalf of the committee. An equitable geographical representation of the five United Nations' regional groups is advisable as well. Nevertheless, in some multilateral environmental agreements, the members of the compliance committee are nominated by the Parties and elected by the conference of the Parties or by the bureau. The efficacy of such an approach still needs to be demonstrated clearly.

### B. Response measures

Once a case of non-compliance has been identified, response measures must be applied. Depending on the approach embodied in the multilateral environmental agreement at issue, these measures can be either positive or negative or a balanced mix of both. The former refers to friendly procedures in a cooperative atmosphere, with the aim of assisting a breaching party to return to compliance. In contrast, the enforcement doctrine is more accusatory in nature and may involve the use of forceful measures; even here, however, such measures are seen as a last resort, to be employed only when other measures have been exhausted.<sup>20</sup>

Response measures include both incentives and disincentives. The former are soft instruments, consisting mostly of capacity-building

*The international community has two kinds of approaches to respond to non-compliant behaviour by States: the diplomatic or facilitative approach on the one hand; and the coercive or enforcement approach on the other.*

<sup>20</sup> Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary Approach", University of Joensuu Publications in Law, 2004, p. 43.

measures such as workshops and other training, technical and financial assistance, technology transfer and international cooperation. Disincentives can take the form of declarations of non-compliance (colloquially referred to as “naming and shaming”), prohibitions of trade, financial penalties and suspensions of privileges. Multilateral environmental agreements feature a great variety of such measures. Several agreements employ only facilitative approach and few or no enforcement measures; this seems to be changing, however, with the implementation of agreements such as the Kyoto Protocol and the provisions of the World Trade Organisation.

## C. Approaches to ensuring compliance

### 1. *Facilitative approach*

This approach is based on the idea that most treaty violations do not result from wilful misbehaviour of Parties but rather from a lack of awareness, capacity, resources and concerns raised within a given Party regarding implementation of provisions of the treaty. In this view, softer means that promote and facilitate state compliance are more likely to be successful in ensuring the effectiveness of environmental agreements. The use of various positive incentives and continuous dialogue between treaty parties and institutions, international organizations and civil society are means to avoid non-compliance. Facilitative measures must assist countries with creating the capacity to comply with their international commitments and strengthening confidence in the treaty regime as a whole, which will lead to a cooperative atmosphere when dealing with compliance problems.<sup>21</sup> It should be noted that such an approach may encourage greater participation in and implementation of the treaty regime. The management doctrine is an application of the general principle of peaceful settlement of disputes and the principle of caution as it clearly emphasizes preventive measures to protect the environment rather than attempting to compensate or punish for environmental harm after it has occurred.<sup>22</sup>

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21 Jutta Brunnee, “Enforcement Mechanisms in International Law and International Environmental Law”, in *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 16.

22 Ibid.

Positive measures that support national action through outside finance or technical aid have become important instruments in the creation of effective multilateral environmental agreements. Positive measures increase the likelihood that countries will ratify or accede to treaties and comply with them. Another advantage is that incentives may also be used when, for political reasons, it could be difficult to apply punitive sanctions. The use of economic instruments in a reasonable manner in environmental regulation can lead to significantly better results than might otherwise be attainable. It should be noted, however, that an excessive use of “carrots” can induce Parties to multilateral environmental agreements strategically to overstate the difficulties they face in implementing them in the hope of increasing the financial assistance that they receive from other Parties. In the same vein, donors sometimes understate their resources as a means of justifying decreased support.<sup>23</sup>

*Financial support can be channelled to States through a special fund that may be established and to which Parties to a convention contribute.*

Financial incentives enable many States to become Parties to agreements that otherwise would be out of reach and to comply with their obligations once they become Parties. Such incentives constitute an application of the principle of common but differentiated responsibilities to environmental issues. Financing can be allocated to specific projects or activities but also to the training of national officials responsible for implementing an environmental treaty, to scientific research relevant to the treaty and to improving the general administrative structure of a country. As a rule, the absence of appropriate national institutions and procedures is likely to lead to non-compliance with international obligations. A facilitative approach is somewhat common in many of the MEAs.<sup>24</sup>

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

*In the development of non-compliance regimes it should be taken into account that the approaches are mutually supportive in serving the aim of promoting compliance with international environmental commitments.*

## 2. *Enforcement approach*

Because positive measures are not always enough to bring into compliance a country that may lack the political will to cooperate, enforcement measures can be applied as a back-up once the management measures have failed. It is clear that, once again, States are willing to protect their sovereignty rather than expose themselves to counter-measures taken by the international community.<sup>25</sup> Creating a binding dispute settlement system as part of an international agreement that of necessity must reconcile competing state interests is difficult. States are frequently reluctant, for political reasons, to take legal action against each other or even to authorize other Parties to do so.<sup>26</sup> Indeed, enforcement measures have been criticized for being bilateral, confrontational and strongly backward-looking, addressing problems only after they arise<sup>27</sup>. Notwithstanding such criticism the threat of stricter enforcement mechanisms and sanctions has played a proven preventive role. As a rule, furthermore, prevention of treaty non-compliance is strongly advisable because repairing environmental harm after it occurs is more costly than prevention – in both economic and social terms.

The use of punitive sanctions can be the ultimate solution for States that show indifference to their international commitments. There must be a real threat that action in violation of a multilateral agreement will be detected and that the penalty that follows will be far greater than any benefit that flows from the violation. A sanction may not be sufficient to offset the advantage achieved through the treaty violation in specific field that is the subject of the treaty but may cause losses in other areas important for the non-compliant Party. It should be noted that punishment involves not only a material cost, but also a public expression of the international community's moral disapproval of a breach.<sup>28</sup> An interesting question is who should have the prosecutorial power and responsibility to take enforcement action against non-compliant State?<sup>29</sup> International institutions have limited enforcement roles with regard to multilateral environmental agreements.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary Approach", University of Joensuu Publications in Law, 2004, p. 74.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

Although there may be no public body at the international level to enforce multilateral environmental agreements we know from domestic enforcement policies and practices that there are a range of strategies available. For instance, private enforcement or public interest environmental litigation by public-spirited groups that have legal standing (*locus standi*) to bring environmental claims in courts at the national level to ensure compliance. Similarly, strategies<sup>30</sup> exist at the international level by which non-State actors (both individuals and groups) can to some extent enforce international environmental law in various forums as a means of furthering compliance. Non-state actors such as civil society groups<sup>31</sup> have the potential to exercise their procedural rights under international law<sup>32</sup> to ensure that States fulfil their international obligations. One strategy civil society groups have at their disposal to promote compliance with multilateral environmental agreements by States is the assertion of environmental human rights claims. Such claims can be brought in numerous forums within the United Nations Systems<sup>33</sup> and regional bodies.<sup>34</sup> The basis for such claims lies in the fact that multilateral environmental agreements are part of international law and can have an impact on multilateral environmental agreements.

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30 Some of the strategies may include: 1. Making submissions to multilateral environmental agreements that allow non-party participation; 2. Petitioning Secretariats of multilateral environmental agreements to pressure non-compliant states; 3. Lobbying state parties to pursue dispute resolution proceedings; and, 4. Participating in Conference of the Parties' meetings of the multilateral environmental agreements. See Malone, Linda A. and Scott Pasternack, *Defending the Environment – Civil Society Strategies to Enforce International Environmental Law*, Island Press, Washington, 2006 for further details on the the strategies available to civil society groups for the enforcement of international environmental law.

31 Civil society groups can include indigenous and local community groups, women's groups, public interest environmental NGOs are a few examples. These groups have always exerted pressures on states to act or to direct states back on to track in the event that they have gone astray in terms of not fulfilling their obligations in furtherance to public policy. Under the United Nations System including treaties and regional forums, such groups are granted certain status of participation in the process or decision-making.

32 Under certain international instruments such as the UN Charter, NGOs are authorized in Article 71 to engage in consultation. Furthermore, the procedure to receive a consultative status is stipulated under Resolution 1996/31 of the Economic and Social Council (ECOSOC).

33 The Human Rights Committee (HRC), the Optional Protocol to the International Covenant on Civil and Political Rights, the Commission on Human Rights and UN Special Rapporteurs are a few examples of platforms that exist within the UN Systems.

34 The European Commission, the European Court, the Inter-American Commission on Human Rights, and the African Charter on Human and People's Rights and its Protocol are some regional platforms.

*It is strongly advisable to favour incentive management measures when a treaty is still in its early stages so that the threat of serious sanctions does not deter potential signatories from the treaty or protocol.*

In the context of the international regime on access and benefit sharing numerous non-State actors, especially indigenous and local community groups and public interest environmental groups who are stakeholders, could bring claims<sup>35</sup> that would play a significant role in fostering compliance with the regime. For instance, there may be occasions of non-compliance with prior informed consent procedures, misappropriation and misuse of traditional knowledge or destruction and degradation of ecosystems and habitats that violate the rights of individuals and groups. In the event of such incidents, right holders could exercise their rights to ensure compliance with the regime.

Suspension of treaty privileges is a traditional sanctioning method under international conventions. Its low cost makes it an attractive sanction. It is not clear, however, that the practice is advisable in all cases, since States may find it even more difficult to fulfil their treaty obligations once their privileges under the treaty are suspended.<sup>36</sup> Suspension of treaty privileges can take various forms. A non-compliant Party may lose its access to technology transfer, to cooperative mechanisms or to financial assistance; it may suffer restrictions on its right to vote at meetings of the Parties, its right to receive documents for such meetings or to participate in standing and temporary committees and working groups.

The starting point should be the use of various facilitative approaches to improve the effectiveness of an environmental agreement for both individual State parties and the treaty system as a whole. The means vary from increasing the transparency of the treaty and assisting participating countries financially and technologically to arranging negotiations and giving participants more time to fulfil treaty obligations. The application of sanctions in the face of severe and persistent non-compliance should always be a possibility. In applying sanctions it is important to calibrate the severity of the sanction to the gravity of the

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<sup>35</sup> For environmental human rights claims to be brought before the relevant forum a number of prerequisites must be established. First, state action or omission must be established. Second, it must be proven that due to the action or omission of the state an environmental degradation has occurred. And third, the environmental degradation must violate a human right.

<sup>36</sup> Ibid.

non-compliance. In addition, it is strongly advisable to favour incentive management measures when a treaty is still in its early stages so that the threat of serious sanctions does not deter potential signatories from the treaty or protocol regimes.

In the deliberation of compliance, non-compliance and enforcement mechanisms, deterrence is an essential factor. Deterrence is essential in that it will guide states in a positive direction toward the achievement of the ultimate goal of compliance and effective implementation of international law, especially multilateral environmental agreements. The existence of enforcement approaches such as sanctions or the civil society strategies to bring claims in the numerous fora can act as deterrent factors that would guide states to comply with their international obligations under multilateral environmental agreements.

The two approaches to non-compliance with international treaties are not mutually exclusive. Instead, an ideal non-compliance system combines elements of both the management and the enforcement approaches, not as alternatives but rather as a menu of possible responses to different types of non-compliance, with particular features for each multilateral environmental agreement.<sup>37</sup> The following table details some of the advantages and disadvantages of the above approaches.

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<sup>37</sup> Ibid.

**Table 1: Advantages and Disadvantages of Compliance Approaches**

Facilitative approach		Enforcement approach	
Advantages	Disadvantages	Advantages	Disadvantages
Promotes and facilitates State compliance	Needs funding	May cause losses in areas important for the non-compliant party	Limits states' sovereignty
Strengthens countries' human, scientific, technological, organizational and institutional resources	Excessive use of "carrots" can induce States strategically to overstate the difficulties they face or underestimate their resources.	Preventive role by the threat of stricter enforcement mechanisms and sanctions	Sometimes confrontational, addresses the problem only after it has arisen
Encourages greater participation (e.g. financial incentives enable many States to become parties to agreements that otherwise would be out of reach for them)	Soft response measure	Public expression of the community's moral disapproval of the act	If the sanctions are too severe, it can discourage parties from joining a treaty or the non-compliant state may decide to withdraw from the treaty.
Emphasizes preventive measures		Suspension of treaty privileges is low cost	Suspension of treaty privileges may increase the difficulties a State faces in fulfilling its treaty obligations
Strengthens confidence in the treaty regime			
Useful when, for political reasons, the application of punitive sanctions could be sensitive			

## V. Examples of compliance mechanisms within multilateral environmental agreements

### A. The Montreal Protocol on Substances that Deplete the Ozone Layer<sup>38</sup>

The Montreal Protocol on Substances that Deplete the Ozone Layer contains a reporting obligation and procedures for reviewing the Parties' production, consumption, import and export of controlled substances.<sup>39</sup> The non-compliance procedure may be initiated by any party to the Protocol that suspects another party of non-compliance, by the Secretariat or through self-reporting. The Montreal Protocol provides an excellent example of a treaty in which the non-compliance response system has been carefully tailored and which combines management and enforcement approaches in a balanced way. So far, this mechanism has proved to be effective. During the design of the non-compliance system it was emphasized, among other things, that the procedures should be non-confrontational in nature and that early warnings of possible non-compliance should be handled through administrative action by the secretariat or through diplomatic channels. The Implementation Committee examines suspected violations and in an amicable atmosphere, first seeks an agreed solution that returns the Party to compliance in a manner that it agrees with. Only if this process comes to a dead-end are sanctions considered. In addition, the Protocol has created a fund, the Multilateral Fund, which provides parties with financial assistance in implementing their obligations. The Multilateral Fund operates under the authority of an Executive Committee and relies upon implementing agencies (e.g. UNEP, the United Nations Development Programme, the United Nations Industrial

38 Compliance under Selected Multilateral Environmental Agreements, UNEP, 2004, pp. 75–76; K. Madhava Sarma, "Compliance with the Multilateral Environmental Agreement to Protect the Ozone Layer", in *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, pp. 25–38.

39 "Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements", WTO & UNEP Secretariats, 2001, p. 9.

40 Ibid.

Development Organization and the World Bank)<sup>40</sup> to carry out projects with Parties aimed at enabling them to fulfil their obligations under the Protocol. The enforcement sanctions to which a non-compliant party exposes itself are suspensions of privileges and trade-related sanctions. A party may lose its access to technology transfer or to the protocol's financial mechanism, as well as the right to produce, consume or trade in the controlled ozone-depleting substances that is the cause of its non-compliance.<sup>41</sup> The Montreal Protocol is a notable multilateral environmental agreement in that it contains provisions that allow for trade sanctions against Parties that fail to live up to their obligations..

## **B. The Kyoto Protocol<sup>42</sup>**

The Kyoto Protocol provides for a comprehensive reporting mechanism. It provides a recent illustration of the way the international community believes compliance with a multilateral environmental agreement can be ensured.<sup>43</sup> Following lengthy negotiations, Parties took the remarkable decision to adopt a two-way approach to solving compliance problems that might arise under the Protocol and created a two-branch Compliance Committee, namely, the facilitative branch and the enforcement branch. The purpose of the facilitative branch is to assist and support parties in implementing their commitments. To that end, the Global Environmental Facility and several special funds (the Climate Fund, the Least Developed Countries Fund and the Adaptation Fund) were established. The enforcement branch is empowered to make formal declarations of non-compliance and decisions concerning the consequences of treaty violations like the suspension of a non-compliant party's right to participate in cooperative mechanisms under the Protocol (e.g., Joint Implementation, the Clean Development Mechanism, the emissions trading system, etc.). A sanction may also be directed at a State's future emission quota, which may be reduced as a result of non-compliance. It is also worth noting that the non-compliance mechanism under the Protocol features a party-to-party trigger.

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<sup>41</sup> Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary Approach", University of Joensuu Publications in Law, 2004, p. 94.

<sup>42</sup> Ibid.

<sup>43</sup> Tuula Kolari, "Promoting Compliance with International Environmental Agreements – A Multidisciplinary Approach", University of Joensuu Publications in Law, 2004, p. 119.

## C. The Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>44</sup>

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is another good example of a non-compliance regime that combines both the facilitative and enforcement approaches. The CITES non-compliance regime has been effective, but is largely based on provisions of the Convention dealing with reporting requirements and international measures and, over the years, measures to achieve compliance have been developed by the parties in resolutions and decisions of the conference of the parties.

Compliance monitoring under CITES is carried out by the Animals Committee, the Plants Committee and the CITES Secretariat. In addition, TRAFFIC (Trade Records Analysis of Flora and Fauna In Commerce) is a trade monitoring programme created by non-governmental organizations that provides technical and scientific information to the Secretariat, the Parties and the CITES committees to ensure that the Convention is being complied with.<sup>45</sup>

A Standing Committee assesses cases of non-compliance that are reported to it by the Secretariat and makes non-binding recommendations to the parties. The Conference of the Parties may take decisions on the consequences of convention breaches on an ad hoc basis or could adopt a formal process based on the mechanisms agreed to by the Parties.<sup>46</sup>

It is worth noting that there is a real need for additional training. Customs officials, for instance, have difficulty in distinguishing between legal and non-legal exports and imports of species of wild flora and fauna. In this respect, the secretariat and a committee of experts

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44 Compliance under Selected Multilateral Environmental Agreements, UNEP, 2004, pp. 41–43; Susan Biniarz, “Remarks about the Cites Compliance Regime”, in *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, p. 89-96.

45 “Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements”, WTO & UNEP Secretariats, 2001, p. 6.

46 “Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements”, WTO & UNEP Secretariats, 2001, p. 6.

have developed an identification manual and have conducted capacity-building workshops for Management Authority staff and enforcement officers to facilitate the identification of specimens included in the convention's appendices. Similarly, legal experts are trained under the National Legislation Project to draft appropriate laws and policies for the Implementation of the Convention at the national level.<sup>47</sup>

Non-compliant Parties to CITES expose themselves to punitive sanctions including the restriction of the right to vote at one or more meetings of the Conference of the Parties, the loss of eligibility to be members of the Standing Committee, the loss of the right to participate in other permanent committees, working groups, etc., and the loss of the right to receive documents for meetings. Furthermore, over the years, a great number of countries have been excluded from the trade in CITES species for a certain period owing to non-compliance. All such bans have been temporary. The success rate of the trade measures undertaken under CITES is almost 100 per cent. The mere threat of a sanction has sometimes been sufficient. Nonetheless, it is important to note that in most cases countries have not been under great pressure to resist the non-compliance procedures since no major economic interests have been involved in the trade. At each meeting the Standing Committee generally reviews existing recommendations to suspend trade and to terminate such suspensions for non-compliance that has been resolved or has seen sufficient progress.

#### **D. The Convention on Biological Diversity's biosafety protocol**

The Convention on Biological Diversity's Cartagena Protocol on Biosafety has a compliance committee. To facilitate dissemination of information and knowledge needed by Parties to implement the Convention, a clearing house mechanism was established. The Convention also obliges the Parties to promote access to expertise in biotechnology, especially for developing countries, to enable them to exploit their biological resources. This provision should encourage third-world countries to join the treaty, especially resource-rich developing countries, by providing them additional economic incentives through participation in a fair and equitable way in the benefits of biotechnology.

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<sup>47</sup> Ibid.

## **E. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade<sup>48</sup>**

The compliance mechanism under the Rotterdam Convention is still being negotiated. So far, no consensus has been reached on several issues, namely, the decision-making process by the Compliance Committee (consensus or voting), the trigger for the non-compliance mechanism by Parties (other than the non-compliant Party) and by the Secretariat, whether the Committee may recommend to the Conference of the Parties that it consider and undertake additional actions and the sources of information that the Committee will be able to consider in evaluating a case of non-compliance.<sup>49</sup>

## **F. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal<sup>50</sup>**

A compliance committee was created under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The committee may receive submissions regarding non-compliance cases from a Party concerning itself or another Party or from the Secretariat. The party whose compliance is in question has the opportunity to give explanations and comments to the committee, which then will give advice, non-binding recommendations or information to that Party with a view to assisting it to resolve its difficulties. The recommendations may for instance be related to the establishment or strengthening of national regulatory regimes, access to financial and technical assistance or the elaboration of compliance action plans. The Committee may also make recommendations to the Conference of the Parties. A trust fund for the implementation of the convention and a technical cooperation trust fund to assist developing countries have been established as well.

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<sup>48</sup> Compliance under Selected Multilateral Environmental Agreements, UNEP, 2004, pp. 63–64.

<sup>49</sup> Summary of the fourth meeting of the conference of the parties to the Rotterdam convention, Earth Negotiations Bulletin, vol. 15, no. 168, 3 November 2008, p.6.

<sup>50</sup> Compliance under Selected Multilateral Environmental Agreements, UNEP, 2004, p. 58-61; Akiho Shibata, “Ensuring Compliance with the Basel Convention – its Unique Features”, in Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia, 2006, Martinus Nijhof Publishers, pp. 69–87.

## VI. Dispute settlement mechanisms

Non-compliance mechanisms are aimed at promoting the fulfillment by Parties of their treaty obligations and addressing cases of treaty violations. Despite these procedures, disputes between Parties can arise concerning the interpretation or application of an agreement. Several dispute settlement mechanisms exist, consisting of progressive steps including negotiation, mediation, conciliation, arbitration and judicial settlement.<sup>51</sup> These various conflict resolution tools can be distinguished by the involvement of external actors and the legally binding character of the decisions.

The first step in the settlement of a dispute is the negotiation, also referred to as the consultation. This mechanism involves only the Parties concerned and favors an exchange of views between Parties with the objective of they themselves finding a solution. The result of a negotiation is not legally binding.<sup>52</sup>

As a subsequent step or as an alternative, Parties may proceed to mediation when they need an external actor to help solve their disagreement. This mechanism may facilitate cooperation between the Parties concerned. The role of the mediator is usually entrusted to another Party to the agreement, to the secretariat or to a designated committee of the convention. The outcome of mediation does not have any binding character.

If the dispute cannot be resolved through the above steps in a certain period of time Parties may submit to conciliation. This tool may also be used when Parties have not accepted the same or any procedure leading to non-binding decisions and have not been able to settle their dispute in a certain period of time. Conciliation can be voluntary or compulsory. A conciliation commission can be established in order to make proposals for the resolution of the dispute, which the Parties concerned must consider in good faith. The decisions are thus non-legally binding.<sup>53</sup>

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

As a last resort arbitration and judicial settlement, as they lead to legally binding decisions, require the consent of the Parties. This consent can be expressed either in advance, in the treaty within which the dispute has arisen or in a general treaty on the settlement of disputes or, subsequently, in an ad hoc agreement after a conflict has arisen.

*The Montreal Protocol could be a prototype for the modern dispute settlement mechanisms in multilateral environmental agreements.*

Arbitration is the resolution of a dispute by a judge in principle chosen by the Parties, who agree to accept the judgment. Parties may also decide to settle their dispute through a judicial proceeding. Conflicts under multilateral environmental agreements may be submitted to the International Court of Justice or the International Court of Environmental Arbitration and Conciliation, among others. The International Court of Justice has the advantage of being a permanent institution and free of any direct cost for the litigating states. In addition, its established body of jurisprudence contributes to the predictability of the process. Parties submitting their cases to arbitration, however, will in general remain in better control of the process and avoid the considerable delays that characterize proceedings before the International Court of Justice.

Details on a number of dispute settlement mechanisms are provided in the following sections.

## **A. Dispute settlement under the World Trade Organization<sup>54</sup>**

Disputes in the context of the World Trade Organization (WTO) arise when a member Government believes that another member is violating an agreement or a commitment it has made to the detriment of the first member. The binding provisions contained in the organization's Dispute Settlement Understanding are a crucial element in providing security and predictability to the multilateral trading system.

The WTO dispute settlement procedure is based on clearly defined and detailed rules, with flexible timetables for completing a case. Requests to consult and use the dispute settlement mechanism should not be considered adversarial acts according to the Dispute Settlement

<sup>54</sup> [www.wto.org](http://www.wto.org); "Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements", WTO & UNEP Secretariats, 2001, pp. 23–26.

Understanding. In this light, the WTO Director-General may be appealed to at all stages to help achieve conciliation. The WTO dispute settlement system consists of consultation, the panel process, the appellate process and implementation.

Settling disputes is the responsibility of the Dispute Settlement Body, which consists of all WTO Members. The Dispute Settlement Body is responsible for the establishment of panels of experts to settle cases. The rulings made by such a panel must be endorsed by the Dispute Settlement Body. In practice, a ruling is automatically adopted unless there is a consensus to reject it. Panelists are usually chosen in consultation with the countries in dispute. They are experts from different countries who examine the evidence and decide in their own capacities if there is a violation.

Both sides may appeal a panel's ruling on a point of law; the appeal body is not entitled to reexamine the facts. The appeal body's ruling must be endorsed by the Dispute Settlement Body as well, and again will be rejected only if there is a consensus to do so.

Because prompt compliance with recommendations or rulings of the Dispute Settlement Body is essential in order to ensure effective resolution of disputes, the Dispute Settlement Body monitors the implementation of its rulings and has the power to authorize action in case of non-compliance.

## **B. Dispute settlement under multilateral environmental agreements**

Most if not all multilateral environmental agreements have dispute settlement provisions. Generally these provisions tend to be weak as States are often reluctant to accept a legal obligation to submit their environmental disputes to binding dispute settlement systems. Binding dispute resolution is a confrontational procedure and arbitration in particular is very costly. States prefer diplomatic and facilitative means to deal with disputes. The possibility that another party to a treaty could take a dispute to arbitration or court, however, is a powerful disincentive to non-compliance and plays a preventive role.

Under CITES, parties may opt for negotiation when there is a dispute over the interpretation or application of the provisions of the Convention. They may also proceed to arbitration before the Permanent Court of Arbitration, provided there is mutual consent.<sup>55</sup>

The first step is negotiation and if no agreement can be reached Parties in dispute may request mediation by a third party. If the disagreement still cannot be resolved, the Parties may agree to settle through arbitration or judicial settlement before the International Court of Justice. If Parties do not accept that or any other procedure, the dispute is submitted to a conciliation commission created at the request of one of the Parties. This commission delivers a final recommendation which the Parties are obliged to consider in good faith.<sup>56</sup>

Under the Basel Convention disputes concerning the interpretation or application of or compliance with the provisions of the Convention may be settled through negotiation. If this is not successful the Parties may by agreement turn to the International Court of Justice or to arbitration. Failure to reach agreement does not absolve the parties from the responsibility of continuing to seek resolution through negotiation.<sup>57</sup>

### **C. Dispute settlement system under the Convention on Biological Diversity**

The Convention on Biological Diversity includes a dispute settlement mechanism in its Article 27. In case of disagreement regarding the application or the interpretation of the Convention, Parties must try to settle through negotiation. If the Parties concerned cannot reach an agreement by negotiation they may jointly request mediation by a third party. Parties may also declare to the Secretariat that they accept compulsory dispute resolution by arbitration or by the International Court of Justice if negotiation and mediation have failed.

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<sup>55</sup> “Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements”, WTO & UNEP Secretariats, 2001, p. 8.

<sup>56</sup> *Ibid.*

<sup>57</sup> “Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements”, WTO & UNEP Secretariats, 2001, p. 11.

If the Parties do not submit to compulsory dispute resolution then they must submit their dispute to a conciliation committee and consider its recommendation in good faith. Parties may also agree to give a binding effect to the recommendations of a conciliation committee.<sup>58</sup>

## VII. Compliance from the perspective of access and benefit sharing under the Convention on Biological Diversity<sup>59</sup>

The Convention on Biological Diversity recognizes the sovereign rights of States in respect of natural resources in areas within their jurisdiction. Parties to the Convention therefore have the authority to determine physical access to genetic resources in areas within their jurisdiction. Parties also have the obligation to take appropriate measures with the aim of sharing the benefits derived from their use. This is one of the fundamental objectives of the Convention. The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits arising out of their Utilization were adopted in 2002 to assist Parties when establishing administrative, legislative or policy measures on access and benefit-sharing and when negotiating contractual arrangements for access to genetic resources and benefit-sharing.

Further to the call for action by Governments at the World Summit on Sustainable Development in 2002, the conference of the parties mandated the working group on access and benefit sharing to elaborate and negotiate an international regime on access to genetic resources and benefit sharing with the aim of adopting instruments effectively to implement the provisions in articles 15 and 8 (j) of the Convention. Paragraph 44 (o) of the Plan of Implementation of the World Summit on Sustainable Development called for action to “negotiate within the framework of the Convention on Biological

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<sup>58</sup> Ibid.

<sup>59</sup> UNEP/CBD/WG-ABS/7/3.

Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources”.

The Ad Hoc Open-ended Working Group on Access and Benefit Sharing at its sixth meeting identified three areas of compliance in respect of which there was a need for further elaboration: the development of tools for encouraging compliance, the development of tools for monitoring compliance and the development of tools for enforcing compliance.<sup>60</sup> One idea for enforcing compliance is an international certificate of origin that would identify the country of origin or source or the legal provenance of genetic resources being shipped in trade over national borders and would provide evidence of prior informed consent by the provider of the resource.<sup>61</sup> One question that must be answered is whether the compliance measure under the international regime requires an internationally recognized certificate or a globally harmonized certificate. Standardized material transfer agreements may also be considered as an option.<sup>62</sup>

A number of topics will have to be considered in establishing a compliance mechanism under the international regime on access and benefit sharing. A list of such topics, including those proposed by the group of legal and technical experts on compliance in the context of the international regime on access and benefit sharing established by the Conference of the Parties to the Convention on Biological Diversity, is set out in the following box.

*One area of compliance that has received some attention during the continuing discussions on access and benefit sharing relates to the idea of an international certification scheme.*

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<sup>60</sup> UNEP/CBD/COP/9/6.

<sup>61</sup> Brendan Tobin et. al. 2008, United Nations University Institute of Advance Studies.

<sup>62</sup> B. Tobin, Monitoring Compliance under the International Regime on ABS: The Role of the International Certificate Scheme. ABDR 10 (3): 95–112.

## Suggested topics to be dealt with in establishing a compliance mechanism under the international regime on access and benefit sharing

- (a) Establishment of a compliance committee, determination of its powers and election of its members;
- (b) Alternatively or additionally, establishment of an international public participation body to investigate cases of non-compliance and to provide fact-finding reports to be admitted as evidence in dispute settlement
- (c) Detection and review of non-compliance cases to assess progress made and the general efficiency of the regime;
- (d) Scope of any reporting obligation, including the timing of reporting and a model reporting format that might call for information on, e.g., scientific data and efforts made to implement the regime;
- (e) Definition of the compliance mechanism trigger, including how information is gathered and who has the power to trigger;
- (f) Measures, facilitative and punitive, for dealing with non-compliance, including funding considerations and the possibility of funding from the Global Environment Facility;
- (g) Internationally agreed obligation for users of genetic resource to complete a declaration of compliance with relevant laws of the source country at designated checkpoints;
- (h) Non-compliance penalties, including warnings, suspension of privileges, trade sanctions and liability;
- (i) Monitoring and evaluation:
  - (i) Third-party verification;
  - (ii) Third party monitoring;
  - (iii) User country monitoring of compliance with source country national laws through check points, notification of national focal points and clearing-house mechanism;
- (j) Notification and reporting:
  - (i) Source country notification of non-compliance to user country focal points and the clearing-house mechanism;
  - (ii) National reports.

Considering the already available compliance procedure under the Cartagena Protocol on Biosafety, it is but appropriate to restate the objective of developing a compliance mechanism for the international regime on ABS is to address non-compliance by Parties and to provide advice or assistance where appropriate. Its operation should be guided by the principles of transparency, fairness, predictability and common but differentiated responsibilities.

*A compliance mechanism should be simple, facilitative, non-adversarial, non-confrontational and cooperative in nature.*

Many parties to the Convention on Biological Diversity are still gathering experience on the access and benefit-sharing regime and its provisions, including the enactment of legislative measures. Their efforts to establish such measures at national level, however, may be hampered by inadequate capacities. In the light of this, a compliance mechanism should include facilitative measures such as capacity-building (training, workshops, strengthening of the government structures) and financial measures<sup>63</sup> combined with enforcement provisions. The text of the revised draft Protocol on ABS<sup>64</sup> in Article 12 calls for compliance on ABS issues with national legislations. This draft Article, while calling for compliance to ABS measures in accordance with prior informed consent and mutually agreed terms on access and sharing of benefits according to the provider country measures also calls for addressing issues of non-compliance. However there is no elaboration on what these measures will be. Also, through Article 13, the same draft Protocol provides for identification and establishment of national check points and disclosure requirements besides providing the minimum information needs as a part of the internationally recognised certificate of compliance. Focusing on compliance with mutually agreed terms, through Article 14, the draft ABS Protocol that is under final stages of negotiation now, provides options for dispute resolution through agreed jurisdictions by the providers and users of genetic resources, through applicable law and options for alternate dispute settlement resolution through mediation or arbitration.

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63 Balakrishna Pisupati, "Access to Genetic Resources and Benefit Sharing: Key Questions for Decision Makers", 2004, IUCN Regional Biodiversity Programme, Asia.

64 UNEP/CBD/WG-ABS/9/3.

Implementation of compliance measures through codes of conduct (Article 16), awareness raising (Article 17), Capacity issues (Article 18) have also been identified in the draft Protocol under negotiation.

The compliance mechanism should identify one or several of the following measures with a view to promoting compliance and addressing cases of non-compliance, taking into account the capacity of the party concerned to comply and such factors as the cause, type, degree and frequency of non-compliance:

- (a) Providing in-country assistance, technical assessment and a verification mission, upon the invitation of the party concerned;
- (b) Calling for explanations when the timeframe agreed in accordance with a given compliance measure is not met;
- (c) Issuing a statement of concern regarding the non-compliance of a Party who is in non-compliance;
- (d) Issuing a warning;
- (e) Issuing a declaration of non-compliance by, for instance, “naming and shaming” those who violate access and benefit sharing agreements;
- (f) Sending a public notification of a compliance matter through the Secretariat to all parties advising that a Party has been notified that it may be in non-compliance and that, up to that time, there has been no satisfactory response or action;
- (g) Requiring the appointment of a representative in the provider country for notification purposes to facilitate administrative and/or criminal procedures;
- (h) Suspension of specific rights and privileges, e.g., ineligibility of a non-compliant party’s to serve as a member of the bureau or any committee set up under the treaty, loss of the right of the party concerned to receive documents for meetings;

- (i) Financial penalties, e.g., ineligibility of a non-compliant party to receive funding for its participation in meetings under the agreement and ineligibility of the party to receive other financial assistance from the agreement or its funding body, including transfer of technology;
- (j) Trade restrictions, if appropriate;
- (k) Any additional action that may be required for the achievement of the objective of the agreement;
- (l) Additional measures within the mandate of the governing body of the agreement to facilitate compliance by a non-compliant party.

Other additional measures that require attention include:

- (a) Establishment of a clearing-house mechanism for information exchange and site for the registration of certificates by national authorities;
- (b) Requirement that detailed contracts be concluded at the time of access for bioprospecting purposes to minimize transaction costs, provide certainty to users and providers and thus minimize future disputes;
- (c) Incentive measures such as preferential access, including market-based incentives;
- (d) Development of model clauses;
- (e) Information sharing on access and benefit sharing requirements as a non-compliance preventive measure.

In cases of non-compliance with an access and benefit sharing agreements, access to the courts by foreign plaintiffs or enforcement of judgments should be determined by the terms of the agreement, including dispute settlement clauses or mechanisms. It is, however, important to note that compliance measures are in themselves not dispute settlement or adversarial measures. If this fact is not taken into

*In view of the financial costs that may arise from, among other things, legal assistance to non-nationals, an international regime could provide for the development of a programme of litigation assistance to facilitate compliance across jurisdictions.*

account then compliance-related discussions are bound to be tough and time consuming. Though it is important to focus on the objectives and principles of public and private international law, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, the International Chamber of Commerce Rules of Arbitration and the International Institute for the Unification of Private Law's Principles of International Commercial Contracts, national legal systems, including those related to intellectual property rights, need to be assessed and understood carefully in defining the legal architecture of an international regime on access and benefit sharing, including its compliance mechanism.

Prior informed consent and mutually agreed terms which form the core of this issue, as described in paragraph 61 of the Bonn Guidelines. Capacity-building for indigenous and local community representatives to strengthen their ability to deal with prior informed consent and mutually agreed terms need to be promoted through any international regime on access and benefit sharing that may be adopted. Furthermore, it may be considered whether an international regime should provide for the determination of commercial and non-commercial use of genetic resources, including appropriate provision of intellectual property rights, research funding, publishing or *ex-situ* collections. An access and benefit sharing regime might also include monitoring of the use of traditional knowledge through such checkpoints.

## Experience from the Pacific region on access and benefit sharing and compliance

The South Pacific Regional Environment Programme (SPREP) has developed a “Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices”<sup>1</sup> to help countries in the region, at least on the technical side, to enable them to comply with their obligations under the Convention on Biological Diversity by establishing national legal frameworks on access and benefit sharing. In addition, the South Pacific Community, in collaboration with other organizations including the Pacific Island Forum and the United Nations Educational, Scientific and Cultural Organization have established a second model law, “The Model Law for the Protection of Traditional Knowledge and Expressions of Culture”<sup>2</sup>. These two model laws are directly related to the various provisions of the Convention on Biological Diversity, primarily Article 8 (j) and articles associated with prior informed consent, benefit sharing arrangements and intellectual property rights issues.

A number of interesting developments are seen in the model laws, whereby existing practice under international law on compliance requirements related to prior informed consent and access and benefit sharing have been incorporated. In addition, complex issues such as dual (ownership) sovereignty and extraterritoriality issues that international law is grappling with are being dealt with under the SPREP model law. For instance, although there is no such thing as dual sovereignty over genetic resources or traditional knowledge under international law, the SPREP model law proposes for co-ownership and a trusteeship mechanism to deal with traditional knowledge and associated genetic resources in the event of multiple owners or in the case of uncertainty of ownership.

National access and benefit sharing legislation has its limits when it comes to extraterritoriality, as it does not always have effect in other jurisdictions. With the recognition of co-ownership and trusteeship under the SPREP model law, however, the countries in the region will have to work out a system based on mutual legal assistance and reciprocity so that one country’s national legislation can have effect in other countries. Such a mechanism would naturally evolve to harmonize the issue of extraterritoriality and the effect of one country’s law on the other. Although they are subject to national legislation, the model laws have provided some direction on the technical aspects of issues surrounding access to and sharing of benefits derived from traditional knowledge and associated genetic resources, which can foster compliance with obligations under the Convention on Biological Diversity to a certain degree by States in the South Pacific.

1. See [http://www.grain.org/brl\\_files/brl-model-law-pacific-en.pdf](http://www.grain.org/brl_files/brl-model-law-pacific-en.pdf).

*The compliance mechanism for an international regime on access and benefit sharing should encompass access to genetic resources both for commercial and non-commercial use, along with appropriate provisions on benefit sharing.*

## VIII. Conclusions

Under the current discussions on compliance within the ABS negotiations, the view held by some Parties that one of the ways for the international regime to prevent misappropriation and misuse of GR, derivatives and associated traditional knowledge is to ensure compliance in user countries with the laws of the provider countries through enforcement of decisions of provider country courts by courts in user countries. The reasoning behind this is that currently there is no automatic enforcement of foreign judgments given by provider country courts in user countries. Litigation in user country courts is too expensive is therefore not an option for private parties from provider countries.

Considering that foreign judgments are enforced in accordance with the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters which has 65 countries who are parties to it, there is no guarantee that foreign judgments regarding misappropriation or misuse of genetic resources will be enforced in user country courts especially if they feel it is a matter they have exclusive jurisdiction over the matter. The decision by a provider country court to nullify a patent given in the user country because of non-compliance with PIC and MAT may be one such case in point. The Hague Convention also applies only to civil and commercial matters thereby excluding from its purview issues of compliance that aren't strictly civil or commercial e.g. criminal sanctions for biopiracy. The main hurdle for enforcement of foreign judgments is that countries that grant patents maintain exclusive jurisdiction over it and do not usually recognize decisions of foreign courts that nullify it.

Some user countries claim that legal systems of most provider countries lack certainty, consistency and clarity of concepts and processes regarding the access to genetic resources, derivatives and associated traditional knowledge and benefit sharing. This has made these user countries wary of any minimum compliance measures on the part of the international regime especially when there is no consensus as to what constitutes legitimate access and what does not. While there is

some merit in this argument there are an increasing number of provider countries that have clearly defined laws and regulations that define what constitutes lawful access, rules for PIC and MAT and established national competent authorities to deal with ABS issues, the response on the side of the user countries to at least ensure compliance with the laws of those provider countries that conform to essential principles of justice such as transparency, consistency, clarity is still to be clarified.

Developing countries could argue that the international regime (Protocol) on ABS to become an international agreement could ensure this kind of reciprocal of enforcement of judgments. This would mean that the Protocol must make clear as to what the scope of enforcement would be e.g. it must include decisions regarding IPRs, punitive damages etc. Provider countries must be willing to comply with the basic principles underlying enforcement of foreign judgments under comity in international law. Such basic principles would include:

- a) The provider country court has jurisdiction over the defendant
- b) The defendant was properly served with a notice of proceedings and was given a fair hearing
- c) The judicial process in the provider country court was in accordance with the principles of natural justice
- d) The judgment of the provider country court does not offend the public policy of the user country (as long as the public policy of the user country is in accordance with the rights of parties to the CBD and the international regime on ABS)

Discussions might revolve around the issue that general references to private international law as being sufficient for ensuring compliance under the international regime are not tenable for provider countries. The reasons for this include:

- a) A number of issues being dealt with under the international regime are completely new in the context of both international and national law and have little or no precedent especially when compared to

enforcement of foreign judgments relating to civil and commercial matters under international comity

- b) Private international law also includes possible litigation in foreign courts especially in relation to contracts between parties from different countries and parties in developing countries who for most part are providers would find it extremely expensive to pursue such a course of action.
- c) The easiest way to ensure compliance with the laws of the provider country is to ensure that judgments delivered by courts in provider countries are appropriately enforced in user countries.

Developing countries therefore feel that the international regime should be a single binding instrument that clearly mandates that in the case of disputes arising from ABS matters, decisions of provider country courts will be enforced in user countries as long as these decisions comply with the principles of justice. The principles of justice referred to here would include some of the concerns raised by some Parties during the negotiations requiring attention on issues such as legal clarity, certainty, transparency etc. in laws relating to access and benefit sharing in provider countries.

Given the specific nature of issues surrounding negotiations under the ABS Protocol within the CBD, Parties should adopt flexible approach to discussions on compliance issues. Understanding that no country, in the present context, can either be only a provider or a user of genetic resources, negotiations should be fair, broad-minded and having the objective of adopting a Protocol is a means to supporting equity and ethics within the scope of the Convention.

## X. Further reading

Beyerlin, Stoll & Wolfrum, *Ensuring Compliance with Multilateral Environmental Agreements. A Dialogue between Practitioners and Academia*, 2006, Martinus Nijhof Publishers, Leiden/Boston, pp. 393.

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*UNEP is committed to supporting the process of finalizing the negotiations of an International Regime on ABS (IR-ABS) and its subsequent implementation. To this effect, UNEP has been supporting a range of stakeholders including the Parties to the Convention on Biological Diversity (CBD), to enhance their capacities, awareness and understanding of the issues related to ABS from social, economic and environmental perspectives so that the Regime, once adopted, can contribute to human development, cooperation and well-being.*

*Through a series of knowledge publications, policy briefs, technical documents and legal analyses of issues, UNEP is preparing stakeholders to orient for a timely conclusion of the negotiations and an effective implementation of the International Regime.*

*To enhance cooperation between stakeholders on ABS issues and to learn from one another on experiences and share lessons learnt in dealing with ABS issues at regional, national and local levels UNEP has established an online 'ABS Knowledge Hub' (<http://abshub.helpserve.com>).*

*UNEP expects that stakeholders will continue to make use of all these resources and advance the implementation of ABS issues for the benefit of all of us.*

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